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C.R.P.No.34 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.10.2022

CORAM:

THE HONOURABLE Mr. JUSTICE S.SOUNTHAR

C.R.P.No.34 of 2022

and

C.M.P.No.215 of 2022

UCAL Fuel Systems,
represented by its Chief Financial Officer,
Having its registered office at Raheja towers,
Delta Wing, Unit 705 177,
Anna Salai, Chennai- 600 002.

.. Petitioner

Vs.

Kintetsu Work Express (India) Pvt. Ltd.,
Having its registered office at Brigade Magnum,
B-101, 1st Floor, International Airport Road,
Amurthahalli, Kodigehalli Gate, Hebbal,
Bangalore, Karnataka- 560092
and branch offices at RR Tower III, 6th Floor,
G1 & G2, TVK Industrial Estate, Guindy,
Chennai-600 032 and represented by its
authorised signatory, Mr.Srikanth Banu

.. Respondent

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India, pleaded to pass an order setting aside the fair and decreetal order dated 02.12.2019 in I.A.No.2 of 2019 in O.S.No.4405 of 2019, on the file of the Court of learned XVI Additional City Civil Court, Chennai and consequently set aside the ex-parte decree dated 26.09.2019 in O.S.No.4405 of 2019.



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For Petitioner : Mr.R.Murari, Senior Counsel
for M/s.Preeti Mohan

For Respondent :M/s.K.F.Manavalan

ORDER

This Civil Revision Petition is filed challenging the order passed by the Court below dismissing the petition filed by the Civil Revision Petitioner under Order 37 Rule 4 of C.P.C seeking to set aside exparte decree passed against him on 26.09.2019 in a summary suit and also seeking leave to defend the suit.

2. The respondent herein filed a summary suit under Order 37 of C.P.C., seeking recovery of Rs.76,42,234.15/- together with interest at the rate of 18% p.a., on the said principal sum. According to the respondent/plaintiff it is a reputed freight forwarding logistics and supply chain management service provider in India and around the world. The petitioner/defendant is carrying on business, inter alia, offering fuel management systems as well as manufacture of pumps, emission control parts and various components etc., for the automotive sector. It was



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averred in the plaint of the respondent that it agreed to deliver the petitioner's products to a "bonded warehouse" in El Paso, USA, to enable petitioner's customers (consignee) to collect the products from the bonded warehouse. As per the agreement, the consignment of the petitioner's products has to be shipped from Chennai Port to a bonded warehouse situated in a free trade zone in El Paso, U.S.A., from where the consignee namely, the petitioner's customers in U.S.A would collect the consignment. It was also agreed that all the charges including charges for use of bonded warehouse and handling charges for storage of petitioner's products quoted in U.S dollars have to be paid by the petitioners in rupee equivalent to the respondent in India. It was also agreed as per the agreement the products of the petitioner were shipped to and stored in bonded warehouse at El Paso, U.S.A. However, the petitioners products were not cleared from bonded warehouse by petitioner's customers (consignees). Hence, the consignment had been retained in bonded warehouse for some more time until the same was cleared by petitioner by making arrangement to bring the same to Chennai from U.S.A. The respondent averred in his plaint that from 08.08.2014 to 19.03.2018 as many as 32 invoices raised by the respondent remained unpaid for the



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services rendered by him under the agreement. The present summary suit was laid by respondent for recovery of the said amount. After service of summons in the suit, the petitioner failed to appear in response to the summons and hence it was set exparte on 07.08.2019. Subsequently, exparte decree was passed on 26.09.2019. Thereafter, the petitioner filed I.A.No.2 of 2019 to set aside the exparte decree and also seeking leave of the Court to defend the suit on 15.10.2019. In support of the said petition petitioner had filed an affidavit wherein it was mentioned that after service of summons the suit came up for hearing for the first time on 07.08.2019. The counsel for the petitioner was unable to appear on 07.08.2019, as she misplaced the vakalat executed in her favour for appearance. Further it was stated that as the advocate who was engaged was suffering from some kind of illness, fresh vakalat could not be executed in her favour immediately. It was further averred on 12.09.2019 counsel appeared on behalf of the petitioner and made a request to the Court to adjourn the matter for a short time to enable the petitioner to file a petition to set aside exparte order passed against it on 07.08.2019. It was asserted that in pursuance of the request made by the counsel, the Court below pleased to adjourn the matter to 04.10.2019 under the



