

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO 269/2022**

Reserved on: 03.03.2023

Pronounced on: 19.04.2023

IN THE MATTER OF:

ZAFAR BADIYARI

..... Appellant

Through: Mr.Sanjeev Narang, Advocate

versus

SANDEEP SINGH

..... Respondent

Through: Mr.Aaditya Vijay Kumar and
Ms.Akshita Katoch, Advocates

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

CM APPL. 45911/2022 (Delay)

1. The present application has been filed under the Limitation Act on behalf of the appellant seeking condonation of delay of 150 days in filing the appeal.
2. Learned counsel for the respondent fairly does not oppose the prayer made in the present application.
3. In view of the above, the application is allowed and the delay of 150 days in filing the appeal is condoned.
4. The application is disposed of.

FAO 269/2022 & CM APPL. 45912/2022(stay)

1. By way of present appeal filed under Order 43 Rule 1 read with Section 104 CPC, the appellant/defendant seeks to impugn the order dated 10.02.2022 passed by the learned ADJ-09 (Central), Tis Hazari Courts, Delhi in M.No.72/2022, dismissing the Appellant's application filed under Order 9 Rule 13 CPC to set aside an ex-parte decree dated 04.10.2021 passed by the court in a summary suit filed under Order 37 CPC.
2. The facts, as borne out from the records, are that the respondent/plaintiff had filed the underlying suit i.e. CS No.461/2021 under Order 37 CPC seeking permanent & mandatory injunction as well as recovery of possession, license fees and damages of Rs.13,30,000/-. In the suit, it was claimed that the suit property being a shop at the ground floor (excluding the mezzanine floor) was given to the appellant on license for 11 months @ Rs.1,33,000/- per month, excluding other charges. The suit was filed based on the dishonoured cheques that had been tendered by the appellant to the respondent to pay off the arrears.
3. The impugned order records that summons in the suit were sent to the appellant and he was treated as served on 17.09.2021. The ex-parte decree was passed by the trial court taking recourse to Rule 6 of Order 37 upon the appellant's failure to enter appearance and file a leave to defend, under Rule 3 and 5 respectively, of Order 37 CPC. The Trial Court had returned a finding of service of process on the respondent.
4. Appellant filed an application for setting aside the ex-parte decree under Order 9 Rule 13 of CPC instead of Order 37 Rule 4, provisioned for in the CPC. The trial court however was not prejudiced because of this misnomer and for all purposes, as is evident from the impugned

order, dealt with the same as one filed under Order 37 Rule 4 and adjudicated the same as such. The trial court has observed in the impugned order that the appellant failed to make out a case for “special circumstances”- which indicates that the trial court adjudicated the application on the principles applicable to Rule 4 of Order 37 and not under Order 9 Rule 13.

5. Mr. Aaditya Vijay Kumar, learned counsel for the respondent took a preliminary objection to the maintainability of the appeal. He submitted that the impugned order having been passed under Order 37 Rule 4 CPC is not appealable under Order 43 Rule 1 CPC.

6. Although learned counsel for the appellant sought to advance arguments on the merits of the case, however, considering that the maintainability itself has been called into question, this Court sets out to decide the issue of maintainability at the first instance as merits of the case is not a relevant consideration at this stage. Learned counsel for the appellant couldn't refer to any CPC provision under which the appeal would fall, however has contended that due to likeness of the two provisions, which essentially deal with power of the court to set aside an ex-parte decree, appeal may deemed to be maintainable against the order passed under Order 37 Rule 4 of CPC, since it is maintainable against an order passed under Order 9 Rule 13 of CPC.

7. This rudimentary parity being drawn to maintain the appeal when no provision has been provided for in the CPC is not even ingenuous for the court to appreciate the attempt. Appeal, which is a statutory right has to be explicitly provided for in a statute and can't be inferred or assumed for practical convenience.

8. Pertinently, Order 37 CPC relates to summary procedure applicable to summary trial for expeditious adjudication of commercial suits. Under sub-rule 2, on being served, a defendant is required to enter appearance, failing which the averments in the plaint are deemed admitted and the plaintiff becomes entitled to a decree. The defendant is required to appear within ten days of the receipt of summons and file memo of appearance. On defendant's appearance, the plaintiff is required to serve the defendant with summons for judgment and within ten days of such service, the defendant is required to apply for leave to defend the suit. The Court thereafter either passes an order dismissing the leave to defend and decreeing the suit, or grants conditional leave to defend on such conditions as it may think fit, or grants unconditional leave to defend.

