

**S. No.112 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CR No.5091 of 2022

Date of Decision:21.11.2022

Nitin SinghalPetitioner

Vs.

Anil GargRespondent

CORAM:- HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Kanwal Goyal, Advocate for the petitioner.

DEEPAK GUPTA, J.

The suit for recovery under the provisions of Order 37 of the Code of Civil Procedure was filed by the plaintiff (petitioner herein), wherein application for leave to defend was moved by the defendant (respondent herein) after 10 days of the service. The plaintiff moved application under Section 151 CPC to decree the suit due to delayed moving of the application by the defendant for leave to defend. That application was dismissed by learned Civil Judge (Junior Division), Faridabad vide impugned order dated 19.07.2022, which is assailed in this revision.

2. The facts, in brief, are that the plaintiff filed suit for recovery of ₹9,25,500/- (₹6 lakhs as principal amount and ₹3,25,500/- as interest) against the defendant by pleading that friendly loan of ₹6 lacs was advanced in cash in the year 2013-14 to the defendant, who had agreed to return the same along with interest @ 21% per annum. Availing of the loan was acknowledged by the defendant by way of receipt. It was pleaded further that the defendant paid interest @₹10,500 per month upto November, 2015 but failed to make payment of interest w.e.f. December, 2015 onwards. The principal amount of ₹6 lakhs and interest from December, 2015 to

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30.06.2018 for 31 months i.e. ₹3,25,500/- was outstanding. Plaintiff sent a legal notice dated 21.11.2016 to the defendant but payment was not made. With these submissions, suit for recovery of ₹9,25,500/- along with pendente lite & future interest was filed on 7.7.2018 under Order 37 CPC.

3. Summons of the suit was issued to the defendant for 11.09.2018, which was served upon him on 12.07.2018. Defendant put in appearance on 31.07.2018 i.e. beyond the period of 10 days after being served with the summons, without moving any application for exonerating the delay. Simultaneously, defendant moved an application for leave to defend (copy Annexure P.5). Plaintiff, on the other hand, moved an application on 31.10.2018 (copy Annexure P.6) for issuance of summons for judgment. He also filed reply to the application of the defendant for leave to defend. Plaintiff, thereafter, moved an application on 19.11.2018 under Section 151 CPC for decreeing the suit on the ground that the defendant had not put in appearance within ten days after serving of the summons upon him. Said application has been dismissed by way of the impugned order.

4. The contention raised by the petitioner is that provision of Order 37 Rule 2 (3) is mandatory and not directory. As the defendant failed to put in appearance within ten days of receipt of summons and did not move an application to condone the delay, so Court was bound to pass the decree. It is also contended that necessary pre-requirements of Order 37 CPC were fulfilled by the plaintiff and so, the impugned order is bad in law and also non-speaking.

5. After hearing learned counsel for the petitioner and perusing

the paper book, I find no merit in the revision.

6. Order 37 of the Code of Civil Procedure provides for a summary procedure in respect of certain suits. The essence of a summary suit is that defendant is not entitled as a matter of right to defend the suit, as in the ordinary suit. Defendant is required to apply for leave to defend within ten days from the date of service of summons upon him and such leave will be granted, only if the affidavit filed by the defendant discloses such facts, as the Court may deem sufficient for granting leave to the defendant to appear and defend the suit. If no leave is granted to the defendant, the plaintiff is entitled to decree. The object underlying the summary procedure is to prevent unreasonable obstruction by defendant who has no defence.

7. However, before a decree can be granted in favour of the plaintiff, it is required to be seen, whether the suit filed by the plaintiff falls within the ambit of Order 37 Rule 1(2) CPC, which read as under:

“Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:—

- (a) suits upon bills of exchange, hundies and promissory notes;
- (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,—
 - (i) on a written contract; or
 - (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
 - (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.”

8. A bare look at the above provision would reveal that summary procedure is applicable in respect of following two classes of suit -

- (i) suits based upon bills of exchange, hundies and promissory notes; and
- (ii) suit for recovery of debts or liquidated demand in money, which is payable by the defendant out of written contract or an enactment or a guarantee given in respect of a debt or a liquidated demand.

9. In the present case, admittedly, there is no written contract between the parties. As per own case of the plaintiff, friendly loan was advanced to the defendant against a receipt. No terms and conditions regarding payment of interest are stated to be mentioned in the receipt. The receipt does not fall within the ambit of bill of exchange, hundi or promissory notes; or written contract. There being no written contract between the parties for alleged friendly loan transaction, as is clear from the pleadings in the plaint and regarding the payment of interest @21% per annum as claimed by the plaintiff, the receipt in itself cannot be treated as a written contract between the parties. The rate of interest has been claimed on the basis of oral agreement. The said suit for recovery of debt or liquidated payment of money with interest cannot be termed as arising out of a written contract. Merely because the defendant has paid interest @21% per annum for some months as is claimed by the plaintiff, does not make it out to be a case of suit arising out of a written contract.

