

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
COMMERCIAL DIVISION

APDT/4/2023
WITH CS/209/2016
IA NO: GA/1/2023, GA/2/2023

KAZI REZAUR RAHMAN
VS
MOHAMMED FAISAL EKRAM

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
AND
The Hon'ble JUSTICE UDAY KUMAR

Date: 19th June, 2023.

Appearance:
Mr. Shamit Aanyal, Adv.
Mr. Sabyasachi Roy, Adv.
...for the appellant

Mr. Sarosij Dasgupta, Adv.
Mr. Saheli Bose, Adv.
...for the respondent

The Court:- By consent of the parties, the appeal and the application are taken up together and disposed of by this order. The plaintiff instituted a summary suit under Order XXXVII of the Code of Civil Procedure praying, inter alia, for a decree for a sum of Rs.11,50,000/- against the defendant along with interest. The writ of summons was served upon the defendant on 16.9.2016 and the Report of the Deputy Registrar (Ct. & J) dated 25th July, 2022 shows that the defendant entered appearance on 20.12.2016 but did not file any written

statement. The summons of the suit in Form No. 4, Appendix-B was served upon the defendant on 16th September, 2016 but the defendant did not enter appearance or file any application for leave to defend the suit within 10 days from the date of service of writ of summons. The defendant belatedly some times in the month of October had filed an application being GA/3/2017 seeking unconditional leave to defend the suit but the same was also dismissed vide order dated 11th July, 2022. The order of 11th July, 2022 is not under challenge.

The plaintiff sued the defendant for realization of the aforesaid sum on account of a loan transaction. The plaint shows that the entire loan amount had been received by the defendant but they did not repay the loan amount. The plaintiff had sent a legal notice to the defendant on 28th January, 2015 calling upon the defendant to pay the entire loan amount to Rs.50,000/- along with interest @ 2% per month aggregating to Rs.4,70,000/- from 26th February, 2011 to 26th January, 2015. In spite of receipt of notice the defendant did not pay the said loan amount along with interest nor he sent any reply to the said legal notice. It is an admitted position that after service of the Summons, the defendant did not enter appearance in the suit within 10 days of such service as required under Order XXXVII Rule 2(3). The Writ of Summons has been duly served under Order XXXVII Rule 2(2) upon the defendant but the defendant did not defend the suit and by reason of Order XXXVII Rule 2(3), the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum exceeding the sum mentioned in the Summons together with the interest at the rate specified, if any, up to the date of decree and such sum for cost as has been determined by the High Court. The learned Trial Judge has considered the Judgment in *IDBI Trusteeship Services Ltd. vs. Hubtown Ltd.*,

(2017) 1 SCC 568 and observed that the defendant did not satisfy the conditions as laid down in the said judgment. In any event, having regard to the fact that in spite of service of summons in Form No. 4, Appendix-B the defendant did not enter appearance within the time specified the decree as a matter of course has to follow. In this regard we may refer to the decision of our Court in *Universal Cable Ltd. vs. West Bengal State Electricity Board* reported in 101 (2) CWN 148. The relevant observations are as follows:

"It has been submitted by Mr. Chatterjee that the learned trial Court is in welter of confusion as the court below was not conscious of the categorical and imperative distinction as regards the procedure which is to be followed in a regular suit and in a proceeding under Order 37 of the Code of Civil Procedure. It is needless to mention that Order 37 is a special summary procedure which cannot be equated to that of the course of prosecution of a procedure in a regular suit. Otherwise there would have been no efficacy for notification or incorporation of Order 37 in the body of the Civil Procedure by way of separate species of procedure canvassed for disposal of the matter which comes under the four corners of the summary proceeding. In support of his contention Mr. Chatterjee has relied on a case of J.B. Ross & Co. v. C.R. Scrivan & Ors, reported in AIR 1917 Calcutta 269 where the Division Bench of this Court has held that a court cannot pass a decree except in suits on negotiable instrument governed by the provisions of Order 37 Rule 2. No decree can legally be given without evidence in a case where the defendant does not choose to contest except in suits on negotiable instruments governed by the provisions of Order 37 Rule 2 of the Code of Civil Procedure. We find even concurrence by Woodroffe J. who has been pleased to hold that according to Rule 2 Sub-rule (2) of the Order 37, in default of obtaining leave to appear and defend, the allegations of the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree.

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The trial court seems to have gone wrong by treating the procedure by fixing a matter of a summary proceeding in ex-parte board where the implications are required to flow by operation of the para-materia for not applying for leave to defend within the time as prescribed. Therefore, if on the expiry of a period for more than 8 months, a purported application is sought to be made for condonation of delay that will have germane effect of making erosion of the entire special procedure as contemplated in a summary proceeding contained under Order 37 of the Code of Civil Procedure. Accordingly, the order impugned suffers from material irregularity in exercise of the jurisdiction and the same is liable to be set aside and the court is directed to deliver a judgement on following the deeming effect of the admission of the allegations contained in the plaint for non-appearance of the defendant with a prayer to leave to defend.”

In view of the aforesaid, we do not find any reason to interfere with the judgment passed by the learned Single Judge.

Consequently, the appeal (APDT/4/2023) fails and is dismissed.

There shall, however, be no order as to costs.

(SOUMEN SEN, J.)

(UDAY KUMAR, J.)