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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 04.05.2023

Pronounced on: 12.05.2023

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RFA 360/2023, CM APPL. 22878/2023 & 22879/2023

AYUSHI AIR EXPRESS PRIVATE LIMITED

AND ANR.

..... Appellants

Through: Mr. Vijay Datt Gahtori and Mr.
Atul Kr. Pandey, Advocates.

versus

TRANSPORTATION INDIA-3PL

..... Respondent

Through: Ms. Niti Khanna, Advocate for
Mr. Mayank Wadhwa, Advocate.

CORAM:

HON'BLE MR. JUSTICE GAURANG KANTH

J U D G M E N T

GAURANG KANTH, J

1. The Appellants in the present Appeal are aggrieved by the Impugned Judgment & Decree dated 14.12.2022 ("*impugned judgment*") passed by the learned ADJ-3, New Delhi District, Patiala House Courts, New Delhi in Civil Suit bearing CS No.408/20 titled as *Transportation India 3 PL Vs Aayushi Air Express Pvt. Ltd.*
2. The Appellants had failed to file an application seeking leave to defend in the said Suit. The learned Trial Court, accordingly, vide the Impugned Judgment, based on the uncontroverted documents placed on record by the Respondent, decreed the Suit for recovery

filed by the Respondent under Order XXXVII of the Code of Civil Procedure, 1908.

3. With consent of the learned counsel for the Appellants, the Appeal is taken up for hearing. Learned counsel for the Appellants state that he had filed complete Trial Court record and consented for the disposal of the present Appeal based on the documents placed on record by him.

BRIEF FACTS RELEVANT FOR THE DISPOSAL OF THE PRESENT APPEAL ARE AS FOLLOWS:

4. The Respondent is a registered partnership firm represented through its partner, engaged in the business of providing logistic services including transportation, warehousing, courier and C&F etc.
5. It is the case of the Respondent that Appellant No.1 is a company incorporated under the Companies Act, represented through its Director, Mr. Sujeet Kumar. Appellant No.2 is the other director of Appellant No.1/Company.
6. The Appellants approached the Respondent for availing its services. Even though there was no written contract between the parties, an arrangement was formulated between the parties and the transactions took place between the parties in terms of the said arrangement. As per the agreed terms, the Appellants were given a credit period of 45 days to clear the payments due to the Respondent.
7. It was the practice between the parties that the Respondent used to raise invoice(s) for the services rendered to the Appellants by the

Respondent and the Appellants were to clear the payment in respect of the said invoice(s) within the credit period of 45 days as agreed between the parties. The transaction(s) between the parties continued for a period of approximately eight to ten months. The Appellants cleared/paid some of the invoices raised by the respondent, however, majority of the invoices were left unpaid.

8. According to the Respondent, the Appellants admitted that an amount of Rs.23,52,372.80/- is outstanding to be paid by them towards the unpaid invoices of the Respondent as on 25.01.2020. Thereafter, the Appellants made partial payment of Rs.50,000/- on 05.02.2020 and Rs.1,00,000/- each on 04.06.2020 and 07.07.2020 towards their liability thus reducing the total outstanding amount to Rs.21,02,324.50/-.
9. Despite repeated requests, the Appellants failed to clear the said outstanding amount payable to the Respondent. The Appellants issued two cheques to the Respondent in the month of January 2020 amounting to Rs.5,00,000/- each towards part payment of the said outstanding dues. However, upon presentation, the said cheques were dishonored. The Respondent issued legal notice dated 27.01.2020 calling upon the Appellants to clear the outstanding dues along with interest. The Respondent also initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881, however, the outstanding dues remained unpaid.
10. The Respondent issued another legal notice dated 29.09.2020 calling upon the Appellants to clear the outstanding amount.

Despite receipt of the said legal notice, the Appellants failed to clear the outstanding amount payable to the Respondent. Hence, the Respondent filed the Suit for recovery under Order XXXVII CPC.

11. Summons of the Suit were issued to the Appellants and accordingly the Appellants entered their appearance on 12.05.2022. Thereafter, the Respondent filed summons for judgment on 15.07.2022.
12. There were disputes regarding the service of summons for judgment upon the Appellants. The learned Trial Court supplied a copy of summons for judgment to the Appellants on 20.09.2022 and the Appellants were granted further opportunity to file the application for leave to defend within the stipulated period. However, the Appellants failed to file any application seeking leave to defend.
13. In view of the same, the learned Trial Court examined the uncontroverted documents placed on record by the Respondent and decreed the Suit for sum of Rs. 21,02,324.50/- with *pendent lite* and future interest @ 6% per annum.
14. Being aggrieved by the Impugned Judgment, the Appellants preferred the present Appeal.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANTS

15. Learned counsel for the Appellants submits that the Respondent filed the Application for summons for Judgment on 15.07.2022, however, the learned Trial Court never considered the said Application and hence no summons for Judgment in the

prescribed forms were issued to the Appellants. Thus, the learned Trial Court failed to follow the procedure prescribed under Order XXXVII CPC.

16. He further submits that the learned Trial Court has failed to appreciate that the Appellants were never served with summons for judgment instead a copy of the application for the issuance of summons for judgment was served upon the Appellants.

17. Learned counsel for the Appellant relied upon the judgments in the matters of *Ramesh Chandra Jaiswal Vs Central Bank of India and Anr.* reported as *1992 Legal eagle MP 85*, *Nek Singh Vs. Ram Prakash* reported as *2006 AIHC (NOC) 231 J&K AIR 2006*, *Atma Tube Product Ltd. V/s Steel Authority of India Pvt. Ltd.* reported as *2001 Legal Eagle (P&H) 110* to contend that procedures under Order XXXVII Rule 3 CPC are to be followed strictly.

