

IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

CS 209 of 2016

IA No: GA 2 of 2017 (Old No: GA 2105 of 2017)

Mohammed Faisal Ekram

Versus

Kazi Rezaur Rahman

Mr. Sarosij Dasgupta

Ms. Saheli Bose

.....For the Plaintiff

Heard on : 10.08.2022

Judgment on : 23.08.2022

Krishna Rao, J.: The plaintiff has filed the instant suit under Order XXXVII of the Code of Civil Procedure, 1908 praying for a decree for a sum of Rs. 11,50,000/- against the defendant along with interest @ 24% per annum. The writ of summon was served upon the defendant on 16.09.2016 and as per the report of the Deputy Registrar (Ct. & J) dt. 25.07.2022, the defendant entered appearance through the Ld. Advocate on 20.12.2016 but has not filed written statement. The defendant has neither entered appearance nor had filed any application for leave to defend the suit within 10 days from the date of service of summons. The defendant belatedly some

times in the month of October had filed an application being GA 3 of 2017 seeking unconditional leave to defend the suit but the same was also dismissed vide Order dt. 11.07.2022.

As per the plaint case, the defendant had approached the plaintiff for providing loan with an undertaking that the defendant will repay the same and accordingly on 26.02.2011, a Memorandum of Mortgage by Deposit of Title Deed was entered between the plaintiff and the defendant and the defendant had borrowed a sum of Rs. 5,00,000/- from the plaintiff with the condition, the defendant will repay the said amount along with interest of Rs. 10,000/- per month. On the same day i.e. 26.02.2011, the defendant had received Rs. 5,00,000/- from the plaintiff. After receipt of the said amount, the defendant failed to repay the said amount to the plaintiff inspite of the several requests made by the plaintiff. Finding no other alternative, the plaintiff had sent a legal notice to the defendant on 28.01.2015 calling upon the defendant to pay the entire loan amount to Rs. 5,00,000/- along with interest @ 2% per month total amounting to Rs. 4,70,000/- from 26.02.2011 to 26.01.2015. Inspite of receipt of notice, the defendant has neither return the loan amount along with interest nor had sent any reply to the said legal notice.

In the case reported in (2017) 1 SCC 568, the Hon'ble Supreme Court has fixed the following guidelines:-

“17. Accordingly, the principles stated in para 8 of Mechelec case will now stand superseded, given the amendment of Order 37 Rule 3 and the bindings decision of four judges in Milkhiram case, as follows:-

17.1. If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit of security.

17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit of security or both can be extended to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to Judgment forthwith.

17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or substantial defence is raised), shall not be granted unless the amount should admitted to be due is deposited by the defendant in court."

In the present case, the defendant has not satisfied any of the conditions as laid down by the Hon'ble Supreme Court to establish that the defendant has raised any triable issues.

Order XXXVII Rule 2 (3) provides that:

"(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted

and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.”

Order XXXVII Rule 3 reads as follows:-

“3. Procedure for the appearance of defendant.- (1) *In a suit to which this Order applies, the plaintiff shall, together with the summons under [Rule 2](#), serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.*

(2) *Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall deemed to have been duly served on him if they are left at the address given by him for such service.*

(3) *On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff’s pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff’s pleader or of the plaintiff, as the case may be.*

(4) *If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4-A in Appendix B for 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.*

(5) *The defendant may, at any time within ten days from service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:*

Provided *that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:*

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security with the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, execute the delay of the defendant in entering an appearance or in applying for leave to defend the suit.”

As per record, the writ of summon was served upon the defendant on 16.09.2016 and the defendant entered appearance thorough the Ld. Advocate on 20.12.2016 but had not filed any written statement. The defendant is not appearing in the instant suit. The suit is filed under the summery procedure under Order XXXVII of the Code of Civil Procedure and summons were also issued in the appropriate form as provided under Order XXXVII Rule 2 (2) and the writ of summon was duly served upon the defendant but the defendant has not defended the suit and thus all the allegations made in the plaint were deemed to have been admitted. The document relied by the plaintiff proves that the defendant entered into a

Memorandum of Mortgage and borrowed an amount of Rs. 5,00,000/- from the plaintiff with the condition that the defendant will return the said amount along with interest @ 10,000/- per month but after receipt of the said amount the defendant failed to repay the said amount inspite of receipt of the legal notice dt. 28.01.2015.

In view of the above, this Court is of the view that the plaintiff is entitled to get a decree as prayed for. The defendant is directed to pay the amount of Rs. 5,00,000/- along with interest @ 2% per month on and from 26.02.2011 to 26.07.2016 amounting to Rs. 6,50,000/- , total amounting to Rs. 11,50,000/- along with further interest pendente lite and interest upon judgment @ 10% till the realization of the said amount to the plaintiff. Decree be drawn accordingly.

CS 209 of 2016 along with **IA No. GA 2 of 2017 (Old GA 2105 of 2017)** are accordingly **disposed of**.

(Krishna Rao, J.)