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

% ***Date of decision: 21st October, 2024***

+ **C.R.P. 195/2024, CM APPL. 37149-37150/2024**

VANDANA DHAMECHA

.....Petitioner

Through: Mr. Joginder Tuli, Ms. Joshini Tuli
and Ms. Shatakshi Sharma,
Advocates.

versus

BHARTI KUMAR SAWHNY

.....Respondent

Through: Mr. Sunil Choudhary Advocate.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T (oral)

1. A Civil Revision under Section 115 read with Section 151 of the *Code of Civil Procedure, 1908* ('CPC' hereinafter) has been filed on behalf of the Revisionist (Plaintiff) against the Order dated 22.02.2024 of learned ADJ, Delhi whereby the Application under ***Order XXXVII Rule 4 and Order IX Rule 13 CPC***, for setting aside the ex-parte Decree dated 24.07.2019 against the Respondent (Defendant), has been allowed.
2. The Petitioner had filed a Civil Suit bearing No.325/2019 under Order XXXVII CPC for recovery of a sum of Rs.6,90,000/- with interest @ 24% per annum.
3. ***Briefly stated***, according to the Plaintiff, she had given a friendly loan of Rs.12 lakhs to the Defendant/Respondent in good faith and confidence,



which she undertook to pay in four part instalments with the last instalment to be made in April, 2017. Three post-dated cheques totalling to a sum of Rs.12 lakhs were issued to the plaintiff with the last payable on 15.03.2019. The two cheques, however, on presentation on 15.02.2019 and 15.03.2019 were returned with the remarks “*funds insufficient*” vide Memo dated 23.04.2019. Despite repeated reminders, the loan amount was not returned by the defendant. Complaint under Section 138 of *Negotiable Instruments Act, 1881* (‘N.I. Act’) in respect of dishonoured cheques were filed. In addition, the Suit for recovery of Rs.6,90,000/- along with interest was filed under Order XXXVII read with Section 151 CPC.

4. *Summons for Appearance* directed to be issued on 29.05.2019 were served on the Respondent/defendant on 05.07.2019 through her 22 year old son Anurag, as per the report of the Process Server. The Respondent/defendant failed to appear within the statutory period of 10 days from the service of Summons for Appearance.

5. As per the record, the Respondent had filed her appearance through counsel at 01:00 P.M on 24.07.2019 i.e. on the same date on which the suit was decreed. The Revisionist/plaintiff has contended that the vakalatnama was in the name of Rajesh Kaushik Advocate, but was signed by another person and was, therefore, faulty. Moreover, the signatures of the Defendant had not been identified by any Lawyer. Consequently, the learned ADJ decreed the suit under Order XXXVII CPC on 24.07.2019.

6. An *Execution Petition* was filed on 22.08.2019 for execution of the Decree.

7. The Respondent then filed the *Application under Order XXXVII Rule 4 read with Order IX Rule 13 CPC* on 26.08.2019 for setting aside the



Judgment and the Decree dated 24.07.2019.

8. The Revisionist/Plaintiff contested the Application and filed the reply on 06.12.2019. It is claimed that the vakalatnama dated 24.07.2019 was defective and is a legally invalid document. Furthermore, Mr. Rajesh Kaushik, whose name was mentioned on the Vakalatnama, never appeared before the learned ADJ.

9. The *learned Trial Court allowed the Application of the defendant and set aside the Judgment and Decree dated 24.07.2019.*

Aggrieved by the said Order, the present Revision Petition has been filed. *The ground of challenge* are:

- (i) that despite being duly served with the Summons for Appearance on 05.07.2019, which is evident from the filing of the Vakalatnama, by the counsel for the Respondent on 24.07.2019 at 01:00 P.M.;
- (ii) That the vakalatnama was filed beyond the statutory period of 10 days.
- (iii) That the explanation given for delay in filing of appearance is not tenable, as the sister-in-law of the Respondent was admitted on 17.07.2019 which was after the expiry of the limitation period of 10 days from the date of service of the summons.
- (iv) the Application under Order XXXVII Rule 4 has been filed after the expiry of limitation period of 30 days as prescribed under Article 123 of the *Limitation Act, 1963*.
- (v) No triable issue has not raised by the Respondent as there is no denial of having taken the loan from the



Petitioner or about issuing the three cheques in lieu of the loan amount.

