

THE HONOURABLE SRI JUSTICE A.SANTHOSH REDDY

C.R.P.Nos.3028 & 3032 OF 2019

COMMON ORDER:

These two civil revision petitions under Article 227 of the Constitution of India are directed against the common order dated 30.07.2019 in I.A.Nos.857 & 856 of 2018 in O.S.No.51 of 2018, on the file of the III-Additional District Judge, Karimnagar, wherein the said applications filed by the petitioner herein under Order XXXVII Rule 3(7) of the Code of Civil Procedure (in short, the CPC') to grant leave to defend the suit and under Article 123 of the Limitation Act and under Order XXXVII Rule 4 CPC to set aside the *ex parte* decree dated 31.08.2018, were dismissed.

2. Heard the learned counsel for the petitioner and learned counsel for the respondent in both the revisions. Perused the record.

3. The petitioner-defendant and respondent-plaintiff in both the revisions are one and the same. The respondent herein filed the suit O.S.No.51 of 2018 for recovery of money based on a promissory note dated 14.12.2015. The said suit was decreed *ex parte* on 31.08.2018. Immediately, the petitioner filed I.A.No.857 of 2018

under Order XXXVII Rule 3(7) CPC to grant leave to defend the suit and another application in I.A.No.856 of 2018 under Order XXXVII Rule 4 CPC to set aside the *ex parte* decree dated 31.08.2018. The Court below dismissed both the applications by the impugned common order on the ground that the petitioner failed to prove that he is entitled for the reliefs prayed in the said applications. Challenging the same, the present revisions are filed by the petitioner-defendant.

4. Learned counsel for the petitioner submits that the Court below committed error in dismissing both the applications without any valid reasons; that summons in the suit were served on the petitioner on 03.08.2018 fixing the date of hearing on 24.08.2018; that petitioner approached an Advocate and he filed vakalath; that petitioner was suffering from ill-health and took treatment from 04.08.2018 to 16.08.2018 and he could not attend the Court within ten days from the date of service of summons, as required under Rule 3(1) of Order XXXVII CPC; that suit was posted to 29.08.2018; that in spite of presence of the petitioner on that day, he was set *ex parte* and an *ex parte* decree was passed on

31.08.2018; and petitioner had got good defence to defend the case. Learned counsel prayed to set aside the impugned order.

5. On the other hand, learned counsel for the respondent while supporting the impugned order submits that the Court below had rightly set the respondent *ex parte*, as he failed to appear before the court despite services of summons. Learned counsel placed reliance on the decision of the Hon'ble Apex Court in **TVC SKYSHOP LTD. v. RELIANCE COMMUNICATION AND INFRASTRUCTURE LTD**¹.

6. Thus, on hearing the submissions of both the learned counsel and upon perusing the material on record, the question that arises for consideration is – whether the impugned order is sustainable in law?

7. The respondent herein filed the suit O.S.No.51 of 2018 under Order XXXVII Rules 1 and 2 CPC for recovery of money based on a promissory note dated 14.12.2015. Summons in the suit were served on the petitioner directing him to appear before the Court on 24.08.2018. As the regular Presiding Officer was on leave, the matter was posted to 29.08.2018. Though the petitioner was present

¹2014 (2)ALD 24 (SC)

on that day, he was set *ex parte* and an *ex parte* decree came to be passed on 31.08.2018. The petitioner neither filed an application to grant leave to defend his case nor submitted anything to the Court and as such the trial Court decreed the suit in terms of Order XXXVII CPC. Subsequently, the petitioner filed I.A.No.857 of 2018 under Order XXXVII Rule 3(7) CPC to grant leave to defend the suit and another application in I.A.No.856 of 2018 under Order XXXVII Rule 4 CPC to set aside the *ex parte* decree dated 31.08.2018.

8. The trial Court in the impugned order observed that the petitioner failed to show any valid reasons for his absence and has not properly proved with any reliable documentary evidence that he suffered ill-health and that he also failed to file any application seeking leave to defend the suit.

