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

% **Date of decision: 3rd April, 2024**

+ **C.R.P. 120/2024**

FAST TRACK EXPRESS LLP Petitioner

Through: **Mr. Soibal Gupta and Mr. Himanshu Swami, Advs.**

versus

GAS LOGISTICS LLP Respondent

Through: **Ms. Shasha Jain and Mr. Tarun Lal, Advs.**

**CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA**

DHARMESH SHARMA, J. (ORAL)

CM APPL. 19544/2024 (exemption)

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

C.R.P. 120/2024 and CM APPL. 19543/2024 (Stay)

3. The petitioner has preferred this civil revision petition under Section 115 CPC assailing the impugned order dated 04.03.2024 passed by the learned ADJ-04, Patiala House Courts, New Delhi, whereby its application under Order XXXVII Rule 4 CPC for setting aside the judgment-cum-decree dated 16.08.2022, has been dismissed.
4. Learned counsel for the respondent/plaintiff is present on advance notice.



5. Learned counsel for the petitioner/defendant has vehemently urged that although it is not disputed that summons in the prescribed form were duly served upon the petitioner/defendant in terms of Order XXXVII Rule 3(1) CPC and no appearance was filed within prescribed period of 10 days and eventually the judgment-cum-decree dated 16.08.2022 was passed, it is vehemently urged that the respondent/plaintiff has played fraud upon the Court inasmuch as the claim is based on fabricated invoices/bills.

6. The attention of the Court has been invited to the copy of airway bill annexed by the respondent/plaintiff in the plaint (Annexure P-4), wherein the name of the consignee i.e. petitioner/defendant is indicated in the left column on the top, whereas the documents available with the petitioner/defendant would show at page 46 of the paper book that the consignee was CNTT Courier and Cargo Services reflecting the same invoice/bill number. It was vehemently urged that since fraud has been played upon the Court, it vitiates everything and the Court committed a gross irregularity in dismissing its application under Order XXXVII Rule 4 CPC.

7. It appears that the application under Order XXXVII Rule 4 CPC was instituted by the applicant/petitioner/defendant on 14.07.2023 and the plea of the petitioner/defendant was that appearance was not put since after receiving notice/summons in the present matter, they confronted one of the partners in the respondent/plaintiff's firm Mr. Gautam Kumar regarding the suit, who informed that they were not required to appear in the present matter and the suit had been filed mistakenly and it was assured that the suit would be withdrawn. It was



also submitted that since the mother of one of the authorised representatives/partners in the petitioner/defendant's firm i.e. Mr. Robin Biswas was suffering from asthma for 30 years and the Covid-19 pandemic broke out, appearance could not be put. The plea that airway bills have been forged and fabricated was also canvassed and only one airway bill was produced.

8. At this juncture, it would be expedient to reproduce the reasons that prevailed in the mind of the learned Trial Court in dismissing the present application, which read as under:

“17. Neither of the parties has cited any judgment of the Hon'ble High Court of Delhi regarding whether the period of limitation for an application under Order XXXVII Rule 4 CPC is to be taken as 30 days as claimed by the plaintiff or whether the same would be 3 years as claimed by the defendant. I am inclined to follow the decision of the Hon'ble High Court of Andhra Pradesh in Karumilli I Bharathi (supra) holding that the period of limitation would be 30 days. The relevant portion of the said decision is extracted hereunder:

