



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 22nd August, 2022.**

+ **CS(OS) 426/2020**

J.K. TYRE AND INDUSTRIES LTD Plaintiff
Through: Mr. Nakull Jain, Advocate.

versus

VEENU KAUR ANAND & ORS. Defendants
Through: Ms. Francesca Kapur, Advocate.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

AMIT BANSAL, J. (Oral)

I.A. 12498/2022(O-XXXVII R-4 of CPC)

1. This application has been filed under Order XXXVII Rule 4 of the Code of Civil Procedure, 1908 (CPC) for setting aside the judgment/decreed dated 26th February, 2021 passed by this Court. While passing the decree on 26th February, 2021, this Court had noted that the defendants have been duly served on 24th December, 2020 and have yet not entered appearance. The order dated 26th February, 2021 is set out hereinafter:

“1. As per the affidavit filed by the plaintiff, the defendants have been served on 24.12.2020. The defendants have not entered appearance.

2. The accompanying suit is filed for recovery of Rs.4,07,52,551/- along with pendente lite and future interest on the amount of Rs.3,54,48,834/-.



3. *Parties entered into a Memorandum of Understanding on 09.12.2019 where defendant No.1 has expressly acknowledged the liability of Rs.3,54,48,834/-. Defendant Nos. 2 to 4 have also given a personal guarantee vide letter dated 21.12.2019. Hence, the present suit under Order 37 CPC.*

4. *Despite service, none has appeared for the defendants. No written statement is filed within the statutory period.*

5. *Accordingly, a decree is passed in favour of the plaintiff and against the defendants jointly and severally for a sum of Rs.4,07,52,551/-. The plaintiff shall be entitled to pendente lite @ 15% per annum. On the amount of Rs.3,54,48,834/-, the plaintiff shall also be entitled to interest @ 15% per annum from the date of the decree till the date of the recovery. Decree-sheet be drawn.*

6. *The suit and all pending applications stand disposed of."*

2. It is clear from the above that the aforesaid order proceeds not only on the basis that the defendants did not enter appearance within the period of ten days as mandated under Order XXXVII Rule 3(1) of the CPC, but also on the merits of the matter.

3. The present application has been filed on 3rd August, 2022 and is based on incorrect facts. Paragraph 5 of the application is set out below:

"5. That it is admitted that the defendants have been served on 24.12.2021, but due to covid-19 pandemic protocols as the tenure from 24.12.2021 to 26.02.2022 was the period of the second wave of the covid-19 pandemic was announced by the Government of India and strict restrictions were imposed."

4. In prayer 'a' of the application, the date of the *ex parte* decree is noted as 26th February, 2022. The fact of the matter is that the defendants were served on 24th December, 2020 and the decree was passed on 26th February, 2021. From the aforesaid, it appears that the application has been hastily



drafted and is therefore, riddled with glaring factual inaccuracies.

5. Further, the application is supported by an affidavit of Mr. Devinder Singh Anand, wherein it is stated that the deponent is the defendant no. 3 and partner in the defendant no. 2 firm. Yet, the application has been filed on behalf of the defendants no. 1 and 4. It is incomprehensible as to how an application filed on behalf of the defendants no. 1 and 4 is not supported by affidavits of the defendants no. 1 and 4 but, in fact, is supported by an affidavit of the defendant no. 3.

6. After passing of the *ex parte* decree dated 26th February, 2021, the plaintiff filed Ex.P.31/2021 seeking execution of the said decree. Counsel for the plaintiff has taken me through various orders dated 22nd March, 2021, 27th May, 2021, 7th October, 2021, 14th December, 2021, 21st February, 2022, 16th March, 2022, 10th May, 2022, 30th May, 2022 and 13th June, 2022 passed in the execution proceedings. A perusal of the aforesaid orders clearly shows that the defendants have been playing hide and seek with the Court. Despite being served, the defendants failed to appear in the execution proceedings and non-bailable warrants were also issued against the defendants. Further, attachment orders have been passed against the immovable properties and bank accounts of the defendants.

7. In paragraph 9 of the present application, the defendants have admitted that they were served in the execution proceedings in May, 2021, however, the defendants are not appearing in the said proceedings. While the defendants have failed to appear in the execution proceedings, the present application has been filed on behalf of the defendants on 3rd August, 2022.

8. For the Court to exercise its power under Order XXXVII Rule 4 of the CPC, 'special circumstances' have to be made out for setting aside a



decree. Such 'special circumstances' have to be determined as per the facts of each case, both in respect of the circumstances that prevented the applicant from appearing in the suit and in respect of facts which would entitle the applicant leave to defend the suit. Reference in this regard may be made to the judgment of the Supreme Court in ***Rajni Kumar v. Suresh Kumar Malhotra and Anr.***, (2003) 5 SCC 315.

9. The only reason given by the applicants for not appearing in the present suit is that the younger son of the defendants was diagnosed with typhoid on 24th February, 2021. However, the defendants were served on 24th December, 2020 and had to enter appearance within ten days thereof. Therefore, the reason given is completely untenable. Even on merits, the only explanation given is that the plaintiff has a security deposit of Rs.1,75,00,000/- of the defendants. However, nothing has been placed on record in this regard. The Memorandum of Understanding dated 9th December, 2019 also does not make a reference to the security deposit.

10. In light of the above, this Court is of the view that the applicants have failed to disclose any special circumstances which warrant exercise of the power envisaged under Order XXXVII Rule 4 of the CPC.

11. Counsel for the applicants has relied on the Supreme Court judgment in *Suo Motu Writ Petition (C) No.3/2020* to contend that in light of the extension of limitation till 28th February, 2022, the Court could not have passed adverse orders due to failure of the defendants from appearing in the present suit.

12. The scope of the various orders passed by the Supreme Court in *Suo Motu Writ Petition (C) No.3/2020* are only to save limitation, where time limit has been fixed under various statutes. The said orders do not absolve



the defendants from entering appearance in a suit instituted under Order XXXVII of the CPC within the prescribed time. Therefore, the reliance placed on the said orders of the Supreme Court cannot come to the aid of the defendants.

13. There is no merit in the application.

Dismissed.

AUGUST 22, 2022

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AMIT BANSAL, J