9. The judgment relied on by learned counsel for the respondent in **TVC SKYSHOP LTD.** (supra), the Hon'ble Apex Court held at paragraphs 8 and 9 as under:

“An analysis of Order XXXVII shows that the provisions contained therein are applicable to the suits specified in Rule 1(2). Rule 2(1) prescribes the particulars to be incorporated in the suit. Sub-rule (3) of Rule 2 lays down that the defendant shall not defend the suit unless he enters

appearance and in default of his appearance, the allegations contained in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for a sum not exceeding the sum specified in the summons together with interest at the specified rate, if any. Rule 3 contains the procedure for the appearance of the defendant. Sub-rule (5) prescribes time limit of ten days from the service of summons for judgment within which the defendant can apply for leave to defend. The concerned Court can grant leave to defend unconditionally or conditionally. First proviso to this sub-rule lays down that leave to defend cannot be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has substantial defence or that the defence is frivolous or vexatious. Second proviso to sub-rule (5) lays down that if the defendant admits part of the amount claimed by the plaintiff then he shall not be granted leave to defend unless the admitted amount is deposited in the Court. Sub-rule (6) provides for the consequences of the defendant's failure to apply for leave to defend or refusal of prayer for leave to defend. In such an eventuality, the plaintiff is entitled to judgment forthwith. Sub-rule (7) lays down that if the defendant is able to show sufficient cause, the Court can excuse the delay in entering of appearance or in making an application for leave to defend. Rule 4 gives power to the Court to set aside the decree provided special circumstances exist for doing so. The Court can also stay or set aside execution and grant leave to the defendant to defend the suit.

The expression "special circumstances" appearing in Order XXXVII Rule 4 was considered by this Court in *Rajni Kumar v. Suresh Kumar Malhotra* 2003(4) ALD 82 (SC) = 003) 5 SCC 315 and it was observed:

"The expression "special circumstances" is not defined in the Civil Procedure Code 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, extraordinary, 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 extraordinary 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.”

In the same judgment, the Court considered the scope of order XXXVII Rule 4 and observed:

“It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the court to grant leave to the defendant to appear to summons and defend the suit if the court considers it reasonable so to do, on such terms as the court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the court, all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the court is empowered to grant leave to the defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9.”

10. In the case on hand, the trial Court has not properly considered the applications filed by the revision petitioner. The petitioner pleaded in the affidavit filed in support of the application that due to ill-health, he has undergone treatment for dengue fever from 04.08.2018 to 16.08.2018 and under some

special circumstances, he failed to appear before the Court. However, he appeared before the Court on 29.08.2018 and despite his presence, the Court below passed the *ex parte* decree on 31.08.2018, as he failed to file an application under Order XXXVII Rule 7 CPC seeking leave to defend the suit. Apart from that, at paragraph 3 of the affidavit, the petitioner stated the special circumstances seeking leave to defend the suit that he did not execute a promissory note in favor of the respondent-plaintiff and there was no transaction as pleaded by him, including the suit amount and that there are no witnesses to the alleged promissory note and he was not scribe of the contents of the alleged promissory note.

11. As seen from the record, it appears that the petitioner was present in the Court on the day when he was set *ex parte*. The counsel ought to have sought time to file an application seeking leave to defend the case of the petitioner, but he failed to do so. Therefore, I find that the applications filed by the petitioner to set aside the *ex parte* decree and to grant leave to defend the suit disclose special circumstances which justify allowing the applications by giving him an opportunity by setting aside the

ex parte decree and permitting him to grant leave to defend the case. Further, this Court is also of the view that the petitioner was not properly guided by his counsel and for the fault of his counsel, the party shall not be made to suffer.

12. For the foregoing reasons, I am of the view that the trial Court has not properly appreciated the provisions of Order XXXVII CPC and the impugned order suffers from infirmity. The trial Court committed jurisdictional error warranting interference by this Court under Article 227 of the Constitution of India.

13. Accordingly, both the civil revision petitions are allowed. The order dated 30.07.2019 in I.A.Nos.857 & 856 of 2018 in O.S.No.51 of 2018, on the file of the III-Additional District Judge, Karimnagar, is hereby set aside. Consequently, I.A.Nos.857 and 856 of 2018 stand allowed. There shall be no order as to costs.

A.SANTHOSH REDDY, J

17.02.2023
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