10. Ld. Counsel on behalf of the Petitioner/ Plaintiff has argued that Order XXXVII Rule 4 CPC requires that not only the special circumstances that prevented the Defendant from entering appearance within the stipulated period has to be explained, but also the triable issues have to be disclosed. The learned Trial Court was incorrect in granting unconditional Leave to Defend without imposing some condition of depositing of money in order to balance the equities and safeguarding the interest of the Plaintiff.

11. It is, therefore, submitted that the Impugned Order dated 22.02.2024 allowing the Application of the Defendant under Order XXXIV Rule 4 read with Order IX Rule 13 of CPC be set aside.

Reliance has been placed by the Petitioner on IDBI Trusteeship Services Ltd. vs. Hubtown Ltd., MANU/SC/1490/2016; Vipin Gupta vs. Prem Singh RFA No202/2006 MANU/DE/9920/2006; Transasia Pvt. Capital Ltd. vs. Parmanand Agarwal & Ors. MANU/DE/1378/2022; Ratna Commercial Enterprises Pvt. Ltd. vs. Vasu Tech Ltd. & Ors. MANU/DE/3168/2009.

12. **The learned Counsel on behalf of the Respondent** has explained that though the sister-in-law was admitted in the hospital on 17.07.2019, but she had not been keeping well even before then and the Defendant was taking care of her, which was the reason for not being able to file the Leave to Defend within time. It is submitted that the Impugned Order is based on cogent reasons and does not require any interference.

13. **Submissions heard.**

14. It is not in dispute that the Summons for Appearance in the Suit under Order XXXVII CPC was duly served upon the Defendant through her son



on 05.07.2019 and the Vakalatnama on behalf of the Defendant was filed by the Counsel on 24.07.2019 which was beyond the 10 days from the date of service. The Judgment and Decree was passed by the learned ADJ on that date.

15. The explanation given by the Respondent is the ailment of sister-in-law who eventually got admitted on 17.07.2019 and died on 21.07.2019. The Defendant was occupied in attending to her and was unable to file the Appearance within time. It is quite understandable that even though the sister-in-law was admitted in hospital on but would have been requiring prior medical attention. The preoccupation of the defendant with the ailing sister-in-law, is a cogent explanation as to why the Respondent may not have been able to pursue the matter diligently, despite service. The learned ADJ thus, rightly accepted the explanation given on behalf of the Respondent to set aside the Impugned Judgement and Decree dated 24.07.2019.

16. The *second grievance* of the Revisionist is that the unconditional Leave to Defend has been granted to the Respondent without any triable issue being raised on behalf of the Respondent. It is claimed that there is no denial about taking of friendly loan or issuance of the cheques out of which two got dishonoured in respect of which the complaints under Section 138 N.I Act are pending.

17. However, the Impugned Order had merely set aside the Judgment and Decree dated 24.07.2019. By way of that Order, no unconditional Leave to Defend has been granted. Order XXXVII Rule 4 of CPC specifically provides that once the Summons for Appearance has been served on the Defendant and the appearance has been filed, Summons for Judgment are



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required to be issued and it is only thereafter, that the Defendant is required to submit the Leave to Defend disclosing the triable issues. No such Order granting unconditional Leave to Defend has been placed on record, nor is it under challenge in the present Revision Petition.

18. There is no infirmity in the Impugned Order dated 22.02.2024 and the Revision Petition is dismissed.

19. The Revision Petition stands disposed of along with the pending Applications.

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 21, 2024
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