10. Still further, even if it be assumed for the sake of arguments that suit falls within the ambit of Order 37 CPC, plaintiff was required to send the summons of the suit to the defendant in Form B in Appendix B as per Rule 2(2) of order 37. Rule 2 of the Order XXXVII CPC provides as to

how the summary suit is to be instituted by the plaintiff. It reads as under :-

“2. Institution of summary suits— (1) A suit, to which this Order applies, may if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain,—

(a) a specific averment to the effect that the suit is filed under this Order;

(b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint;

(c) the following inscription, immediately below the number of the suit in the title of the suit, namely:—

"(Under Order XXXVII of the Code of Civil Procedure, 1907)."

(2) the summons of the suit shall be in Form No. 4 in Appendix B or in such other form as may, from time to time, be prescribed.

(3) xxxxxxxxxxxxxxxxxxxxxxxxx."

11. It is evident from the aforesaid Rule that whenever the suit is filed under Order XXXVII of CPC, the summons of the suit is to be sent in Form No.4 of Appendix B, which is as under :-

“Appendix B

No.4

SUMMONS IN A SUMMARY SUIT

[O.37 R. 2]

(Title)

To

(Name, description and place of residence)

Whereas..... has instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908, for Rs.....

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and interest, you are hereby summoned to cause an appearance to be entered for you, within ten days from the service hereof, in default whereof the plaintiff will be entitled, after the expiration of the said period of ten days, to obtain a decree for any sum not exceeding the sum of Rs..... and the sum of Rs..... for costs, together with such interest, if any, as the Court may order.

If you cause an appearance to be entered for you..... the plaintiff will thereafter serve upon you a summons for judgment at the hearing of which you will be entitled to move the Court for leave to defend the suit.

Leave to defend may be obtained if you satisfy the Court by affidavit or otherwise that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to defend.

Given under my hand and the seal of the Court, this..... day of.....20..

Judge.”

12. In the present case, the summons to the defendant regarding the suit for 11.09.2018 was issued not in Form N: 4 as per Appendix B provided under Order 37 Rule 2 CPC, as is evident from the copy of notice (Annexure P.3). Ironically, this summons was not even sent under Order 5 Rule 1 or 3 CPC as is in the ordinary suit. Rather, said notice was sent under Order 9 Rule 6 CPC, which in fact provides about the procedure when only plaintiff appears. Simply because a note has been given below this notice sent under Order 9 Rule 6 CPC to the effect that the suit has been filed under Order 37 CPC, does not fulfill the requirements of Order 37 Rule CPC.

13. Not only above, Rule 3 of Order XXXVII CPC provides the procedure to be followed for appearance of the defendant. The relevant portion of said Rule 3 reads as under :-

“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 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. 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.

(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) xxxxxxxxxxxxxxxxx

(7)xxxxxxxxxxxxxxxxxx”

14. It is apparent from the above said Rule that on appearance of the defendant within ten days of service, he is required to file an address in the Court for service of notice upon him and it is thereafter that plaintiff is required to serve upon him (defendant) a summons for judgment in form No.4-A in Appendix B, which should be returnable not less than ten days from the date of service. Form No.4-A in Appendix-B reads as under :-

No.4 -A

SUMMONS FOR JUDGMENT IN A SUMMARY SUIT

[O.37 R. 3]

(Title)

In the..... Court atSuit 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..., at.....o'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....”

15. In this case, though plaintiff moved an application on 30.10.2018 (Annexure P6) for issuing summons for judgment, but defendant was not served with the summons in Form No.4-A in Appendix B.

16. It has been held by this court in **Nand Kumar Vs. Sheela Devi, 1997(1) RCR (Civil) 113** that provision of Order XXXVII CPC provides a summary procedure for disposal of case and therefore, under its Rule 3, the plaintiff is duly bound to send a copy of plaint and annexure thereof to the defendant under Rule 2. A summons is to be sent in Form No.4 of Appendix B. Without copy of pronote, it cannot be said that provision of Order XXXVII Rule 3 CPC was complied with.

17. In the present case, as evident from notice (Annexure P3), defendant was never served with summons in Form No.4 of Appendix B of CPC; and after putting in appearance, he was not served with summons in Form No.4-A of Appendix B alongwith the copy of receipt, which was the basis of the plaintiff's case.

18. The impugned order dated 19.07.2022, Annexure P.1 reveals that aforesaid contentions were raised by the defendant before the Court below. The learned Court, by keeping in view the contentions of the defendant but without commenting on the merits of the case, dismissed the application for decreeing the suit. The contention of the petitioner that a non-speaking order has been passed, is without merit because learned Court has clearly given its mind that application was dismissed having regard to the specific contentions made by the defendant.

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19. In view of the above, it is held that there is no merit in the present revision.
20. Dismissed.

November 21, 2022
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(DEEPAK GUPTA)
JUDGE

Whether Speaking/reasoned
Whether Reportable

Yes/No
Yes/No