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caption exparte evidence. It was further averred that the counsel for the petitioner appeared before the Court on 04.10.2019 with appropriate petition supported by affidavit to set aside the exparte order. But strangely she found that the matter was not listed and on enquiry and perusal of online status the counsel came to the know that the suit stood posted on 26.09.2019 for recording exparte evidence and judgment was pronounced by the Court on the same day. It was also asserted that the above said facts were brought to the notice of the Court below on 04.10.2019 itself and subsequently present petition was filed on 15.10.2019.

3. The said petition was resisted by the respondent by filing a counter wherein it was mentioned that revision petitioner had not made out any special circumstances to set aside the exparte decree passed against it. It was averred that though summons were served on petitioner, it failed to enter appearance within 10 days and issue notice of appearance to the respondent as contemplated under Order 37 Rule 1 and 3 of C.P.C. It was also averred that the petitioner on receipt of summons could have requested the respondent for supply of plaint documents had it



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not been served on it at the time of service of summons.

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4. The Court below on consideration of affidavit and counter affidavit and rival submissions of the parties came to the conclusion that that petitioner herein has not made out any special circumstances for his non appearance and refused to set aside the exparte decree and dismissed the petition. Aggrieved by the same the petitioner has come up by way of this revision.

5. The learned senior counsel for the petitioner raised the following points:

1. At the time of service of summons on the petitioner annexures to the plaint namely plaint documents were not served on the petitioner and hence there is no substantial compliance of Order 37 Rule 3 of C.P.C.

2. Summary suit can be filed only in respect of a debt or liquidated money claim and in the present case it was filed on the strength of invoices which are not debt or liquidated money claim.

3. According to the petitioner the suit claim based on 32 invoices from 08.08.2014 to 19.03.2018 is partially time bared on the face of it i.e., invoices up to 28.04.2016 are time bared.



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4. The learned senior counsel for the petitioner further submitted that the transaction alleged in the plaint cannot be treated as open, mutual and running account.

6. Elaborating above said points the learned senior counsel for the petitioner submitted that in the impugned order there is no discussion as to whether the plaint annexures were served on the petitioner are not. The learned senior counsel further stressed that circumstances pleaded by him for petitioner's failure to appear was not at all considered by Court below.

7. Per contra the learned counsel for the respondent raised the following points:

1. Against an exparte decree an appeal will lie under Section 96(2) of C.P.C and hence the present petition to set aside the exparte order and grant leave to defend the suit is not maintainable.

2. The petitioner failed to mention the date on which the suit summons were served on him.

3. The petitioner has not explained why he failed to issue notice of appearance as required by Order 37 Rule 3(3) of C.P.C.



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8. The learned counsel for the respondent relied on the following judgments in support of his contentions.

1. ***AIR 1984 SCC 38 (Mohd. Yunus vs. Mohd. Mustaqim and others)***- for the proposition that the supervisory jurisdiction of the High Court under article 227 of the Constitution of India is limited to see whether the inferior Court or Tribunal function within the limits of its authority and not to correct any error apparent on the face of record much less on error of law.

2. ***AIR (2003) 5 SCC 315, (Rajni Kumar vs. Suresh Kumar Malhotra and Another)***-wherein the expression special circumstances mentioned in order 37 Rule 4 was explained as a circumstances so unusual or extraordinary to justify putting a clock back by setting aside the decree to grant further relief in regard to post decree matters.

3. ***AIR 1989 Raj 132, (Mohal Lal vs. Om Prakash)*** for the proposition the expression special circumstances employed under Order 37 Rule 4 of C.P.C is not synonymous with the expression sufficient ground used in Order 9 Rule 13 of C.P.C. Therefore according to the learned counsel mere existence of sufficient ground is not sufficient to set



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aside the exparte decree and grant leave unless petitioner satisfy the Court with regard to the existence of something more namely special circumstances explaining his non appearance.