9. The principles governing a suit under Order 37 CPC have been delineated by the Supreme Court in IDBI Trusteeship Services Limited v. Hubtown Limited reported as **(2017) 1 SCC 568**, where it has been held that Order 37 CPC is a complete code in itself. Order 37 Rule 4 provides for setting aside of an ex-parte decree passed under preceding Rule 6. There is no choice available to a party either chose to file an application under Order 37 Rule 4 or Order 9 Rule 13 of CPC. Order 37, being a complete code in itself, does not countenance borrowing the remedies from other provisions of the CPC, outside of the Order 37 code. The relevant extract reads as under:

“17. Accordingly, the principles stated in para 8 of Mechelec case will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case, as follows:

17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.”

10. In Rajni Kumar v. Suresh Kumar Malhotra and Another reported as (2003) 5 SCC 315, the Supreme Court had earlier also highlighted the scope of the aforesaid two provisions in the following manner:

“10. In considering an application to set aside ex parte decree, it is necessary to bear in mind the distinction between suits instituted in the ordinary manner and suits filed under Order 37 CPC. Rule 7 of Order 37 says that except as provided thereunder the procedure in suits under Order 37 shall be the same as the procedure in suits instituted in the ordinary manner. Rule 4 of Order 37 specifically provides for setting aside decree, therefore, provisions of Rule 13 of Order 9 will not apply to a suit filed under Order 37. In a suit filed in the ordinary manner a defendant has the right to contest the suit as a matter of course. Nonetheless, he may be declared ex parte if he does not appear in response to summons, or after entering appearance before framing issues; or during or after trial. Though addressing arguments is part of trial, one can loosely say that a defendant who remains absent at the stage of argument, is declared ex parte after the trial. In an application under Order 9 Rule 11, if a defendant is set ex parte and that order is set aside, he would be entitled to participate in the proceedings from the stage he was set ex parte. But an application under Order 9 Rule 13 could be filed on any of the grounds mentioned thereunder only after a decree is passed ex parte against defendant. If the court is satisfied that (1) summons was not duly served, or (2) he was prevented by sufficient cause from appearing when the suit was called for hearing, it has to make an order setting aside the decree against him on such terms as to cost or payment into court or otherwise as it thinks fit and thereafter on the day fixed for hearing by court, the suit would proceed as if no ex parte decree had been passed. But in a suit under Order 37 the procedure for appearance of defendant is governed by provisions of Rule 3 thereof. A defendant is not entitled to defend the suit unless he enters appearance within ten days of service of summons either in person or by a pleader and files in court an address for service of notices on him. In default of his entering an appearance, the plaintiff becomes entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, upto the date of the decree together with costs. The plaintiff will also be

entitled to judgment in terms of sub-rule (6) of Rule 3. If the defendant enters an appearance, the plaintiff is required to serve on the defendant a summons for judgment in the prescribed form. Within ten days from the service of such summons for judgment, the defendant may seek leave of the court to defend the suit, which will be granted on disclosing such facts as may be deemed sufficient to entitle him to defend and such leave may be granted to him either unconditionally or on such terms as the court may deem fit. Normally the court will not refuse leave unless the court is satisfied that facts disclosed by the defendant do not indicate substantial defence or that defence intended to be put up is frivolous or vexatious. Where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, no leave to defend the suit can be granted unless the admitted amount is deposited by him in Court. Inasmuch as Order 37 does not speak of the procedure when leave to defend the suit is granted, the procedure applicable to suits instituted in the ordinary manner, will apply.

11. 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 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 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.”

11. Rajni Kumar (Supra) does not leave the issue open for further discussion by this court. Order 43 Rule 1 does not countenance an appeal filed against the Order passed under Order 37 Rule 4 of CPC. Accordingly, the preliminary objection raised by the respondent is upheld and the appeal is dismissed.

12. The appellant shall be at liberty to seek appropriate remedy in accordance with law.

13. It is clarified that this Court has not gone into the contentions of either of the parties relating to the merits of the case.

(MANOJ KUMAR OHRI)
JUDGE

APRIL 19, 2023/v