18. With these submissions, learned counsel for the Appellants prayed for setting aside of the Impugned Judgment.

LEGAL ANALYSIS

19. This Court has heard the arguments advanced by the learned counsel for the Appellants and perused the documents placed on record by the Appellants. This Court also examined the Judgments relied upon by the parties.

20. In the present case, the whole controversy is whether the Appellants have been served with summons for judgment or not. In order to examine the controversy, this Court deems it appropriate to refer to and discuss the provisions of Order

XXXVII CPC. Order XXXVII CPC deals with the summary procedure. Order XXXVII Rule (2) deals with the institution of summary suits and Rule (3) deals with the procedure for the appearance of the defendant. Order XXXVII Rule (2) and (3) CPC reads as follows:

“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) 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.

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 annexes 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 order, 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-said 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 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 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.”

21. From the perusal of the above mentioned legal provisions, it is clear that Order XXXVII Rule 3(3) CPC prescribes the procedure for appearance of defendant. In the event of service of summons upon the defendant under Order XXXVII Rule 3(2) CPC in the prescribed form, the defendant may at any time within ten days of such service enter an appearance either in person or by a pleader and in either case, he shall file in Court an address for service of notice on him. If the defendant enters an appearance, the plaintiff shall thereafter serve upon the defendant summons for judgment in Form No.4-A 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, amount claimed and stating that in his belief, there is no defence to the Suit. Further, the defendant may at any time, within ten days from the service of such summons for judgment, by affidavit or otherwise, disclose such facts as may be deemed sufficient to entitle him to seek leave to defend such suit, and leave to defend may be granted to him unconditionally and upon such terms and conditions which the Court may deem just and proper.

22. In the present case, there is no dispute with respect to the receipt of the summons as envisaged under order XXXVII Rule 3(2) CPC. In pursuance of the said summons, the Appellants filed their address for service. The controversy is whether the summons for

judgment as envisaged under Order XXXVII Rule 3(4) CPC is served upon the Appellants. It is the case of the Respondent that they filed the process fee and summons for judgment were issued to the Appellants, whereas it is the stand of the Alhmad that no such summons were ever issued. In any case, the Appellants through his counsel appeared before the learned Trial Court on 20.09.2022. During the course of the proceedings, the learned Trial Court handed over the copy of the summons for judgment to the Appellants. The relevant portion of the order dated 20.09.2022, reads as follows:

“20.09.2022

Present: Ms. Muskan Gupta, Ld proxy counsel for the plaintiff,

Sh. Mahesh Kumar, Ld proxy counsel for all the defendants.

Considered the last orders.

Though Ld counsel for the plaintiff states that she has taken the steps for issuance of summons for judgment, however, Ahlmad has reported that no steps have been taken till today. Nonetheless Ld. counsel for the plaintiff also states that she has got issued summons of judgment upon the defendants through speed post.

On the other hand. Ld counsel for the defendant states that he has not received any copy for summons of judgment. Putting the entire controversy at risk, copy of the same is supplied today.

Defendant is at liberty to file leave to defend application within stipulated period as mandated by law.

Relist the matter now on 14.12.2022. "

23. It is evident that the learned Trial Court on 20.09.2022 served the Appellants with the summons for judgment. However, the Appellants failed to file any application seeking leave to defend.

It is the case of the Appellants that they have not been served with summons for judgment in the prescribed format, i.e., in Form No.4 A, Appendix B.

24.The intention of serving the summons for judgment in the specified format is to ensure that on receipt of the said summons, the defendant follows the strict timeline as prescribed for a summary suit.

25.In the present case, the learned Trial Court records that summons for judgment are served upon the Appellant on 20.09.2022 and granted time to file an application seeking leave to defend as per the statutory limit. However, the Appellants have argued that no summons for judgment were served upon them. In this regard, it is important to examine the findings of the learned Trial Court:

“3.3 Hence vide proceedings dated 20.09.2022 the summons for judgment were duly supplied/served upon the defendant’s counsel Sh. Mahesh Kumar, whose name is there in the vakalatnama, but the defendants till date have not filed any leave to defend application. No doubt plaintiff had not filed the PF for issuance of summons for judgment and the summons for judgment were served in the court directly but merely because they were served in the court directly does not mean that the summons for judgment were not properly served upon the defendants. What is required is the service i.e. due notice upon the opposite side. Whether it is on filing of PF or the same is served directly in the court is of no significance. Requirement of law is service of process/application etc. Once the summons for judgment were filed, said fact was within the knowledge of the defendants/Ld. Counsel for the defendants and the copy of the same was duly supplied to the defendants by the court. The defendants ought to have filed the leave to defend application within the stipulated time.

3.4 What has not been explained by the Ld. Counsel for the defendants is what prejudice has been caused to the defendants merely because they were supplied with the

summons for judgment in/by the court. There is no irregularity much feast illegality and no prejudice whatsoever has been or could have been caused to the defendants.”

26.This Court is in agreement with the finding of the learned Trial Court. The requirement of law is to serve the defendant with summons for judgment, which have been duly served directly by the Court upon the Appellants (defendant) in the present case. Therefore, the objection of the Appellants is hyper technical and is devoid of any merit and is thus rejected.

27.In view of the detailed discussions herein above, the Impugned Judgment is upheld, and the present Appeal is dismissed. All the pending applications are also dismissed. No order as to costs.

GAURANG KANTH, J.

MAY 12, 2023