9. In reply to the contention of the learned counsel for respondent, the learned senior counsel for the petitioner relied on the following judgments.

1. **1948 (6) Delhi reported judgments 178, (Punjab & Sind Bank vs. Ramji Das Khanna & Anr.),** for the proposition that service of summons shall be along with plaint copy and its annexures.
2. **2007 (93) DRJ 831, Goyal MG Gases Ltd vs. Premium International Finance Ltd and Ors-** wherein it was held that in a summary suit under Order 37 it is mandatory to serve the copy of plaint along with its annexures.
3. **2018 SCC Online MAD 3302 (Shankunthala Bansal and Ors. vs. Puspaltha Gadia and Ors.-** for the proposition that against the order passed under Order 37 Rule 4 of C.P.C revision is maintainable.



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10. Heard the arguments of the learned senior counsel for the petitioner and the learned counsel for the respondent and perused the typed set of papers and original records received from the Court below.

11. In order to set aside the exparte decree passed in a summary suit and grant leave to defend the suit, the Court has to satisfy with regard to the existence of special circumstances, which prevented the defendant from applying from leave to defend and also with regard to the existence of facts which could entitle to him to defend the suit. Perusal of the impugned order would suggest the Court below dismissed the petition mainly on the ground that the revision petitioner failed to prove the existence of special circumstances which prevented him from appearing before the Court and apply for leave to defend. As far as the existence of other circumstances which would entitle the revision petitioner to defend the suit are concerned, the Court below did not consider the same as it found, in the first instance, petitioner failed to prove the existence of special circumstances.



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12. The expression special circumstances employed under Order 37 Rule 4 of C.P.C was very well explained by the Hon'ble Apex Court in a judgment reported in (2003) 5 SCC 315, (**Rajini Kumar Vs. Suresh Kumar Malhotra and another**)

“7. To appreciate the contentions of the parties it would be useful to refer to Rule 4 of Order 37 C.P.C. which is in the following terms :

"Order XXXVII -Summary Procedure

*(1) to (3) ****

(4) Power to set aside decree - After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."

8. A careful reading of Rule 4 shows that it empowers, under special circumstances, the court which passed an ex parte decree under Order 37 to set aside the decree and grant one or both of the following reliefs, if it seems reasonable to the court so to do and on such terms as the court thinks fit :

(i) to stay or set aside execution and



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(ii) to give leave to the defendant (a) to appear to the summons and (b) to defend the suit.

9. The expression 'special circumstances' is not defined in the C.P.C. nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extra-ordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37, Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extra ordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre decree matters viz., to give leave to the defendant to appear to the summons and to defend the suit."(emphasis supplied)

13. In the light of the law laid down by the Hon'ble Apex Court in the above said decision we have to examine the case on hand. In the



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present case revision petitioner pleaded that in response to the summons received from the Court it engaged an Advocate, but the vakalat executed by the petitioner was misplaced by the said Advocate and she was also not well at the relevant point of time and consequently she could not appear before the Court on the date of hearing. It was also mentioned that on a subsequent date of hearing Advocate appeared before the Court and took time for filing petition to set aside exparte order and on such request matter was adjourned to 04.10.2019. But strangely the matter was taken up for hearing on 26.09.2019 and exparte decree order was passed on that day. The Court below rejected the contention mainly on the ground that an Advocate to whom the vakalat was given by the petitioner did not file any affidavit in support of such contention. However, before this Court an affidavit was filed by the learned counsel on record for the revision petitioner namely Preethi Mohan dated 19.09.2022 wherein it was averred as follows:

“3. I state that when the captioned petition was taken up for final arguments on 09.09.2022, a question arose as to whether an Affidavit had been filed by the counsel for the petitioner in the proceedings before the Court of Hon'ble XVI Additional Judge, City Civil Court in



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O.S.No.4405 of 2019, affirming the fact of the misplacement of the Vakalat, resulting in no appearance for the defendant therein (Petitioner herein on 07.08.2019, when the suit came up for hearing for the first time. It is in furtherance of the same, and the argument advanced on behalf of the respondent in this petition, that I am filing the present affidavit.