“12. As I have already stated above, Rule 4 of Order 37 contemplates an "ex parte decree" in the same sense the CPC has used under Order 9 Rule 13 or in the same sense the Limitation Act has used under Article 123 of the Limitation Act and the period of limitation is 30 days, from the date of the decree or where the summons or notices were not duly served, when the applicant had the knowledge of the decree. The High Court of Bombay also took that both the Limitation Act and Code of Civil Procedure have used the expression "ex parte" in the same sense of the term. But, their further conclusion that for such an ex parte decree passed under Order 37, there is no provision under the Limitation Act, therefore, Article 137 of the Limitation Act applies, consequently the period of limitation is three years. In my humble opinion that would not be acceptable. Because Rule 4 of Order 37 applies only to ex parte decree on the basis of deemed admissions on the part of defendant, but not to a decree passed on contest in



the presence of both parties. Therefore, Article 123 governs such ex parte decree passed under Order 37 and the limitation is 30 days, but not three years. This interpretation, in my opinion is based on reasonable construction of the provisions of Order 37 of CPC along with Section 123 of the Limitation Act. To say that for other ex parte decree passed in a summary suit under Order 37 is three years would be absurd. When the Legislature thought of providing a speedy remedy for the plaintiff to obtain the decree under Order 37. they could not have thought of providing three years limitation under Article 137 of the Limitation Act for setting aside such an ex parte decree. In this view of the matter, I record my humble disagreement with the judgment of the High Court of Bombay in P.N. Film's case (supra), High Court of Rajasthan rendered in Surya Prakash's case (supra) and the judgment of Jammu and Kashmir High Court rendered in Subash Raina's case (supra).

13. In this view of the matter, the present application filed by (he defendant beyond the period of 30 days would be barred by limitation and he can show the 'special circumstances' under Rule 4 of Order 37, but not the 'sufficient cause' in terms of Section 5 of the Limitation Act, since the principle of sufficient cause found under Section 5 of the Limitation Act also stands substituted by the phrase 'special circumstances found under Rule 4. To this extent, Section 5 of the Limitation Act stands modified by Order 37 Rule 4 CPC on the ground that the special law excludes the general law. Since, the Order 37 has not provided any specific limitation as a special law, the general law of limitation provided under Article 123 of the Limitation Act applies and such period of limitation is 30 days. Therefore, in such circumstances, the defendant shall the an application within 30 days, but should show specific circumstances for condonation of delay and for setting aside the ex parte decree."

(Emphasis supplied by me)

18. I may also refer to the decision of the Hon'ble High Court of Delhi in Indo Den Energy Ltd. v. The Saraswati Ind. Syndicate Ltd Manu/DE/0586/2000, in which the Hon'ble High Court has not considered the period of limitation for filing an application under Order 37 Rule 4 CPC as 3 years as is the case of the defendant in the present case. The relevant portion of the decision is extracted hereunder:



"7. Even otherwise, the present revision petition is directed against the order passed by the civil judge on the application filed by the petitioner under order 37 Rule 4 CPC and such an application is required to be filed within the period of limitation. The aforesaid judgment and decree was passed on 22.8.94 and the said application under order 37 Rule 4 CPC was filed on 17.10.1995. Thus, the application was barred by limitation. Admittedly, no application under section 5 of the Limitation Act was filed by the petitioner seeking for condensation of delay in filing the said application. I have looked into the application filed by the petitioner under order 37 Rule 4 CPC. Even after going through the averments made therein, I do not find any reason, not to speak of plausible reason therein, mentioned by the petitioner making out a case of sufficient cause for condonation of delay. No cause is shown at all even in the said application filed under order 37 Rule 4 CPC explaining the delay in filing the application.

8. The trial court was, therefore, also justified in holding that the application under order 37 Rule 4 CPC was barred by limitation and that no sufficient cause was made out and that no ground was made out for setting aside the ex parte judgment and decree. I find no infirmity in the aforesaid findings as well. The petition, therefore, has no merit and is dismissed accordingly."

