

HIGH COURT OF CHHATTISGARH, BILASPURWrit Petition (Art. 227) No.460 of 2019Order reserved on: 13-8-2019Order delivered on: 19-8-2019

T. Dwarkanath Naidu, S/o Late Shri T.G. Naidu, Aged about 60 years, R/o "Shri Guru Kripa", Plot No.D-9/10, Street – 24, Ashish Nagar, West Risali, Bhilai, Tehsil and District Durg (C.G.)

---- Petitioner

Versus

Krishna Kumar Sahu, S/o Shri Heera Ram Sahu, Aged about 52 years, Proprietor – Krishna Engineering Works, R/o Behind Santoshi Temple, Plot No.9-31, Ispaat Nagar, Risali, Police Station Newai, Bhilai, Tehsil and District Durg (C.G.)

---- Respondent

For Petitioner: Mr. B.P. Singh, Advocate.

For Respondent: None present though served.

Hon'ble Shri Justice Sanjay K. AgrawalC.A.V. Order

1. Taking exception to the order passed by the learned trial Court rejecting the application under Order 37 Rules 4 & 5 of the CPC in a summary suit filed by the plaintiff, he has preferred this writ petition invoking the jurisdiction of this Court under Article 227 of the Constitution of India.
2. The petitioner herein / plaintiff filed a summary suit under Order 37 of the CPC for decree of ₹ 30 lakhs against the defendant / respondent herein in which the Court issued summons to the defendant to appear and pursuant to the summons so issued, the defendant appeared before the trial Court and thereafter, on 4-2-2019, the said Court directed the plaintiff to supply the copy of plaint and the documents and fixed the case for written statement. In the

meanwhile, on 14-12-2018, the plaintiff filed an affidavit stating inter alia that the defendant has been served with summons and within ten days from the date of service of summons, he has not filed application seeking leave to defend the suit and as such, the defendant has no defence and that the plaintiff is filing affidavit in support of his claim / suit. Thereafter, on 15-3-2019, the plaintiff filed an application under Order 37 Rules 4 & 5 of the CPC that he had already filed affidavit on 14-12-2018 and since the defendant is having no defence, therefore, summons for judgment be served to the defendant which was replied by the defendant and ultimately, by the impugned order, the learned trial Court has rejected the application finding the application being merit-less. Questioning that order, this writ petition has been preferred.

3. Mr. B.P. Singh, learned counsel appearing for the plaintiff / petitioner herein, would submit that the trial Court is absolutely unjustified in rejecting the application filed under Order 37 Rules 4 & 5 of the CPC, as the defendant within days from the date of entering appearance has not sought leave to defend, therefore, the application under Order 37 Rules 4 & 5 of the CPC ought to have been allowed by the trial Court and the impugned order deserves to be set aside by granting the writ petition.
4. None present for the respondent herein / defendant, though served.
5. I have heard learned counsel for the petitioner on the question of admission and considered his submissions and went through the documents annexed with the writ petition with utmost circumspection.
6. The short but interesting question about the interpretation of the

provisions contained in Order 37 Rule 3(4) of the CPC arises in this instant writ petition.

7. In order to consider the plea raised at the Bar, it would be appropriate to consider the provisions contained in Order 37 Rule 3, sub-rule (4), of the CPC which reads as follows: -

“(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.”

8. Form No. 4A of Appendix “B” of the Code states as under: -

“No. 4A

SUMMONS FOR JUDGMENT IN A SUMMARY SUIT

(O. XXXVII, r. 3)

(Title)

In the Court, at Suit No. of
20....

XYZ Plaintiff

Versus

ABC Defendant

Upon reading the affidavit of the plaintiff the Court makes the following order, namely

Let all parties concerned attend the Court or Judge, as the case may be, on the day of 20.... atO' clock in the forenoon on the hearing of the application of the plaintiff that he be at liberty to obtain judgment in this suit against the defendant (or if against one or some or several, insert names) for Rs..... and for interest and costs.

Dated the day of 20.....”

9. A focused perusal of the provisions contained in sub-rule (4) of Rule 3 of Order 37 of the CPC would show that a separate affidavit

verifying the cause of action and the amount claimed and further stating that in the belief of the plaintiff the defendant has no defence to the suit must accompany the summons for judgment in Form 4A in Appendix B or such other as may be prescribed from time to time. Form No.4A clearly makes a specific reference about such an affidavit in the words, “upon reading the affidavit of the plaintiff the Court makes the following order”. It abundantly makes it clear that the filing of the affidavit containing above assertions is a pre-condition for obtaining and issuing the summons for judgment.