4. I state that the O.S.No.4405 of 2019 came up for hearing for the first time on 07.08.2019. I further state that the petitioner herein, just before such date, had given the vakalat in my favour, which was inadvertently misplaced in my office. I was also at the relevant point in time not attending office due to my being unwell in the first and second week of August 2019, and consequently owing to my absence coupled with the fact of the vakalat having been misplaced, the case was by oversight not attended to on the date on which it was first called i.e. 07.08.2019. I was also not available and hence not in a position to have fresh a vakalat executed in my favour from the petitioner and have the same produced before the lower Court on 07.08.2019. Owing to the said reason, the petitioner was set ex parte and the matter was adjourned to 11.09.2019. I state that the non-appearance and the misplacing of the vakalat were entirely on account of an oversight at my end,



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and not in any manner attributable to the petitioner herein.”

14. Misplacement of vakalat by an Advocate and her non appearance before the Court on behalf of the client on the date of hearing owing to misplacement of vakalat and illness can be certainly treated as special circumstances under Order 37 Rule 4 of C.P.C. When a client gives vakalat to an Advocate to represent him in the Court of law, under normal circumstances Advocate will file the vakalat and appear before the Court. The vakalat executed by client is the lifeline of an Advocate and no Advocate would like to misplace the vakalat. If an Advocate files that she misplaced the vakalat and owing to such misplacement and her illness she could not appear on behalf of the client certainly there must be an extraordinary situation under which the vakalat should have been misplaced. In the light of the affidavit filed by the counsel on record extracted above this Court is inclined to accept the contentions of the petitioner that existence of special circumstances as contemplated under Order 37 Rule 7 of C.P.C., had been established by the petitioner herein.



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15. The next question that arises for consideration is whether the petitioner on the basis of the averment made in their affidavit has made out the case to grant it leave to defend the suit. This question was not at all considered by the Court below in the impugned order, as it dismissed the petition on the 1st ground (non existence of special circumstances). The petitioner submitted that the suit claim is based on the agreement which came into existence by exchange of E.mails and it is not a suit for recovery debt or liquidated money claim. It was also submitted that out of 32 invoices relied on by the respondent 16 were time barred. It was also further submitted that averments found in the plaint are not sufficient to presume existence of open, mutual and running account. The learned senior counsel for the petitioner submitted that in a mutual, open and running account one side payment is not sufficient. The mutual account involves reciprocal demand and payment or promise to pay. In the light of the averments contained in the affidavit of the petitioner in respect of the above said points, I feel there are triable issues in this case which entitle the petitioner to get leave to defend the suit. The question of limitation, existence of open, mutual and running account and existence of



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agreement to avail a services of the respondent as claimed in the plaint averments etc., have to be gone into in a full fledged trial. Therefore, this Court comes to a definite conclusion that the petitioner is entitled to leave to defend the suit. However, in the facts and circumstances of the case, it would be appropriate to grant conditional leave to the revision petitioner by directing him to deposit a sum of Rs.10 lakhs as a condition to defend the suit.

16. In view of the discussions made above, the Civil Revision Petition is allowed by setting aside fair and decreetal order passed in I.A.No.2 of 2019, on condition, petitioner deposits a sum of Rs.10 lakhs to the credit of O.S.No.4405 of 2019 on the file of the XVI Additional City Civil Court, Chennai within a period of six weeks from the date of receipt of copy of this order. On such payment by the petitioner, exparte decree dated 26.09.2019 passed in O.S.No.4405 of 2019 stands set aside and the petitioner is granted leave to defend the suit. The Court below is directed to dispose of the suit in accordance with law. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.



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After pronouncement of the order, the learned counsel for the respondent made a request to this Court to fix a time limit for the disposal of the suit. Considering the fact that the suit is for recovery of money and the suit is of the year 2019, this Court is inclined to issue a direction to dispose of the suit within a period of six months from the date of receipt of copy of this order.

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To

XVI Additional Judge,
City Civil Court,
Chennai

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