(Emphasis supplied by me)

19. Thus, the defendant/applicant was required to file the application for setting aside the impugned decree dated 16.08.2022 within 30 days. Since the defendant had refused to accept the summons for appearance, the defendant would be deemed to have received the summons and to have knowledge of the summary suit proceedings till the passing of the decree. The application of the defendant is grossly barred by time having been filed after a delay of around 313 days. The defendant has not even filed any application under section 5 of the Limitation Act seeking condonation of delay in filing the application to set aside the impugned decree. Even in the application under Order XXXVII Rule 4 CPC, there is no plausible explanation to entitle the defendant for condonation of the delay. As such, the application is liable to be dismissed on the ground of limitation. 20. Even assuming that the application was within limitation or that delay were to be condoned, even otherwise, I find that the defendant has been unable to show any special circumstances which would entitle the defendant for setting aside of the impugned decree. The plea of



the defendant that upon receiving the summons, one of the partners of the defendant had approached the plaintiff and was informed that the suit was filed mistakenly and that the same would be withdrawn and that is why the defendant did not enter appearance does not appear plausible. It is to be remembered that as per the service report, the defendant had refused to accept the summons. The summons was also served through email. All this has not been disputed. Ordinary, no reasonable person would take the summons issued from court in such a non-serious manner that the defendant would go to the plaintiff and upon simply being told that the suit was filed by mistake and that the same would be withdrawn, would return comfortably and not appear in the suit proceedings. Even if such a defendant would not formally enter appearance in the suit within time, ordinarily such a defendant would at least come to the court to at least inquire about what was going on in the suit. In case, the defendant would find that an ex parte decree was passed, the defendant would immediately move for setting aside of such a decree. In the present case, the defendant refused to accept the summons for appearance on 07.04.2022 and the decree was passed on 16.08.2022. The defendant has ultimately filed the application only on 13.07.2023 and there is no explanation for the delay. The submission made on behalf of the defendant that the defendant was misled by the plaintiff into not appearing in the suit does not inspire confidence at all. In all likelihood, the defendant refused service of the summons and did not appear only with a view to evade and prolong the proceedings. Unfortunately for the defendant, the defendant perhaps did not realise that a summary judgment and decree would come to be passed under Order XXXVII CPC.

21. The defendant has also raised the plea that the partners were taking care of the mother of one of the partners between 24.11.2020 till her eventual death on 03.01.2022, and consequent financial crisis, and that is how also they could not appear in the suit. This submission also does not inspire confidence. Firstly, this plea is contradictory to the other plea that the defendant did not appear as the defendant had been misled. Secondly, whereas as per the case of the defendant, the mother unfortunately expired on 03.01.2022, the summons was refused only later on 07.04.2022. There is no reason why the defendant would refuse to take service on 07.04.2022 due to the reason of the unfortunate death of the mother on 03.01.2022 and not appear in the suit. I am in agreement with the submission of the Id. Counsel for the plaintiff that the defendant is only trying to create excuses as an afterthought for non-appearance.



22. Thus, the defendant has been unable to show any special circumstances to justify its non-appearance in the summary suit. This would by itself lead to dismissal of the application under Order XXXVII Rule 4 CPC.

23. Further, as rightly pointed out by the Id. Counsel for the plaintiff, the summary suit of the plaintiff is essentially based on the invoices, and in the application under Order XXXVII Rule 4 CPC, the defendant has nowhere stated anything about these invoices. Although, the defendant has claimed that the airway bills which were the basis of the invoices were forged and fabricated, there is no whisper in the application with respect to the invoices themselves and the defendant has not disputed the invoices.

24. In the result, I would hold that the application of the defendant under Order XXXVII Rule 4 CPC is without any merit, and is, accordingly, dismissed.”

9. *Ex-facie*, the aforesaid reasons assigned by the learned Trial Court suffer from no blemish at all in law. In the face of the fact that it was acknowledged that summons under Order XXXVII Rule 3(1) of the CPC were served upon the petitioner/defendant, the application under Order XXXVII Rule 4 CPC was *per se* barred by limitation. Further, evidently no “special circumstances” have been brought on the record so as to warrant setting aside and re-opening of the proceedings initially instituted under Order XXXVII CPC by the respondent/plaintiff.

10. Accordingly, the present civil revision petition is dismissed along with the pending application.

DHARMESH SHARMA, J.

APRIL 03, 2024

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