10. The question is, whether the provisions contained in sub-rule (4) of Rule 3 of Order 37 of the CPC are mandatory and it does not admit of any relaxation of exception because of the consequences which they entail owing to its non-compliance?
11. If either the appearance is not entered upon by the defendant within a period of ten days from the service of summons for appearance in Form No.4 or defendant fails to file leave to defend application within a period of ten days from the service of summons for judgment in Form No.4A, the natural consequence which would follow is that the averments and allegations made in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree of the suit amount. The Legislature in its wisdom has laid far reaching consequences for the defendant and therefore the defendant in all fairness should also be entitled to strict compliance of the said provisions on the part of the plaintiff, therefore, it is manifest that no summons for judgment as envisaged by sub-rule (4) of Rule 3 of Order 37 of the CPC can be obtained and issued without filing of the affidavit and unless the Court had recorded its

satisfaction and a copy of the said affidavit filed by the plaintiff is also accompanied with the summons for judgment in Form No.4A of Appendix B. The summons for judgment in Form No.4A of Appendix B without a copy of the affidavit of the plaintiff cannot be said to be valid summons for judgment. (See Satish Kumar v. Prism Cement Ltd.¹.)

12. The M.P. High Court in the matter of Rameshchandra Jaiswal and others v. Central Bank of India and another² has clearly held that the provisions contained in Order 37 Rule 3(4) of the CPC are mandatory and if the summons for judgment as required by sub-rule (4) are not issued, the defendant has no basis upon which he can ask for leave to defend and such summons cannot be dispensed with. It has been observed by His Lordship of the M.P. High Court as under: -

“7. From a perusal of sub-rules 4, 5 & 6 of Rule 3 of Order 37 it is clear that the entire action is based on summons for judgment. If summons for judgment is not issued as required by Sub-rule 4, there is nothing on the basis of which the defendant could ask for leave to defend and there is nothing on the basis of which the Court could grant judgment. The provisions are, therefore, clearly mandatory and in fact the summons for judgment is a basis to any judgment which may be pronounced under Order 37 C.P.C. If there is no affidavit verifying the cause of action and the amount claimed and stating that in plaintiff's belief there is no defence to the suit, there is nothing for the defendant to defend against and there is nothing against which leave to defend could be asked for.”

13. The principle of law laid down in Rameshchandra Jaiswal (supra) has been followed with approval by the M.P. High Court in the matter of United Western Bank Ltd. and another v. M/s. Manoj Hosiery and two others³.

1 ILR (2003) II Delhi 161

2 1992 J LJ 434

3 1996 SCC OnLine MP 660

14. Thus, from the aforesaid judgments of the M.P. High Court it is quite vivid that if the summons for judgment are not issued as required by sub-rule (4) of Rule 3 of Order 37 of the CPC, the defendant cannot ask for leave to defend and there is nothing on the basis of which the Court could grant judgment, and the provisions are clearly mandatory in nature.
15. Reverting to the facts of the present case in light of the provisions contained in Order 37 Rule 3(4) of the CPC and the decisions of the M.P. High Court in Rameshchandra Jaiswal (supra) and United Western Bank Ltd. (supra), it is quite vivid that in the instant case, in the suit filed by the plaintiff under Order 37 of the CPC, the trial Court issued summons to the defendant for his appearance on which the defendant has appeared and on 4-2-2019 the trial Court directed the plaintiff to serve copy of the plaint and documents to the defendant and fixed the case for filing of written statement and in the meanwhile, only on 14-12-2018, the plaintiff filed an affidavit before the Court that the defendant has no defence and he has not applied for leave to defend and simply stated that the cause of action and the amount claimed is correct which has already been stated in the plaint and thereafter, filed an application under Order 37 Rules 4 & 5 of the CPC stating that the defendant has not applied for leave to defend as required under Order 37 Rule 5 of the CPC which has been rejected by the trial Court. [It is appropriate to notice here that there is nothing on record to show that the said affidavit was served to the defendant and even otherwise, it is not complying with the mandate of Order 37 Rule 3(4) of the CPC.]

16. A careful perusal of the entire narration of facts would clearly show that the court has not recorded its satisfaction and has not issued summons for judgment so far in Form No.4A in Appendix B as required by sub-rule (4) of Rule 3 of Order 37 of the CPC and therefore the defendant could not ask for leave to defend under sub-rule (5) of Rule 3 of Order 37 of the CPC and there is nothing on the basis of which the Court could grant judgment, as the provisions of Order 37 Rule 3(4) of the CPC have been held to be mandatory by the M.P. High Court in Rameshchandra Jaiswal (supra). Without complying sub-rule (4) of Rule 3 of Order 37 of the CPC, sub-rule (5) of Rule 3 of Order 37 of the CPC cannot be pressed into service. As such, since summons for judgment in Form No.4A have neither been issued after due satisfaction of the trial Court nor served to the defendant, therefore, the stage for seeking leave to defend under sub-rule (5) of Rule 3 of Order 37 of the CPC has not been reached. Therefore, the trial Court is absolutely justified in rejecting the application under Order 37 Rules 4 & 5 of the CPC. I do not find any merit in this petition. The writ petition deserves to be and is accordingly dismissed, *in limine*. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge