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C.R.P. (PD) .No.3285 of 2024

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

|                                   |                                     |
|-----------------------------------|-------------------------------------|
| <b>Reserved on:</b><br>31.01.2025 | <b>Pronounced on:</b><br>21.02.2025 |
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**CORAM:**

**THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN**

C.R.P.(PD).No.3285 of 2024  
and C.M.P.Nos.17566 & 28951 of 2024

Simplex Infrastructures Limited,  
Represented by R.Swaminathan  
Assistant General Manager,  
Simplex House,  
27, Shakespeare Sarani,  
Kolkata, West Bengal – 700 017.

.. Petitioner

(Cause title accepted vide Court order  
dated 31.07.2024 made in C.M.P.No.  
15967 of 2024 in C.R.P.SR.No.88712 of  
2024)

**Vs.**

Malini Ganesh

.. Respondent

**Prayer:** This Civil Revision Petition is filed under Article 227 of the Constitution of India, praying to set aside the order dated 10.06.2024 made in I.A.No.3 of 2024 in O.S.No.5988 of 2023 on the file of the XXII Additional City Civil Judge at Chennai.



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C.R.P. (PD) .No.3285 of 2024

For Petitioner : Mr.Thriyambak J.Kannan  
For Respondent : Ms.Malini Ganesh  
(Party-in-person)

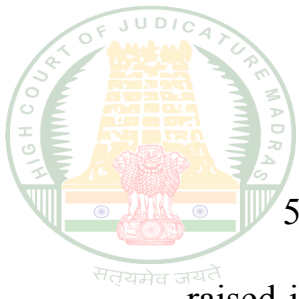
### **ORDER**

This civil revision petition challenges the order passed by the learned XXII Additional City Civil Judge, Chennai, in I.A.No.3 of 2024 in O.S.No.5988 of 2023 dated 10.06.2024.

2.For the sake of convenience, the parties shall be referred to as plaintiff and defendant.

3.The civil revision petitioner is the defendant in the suit.

4.O.S.No.5988 of 2023 is a suit for recovery of money. The plaintiff is a practising Lawyer enrolled with the Bar Council of Tamil Nadu and Puducherry. She had been engaged by the defendant for performance of professional services. Work orders had been issued by the defendant to the plaintiff. It related to certain arbitration proceedings wherein the defendant was one of the parties to the proceedings.

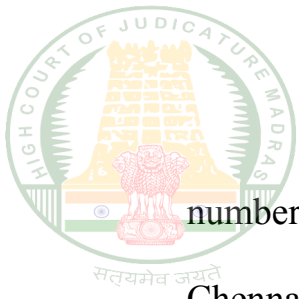


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5.Towards her professional services already rendered, the plaintiff had raised invoices on the defendant. The defendant defaulted in payment of the same. When the plaintiff called upon the defendant to settle the dues, the defendant gave an assurance that it will do so. Part payments were made thereafter. Full settlement was not arrived at. The plaintiff submitted a final invoice on 04.10.2021. She also sent reminders subsequently. Apart from making part payment of Rs.4,61,525/-, substantial payments were not made.

6.Being left with no other option, the plaintiff served a demand notice on 16.05.2023. Yet again on 14.07.2023, she issued a lawyer's notice to the defendant. As the outstanding amount towards the work orders remained unpaid, the suit was presented for recovery of a sum of Rs.82,81,446/- together with interest at the rate of 12% per annum from the date of the plaint till the date of realization. The suit was presented as an Under Chapter suit. The plaintiff pleaded that as the suit is based on invoices, which are written contracts, the suit would be covered in terms of Order XXXVII Rule 1(2)(b)(i) of the Civil Procedure Code.

7.The suit was presented on 25.09.2023. It was returned and finally



numbered on 07.10.2023. The learned XXII Additional City Civil Judge, Chennai, ordered notice to the defendant. It is not in dispute that the suit summons under Order XXXVII Rule 3 was not served on the defendant. Private notice was ordered by the Court on 10.10.2023. Private notice had been taken by the counsel for the plaintiff on 11.10.2023. Service through e-mail had also been taken on the defendant on 11.10.2023.

8. Along with the suit, an application in I.A.No2 of 2023 was filed seeking prohibitory order restraining the second respondent therein from releasing any amount less than the suit value to the first defendant / first respondent therein. Notice was ordered in this application also. Affidavit of service was filed in Court on 13.10.2023. The counsel for the defendant filed a vakalatnama in the suit on 13.10.2023. Soon thereafter, the counsel had filed a notice of appearance on 27.11.2023 in the suit. It was received by the plaintiff. An endorsement was made on the notice stating that the notice of appearance is defective as the address for service had not been mentioned therein. However, even before that the learned counsel for the defendant had received from the learned counsel for the plaintiff a copy of the plaint along with all the plaint documents on 17.10.2023.



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9.Subsequently, two memos were filed by the counsel for the defendant, on 02.12.2023. One of the memos stated, as there is no compliance with the terms of Form No.4 of Appendix B of the Civil Procedure Code read with Order XXXVII Rule 2(2) of the Civil Procedure Code, the suit should be converted to an ordinary suit.

10.The second memo was presented by the defendant stating that as it is a commercial suit within the meaning of Commercial Courts Act, 2015, the suit has to be transferred to the Commercial Court on grounds of jurisdiction.

11.The learned Trial Judge, was of the view that substantial orders, cannot be passed in a memo and therefore, called upon the defendant to withdraw the memos and file applications for the same relief. Accordingly, the defendant withdrew the memos and filed separate applications.

12.It is pertinent to point out here that a fresh notice of appearance was served on 02.12.2023 by the counsel for the defendant, giving notice of appearance as well as the address for service. On 08.12.2023, the plaintiff served the summons for judgment as required under Order XXXVII Rule 3(4)



of the Civil Procedure Code, and the plaintiff also filed her reply to the two memos filed by the defendant.

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13.The defendant thereafter filed two applications, and one of them was in I.A.No.5 of 2024 seeking condonation of delay of 36 days in filing the application seeking leave to defend.

14.As the suit was languishing without any further progress, the plaintiff moved a revision before this Court seeking for expeditious disposal of the suit. This revision in C.R.P.(PD).No.2098 of 2023 came to be disposed of by an order dated 22.05.2024 directing the Trial Court to dispose of the application in I.A.No.2 of 2023 on or before 15.06.2024. On 06.06.2024, the defendant filed two applications in I.A.Nos.3 & 4 of 2024 seeking the very same prayers, as sought for in the two memos filed on 02.12.2023.

15.By an order dated 10.06.2024, the learned Trial Judge dismissed all the interlocutory applications and adjourned the matter for filing of counter in the application filed to condone the delay in filing the petition seeking leave to defend and in the leave to defend applications.



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16.After receipt of a counter on 08.07.2024, the learned Trial Judge proceeded to dismiss the applications on 26.07.2024. On that very day, considering the fact that the summons for judgment was served on the defendant, the learned Trial Judge decreed the suit as prayed for. Subsequently, this revision has come before this Court challenging the order of the learned Trial Judge in I.A.No.3 of 2024 refusing to convert the suit filed under Order XXXVII to a regular suit.

17.The plaintiff had entered appearance by way of a caveat.

18.I heard Mr.Thriyambak J.Kannan in support of the revision and Ms.Malini Ganesh (party-in-person) who opposed the same.

19.Mr.Thriyambak J.Kannan contended that as summons had not been served on the defendant, as required under Form No.4 of Appendix B of the Civil Procedure Code, the suit ought to have been converted to a regular suit. He relies upon a judgment of this Court in **Indian Bank Vs. R.Latha and others** in **C.R.P.No.468 of 2018** dated **16.12.2020**, to argue that in case of



non-compliance of Order XXXVII Rule 3 of the Civil Procedure Code, the suit has to be converted to an ordinary suit.

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20. When it was pointed out to the learned counsel that the suit itself had been decreed by the learned Trial Judge and hence, the revision is not maintainable as against the interlocutory order passed, he refers the attention of this Court to a judgment in *M/s. Shivsu Canadian Clear International Limited Vs. Freightcan Global Logistics Private Limited*, [(2013) 2 LW 949], to argue even post decree, a revision can be presented. He added that the Supreme Court in *Rajni Kumar Vs. Suresh Kumar Malhotra and another*, [(2003) 5 SCC 315] had pointed out that non service of summons is a justifiable ground available to a party to invoke the provisions under Order XXXVII Rule 4 of Civil Procedure Code to set aside the decree passed in the summary suit.

21. Per contra, Ms. Malini pleaded that this Court had settled the issue regarding non service of summons in *Jivaraj Motilal Vs. Marthaka Plastic Industries and ors.*, [(1985) 98 LW 366] and therefore, this plea is not available to the defendant. She adds this view had been accepted in



**S.T.Kasinathan and another Vs. A.Tamilarasan and another, in**

**C.R.P.(PD).No.2837 of 2019** dated **30.08.2019**. She relied upon several other judgments to argue that the civil revision petitioner is a person who has come to Court with unclean hands and therefore, this Court should not extend any benevolence to him.

22.The argument of Ms.Malini Ganesh is as follows:-

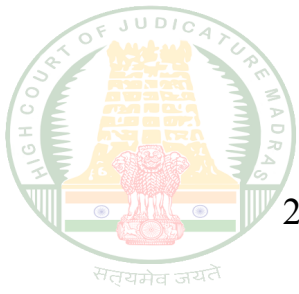
(i)filing of vakalat in I.A is sufficient to comply with service of notice under Order XXXVII;

(ii)interlocutory order merges with the decree and therefore an appeal alone is maintainable as against the decree and a revision is not maintainable;

(iii)failure of the Court to serve summons on the defendant cannot be a ground for a Court to reopen the decree;

(iv)the intention of the revision petitioner is to wilfully drag on the matter and move the Court with unnecessary petitions and deny the plaintiff the fruits of the decree; and

(v)if at all the revision petitioner argues about discharge by satisfaction, it can be done so only under Section 47 of the Civil Procedure Code and that too at the time of execution and not by way of a revision.



23.I have considered the submissions of both sides.

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### **Applicability of Order XXXVII**

24.It is not in dispute that the plaintiff had been appointed as an Advocate for the defendant in arbitration proceedings. It is the case of the plaintiff that the defendant had promised to pay her the professional fees and she had acted on the instructions and performed the duties. However, after receiving the professional service of the plaintiff, the defendant defaulted in the payment of her professional dues. She tried several means to get her dues. Unfortunately the defendant did not honor the same. Left with no other alternative, she filed a suit invoking Order XXXVII. It is the contention of Mr.Thriyambak J.Kannan that Order XXXVII is not attracted for such kinds of suits.

25.As to the classes of suits which can invoke Order XXXVII, they are enumerated under Order XXXVII Rule 1(2) of the Civil Procedure Code. Order XXXVII Rule 1(2)(b)(i) empowers a person seeking to recover a debt or liquidated demand in money payable by the defendant arising on a written contract to file an Under Chapter suit. Document Nos.1 to 8 filed along with

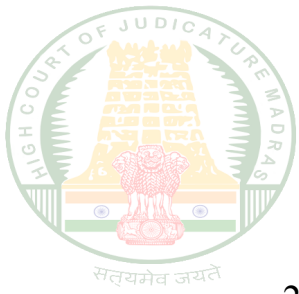


the plaintiff show that the plaintiff had made a proposal regarding fee and on the request of the defendant, the said proposal was revised and finally work orders had been placed by the defendant on the plaintiff. This shows that there was a written contract between the plaintiff and defendant, thereby attracting Order XXXVII Rule 1(2)(b)(i) of Civil Procedure Code. Hence, the argument of Mr.Thriyambak J.Kannan that the suit is not covered under Order XXXVII is not acceptable.

**Service of summons under Order XXXVII Rule 2(2)**

26.I now turn to the fulcrum of the plea of the defendant that as summons had not been served on the defendant as contemplated under Order XXXVII Rule 2(2) of the Civil Procedure Code read with Form No.4 of Appendix B of Civil Procedure Code, the suit ought to be converted to an ordinary suit.

27.In order to convince myself that the summons had not been served, I had called for the entire records in the suit. On perusal of the suit records, it is clear that the summons were served as contemplated under Order XXXVII Rule 2(2).



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28.It is here that I have to refer to the judgment cited by Ms.Malini Ganesh in *Jivaraj Motilal Vs. Marthaka Plastic Industries and ors., [(1985) 98 LW 366]*. In that case, Hon'ble Mr.JUSTICE V.RATNAM, held that the procedure under Order XXXVII Rules 2 and 3 is a strict and stringent one. He pointed out that when the defendant had entered appearance in the interlocutory application, it should be deemed that he has entered appearance in the suit also. The purpose for summons under Order XXXVII Rule 2(2) of Civil Procedure Code is clear from perusal of Form No.4 of Appendix B of the Civil Procedure Code. This summon is fundamentally different from Form No.I as contemplated under Order V Rule 1 of the Civil Procedure Code, in the sense the summons under Order XXXVII Rule 2(2) specifically states that the suit is presented under Order XXXVII of the Code and that if appearance is entered by the defendant, then the plaintiff will serve upon him the summons for judgment, in which event the defendant will be entitled for leave to defend.

29.A perusal of the affidavit of service of private notice filed by the plaintiff on 13.10.2023 shows that the plaintiff had specifically stated that the



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suit has been filed as a summary suit. The defendant was not under any confusion whether it was an ordinary suit or a summary suit, because on entering appearance, he had given a notice of appearance to the plaintiff. Notice of appearance is in stark distinction to a regular suit. If the defendant was not aware that it was a summary suit, the question of issuing a notice of appearance does not arise. Apart from that, the counsel had on 17.10.2023 sought for and obtained a copy of the plaint and documents by hand delivery. When the defective notice of appearance was given on 27.11.2023, the defendant was very well aware that it is an Under Chapter suit. This is clear from the document itself, which reads as hereunder:

*“Notice of appearance filed under Order XXXVII of the Code of Civil Procedure”*

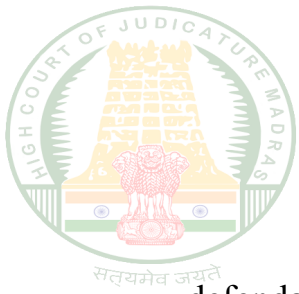
30. Since the notice of appearance itself was defective, the defendant yet again served a notice of appearance on 02.12.2023. Even in the said proceedings, the defendant had stated the notice of appearance is being given under Order XXXVII, but without prejudice to any challenge to the same. A comparison of the two notices of appearance shows, in the first document, the



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defendant has not reserved any such plea. Five days later, when it was pointed out by the plaintiff that the notice of appearance given on 27.11.2023 is defective, he woke up and gave a notice on 02.12.2023 reserving his right. This implies that by the time the second notice of appearance was given, the defendant was well aware that it was an Under Chapter suit. Curiously enough, from 17.10.2023, till the correct notice of appearance was given on 02.12.2023, no protest was made by the defendant saying that the summons have not been served. As pointed out above, on receiving of plaint and documents on 17.10.2023, the defendant was well aware that the suit has been presented under Order XXXVII.

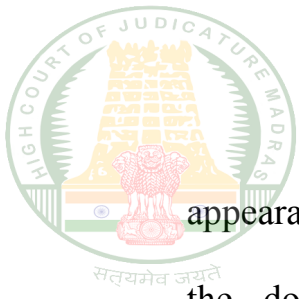
31. Furthermore, the Code is not insensitive that interlocutory applications might be sought for in an Under Chapter suit. It contemplates a procedure under Order XXXVII Rule 3(2) that when summons are duly served on the counsel, who has entered appearance and has given notice of appearance under Order XXXVII Rule 3(1), it is deemed to be a service on the defendant. The plaintiff in accordance with Order XXXVII Rule 3(4), had also served a summons for judgment on the defendant on 08.12.2023 and filed the same in the Court on 13.12.2023. All these would show that the



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defendant was well aware that he is contesting an Under Chapter suit and therefore, he cannot plead as Form No.4 of Appendix B of the Civil Procedure Code had not been served on him, the suit has to be converted to an ordinary suit.

32.In this regard, the view taken by Mr.JUSTICE V.RATNAM in **(1985) 98 LW 366**, cited *supra*, applies in all force. In that case, the learned Judge was called upon to decide two issues, namely, the failure to serve summons under Form No.4 of Appendix B r/w. Order XXXVII Rule 2(2) and Form No.4A of Appendix B r/w. Order XXXVII Rule 3(4). The learned Judge held if a party enters appearance even before summons have been served in terms of Form No.4 of Appendix B, he cannot later on turn around and plead that it had not been served. However, he held that the plaintiff in such a summary suit cannot take advantage of the appearance of the defendant in the interlocutory application stage, for the purpose of dispensing with the summons for judgment in terms of Form No.4A of Appendix B under Order XXXVII Rule 3(4). The first portion of the judgment squarely applies to the facts of the present case. The defendant, having entered



appearance even in the interlocutory application stage and having received all the documents, cannot turn around and plead that the procedural requirement of Order XXXVII Rule 2(2) had not been followed.

33.Insofar as the judgment in **Indian Bank Vs. K.Latha and others** in **C.R.P.(PD).No.468 of 2018 dated 16.12.2020** is concerned, this Court had come to a conclusion on the facts of that case that the summons were not accompanied with the plaint and the copies of the documents filed therewith. Hence, the learned Judge held that there was no compliance under Order XXXVII Rule 2 of the Code. However, in this case, on 17.10.2023, the defendant had received all the copies of the plaint and documents and he had not received a mere Form No.4 of Appendix B. Therefore, when there is substantial compliance with Order XXXVII Rule 2, I am not in a position to apply that judgment to the facts of the present case.

34.I should also record, during the course of the proceedings, Mr.Thriyambak J.Kannan had made substantial payments to the tune of Rs.38,87,785.00 under the decree to the plaintiff, which the plaintiff has also acknowledged the same in C.M.P.No.28951 of 2024.



C.R.P. (PD) .No.3285 of 2024

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### **Decision**

35.In the light of the above discussion, the Civil Revision Petition is dismissed. The dismissal of this revision will not prevent the defendant from challenging the dismissal of the application filed to condone the delay in filing the application seeking leave to defend and the leave to defend application. The defence that the party will take in the leave to defend application cannot be snuffed out in the revision preferred against an order deciding conversion of a summary suit into an ordinary suit. Hence, this liberty. Consequently, the connected Miscellaneous Petitions are closed. No costs.

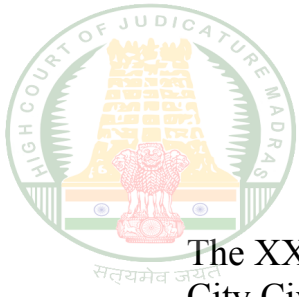
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Internet : Yes / No  
Neutral Citation : Yes / No

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C.R.P. (PD) .No.3285 of 2024

The XXII Additional Judge,  
City Civil Court, Chennai.

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**V.LAKSHMINARAYANAN, J.**

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**C.R.P.(PD).No.3285 of 2024**



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C.R.P. (PD) .No.3285 of 2024

21.02.2025