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

+ **FAO 87/2025**

ANKUR SINGH

.....Appellant

Through: Dr. Vivek Singh, Ms. Gargi
Sharma and Ms. Avika Singh,
Adv.

versus

NEERAJ NATH SHARMA

.....Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

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04.04.2025

1. The hearing is being conducted through hybrid mode.

CM APPL. 20050/2025 (For Exemption)

2. Allowed, subject to all just exceptions.

3. Application stands disposed of.

CM APPL. 20049/2025 (Delay of 234 days in filing)

4. This application has been moved on behalf of the applicant/appellant seeking condonation of delay of 234 days in filing the present appeal.

5. For the reasons stated in the application, the application is allowed and delay of 234 days in filing the present appeal is condoned.

6. The application stands disposed of.

FAO 87/2025

7. The appellant, who is a defendant in the suit that was pending before the learned Trial Court, is assailing the impugned judgment/decreed dated 18.04.2024 passed by the learned ADJ-11, Central District, Tis Hazari Courts, Delhi [**“Trial Court”**], whereby her application under Order IX Rule 13 of the Code of Civil



Procedure, 1908 [“CPC”], read with Order 21 Rule 26 of the CPC was dismissed.

8. None appeared on behalf of the respondent/plaintiff/ Decree Holder, despite sending advance notice.

9. In a nutshell, the respondent/plaintiff filed a suit under Order 37 of the CPC. It appears that since the summons in the prescribed forms in terms of Sub-Rule 3 Order 37 of the CPC was duly served upon the appellant/defendant and for not putting any appearance, the suit was decreed *ex parte vide* judgement dated 07.11.2022.

10. The appellant/defendant has filed an application under Order IX Rule 13 of the CPC read with Order 21 Rule 26 of the CPC, not only for setting-aside the *ex parte* decree, but also for staying the execution of the proceedings against him.

11. It would be apposite to reproduce the reasons which prevailed the mind of the learned Trial Court while dismissing the application:-

“10. There is force in the contention of Id. Counsel for non applicant that Order XXXVII CPC is a complete code in itself and if a decree had been passed under Order XXXVII CPC, application needs to be moved under Order XXXVII Rule 4 CPC and not under Order IX Rule 13 CPC. This is for the simple reason that in Order IX Rule 13 CPC, applicant only has to show that he was prevented by sufficient cause from appearing in the court and under Order XXXVII Rule 4 CPC, he has to additionally plead the grounds which would entitle him leave to defend. Therefore the application under Order XXXVII Rule 4 CPC should have been filed. In this regard, reliance is placed on the judgment of Hon'ble Supreme Court in **Rajni Kumar v. Suresh Kumar Malhotra, 2003 (5) SCC 315**, wherein it has been held as under: -

7. To appreciate the contentions of the parties it would be useful to refer to Rule 4 of Order 37 C.P.C. which is in the following terms :

"Order XXXVII -Summary Procedure (1) to (3) xxx xxx xxx (4) Power to set aside decree - After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on



such terms as the Court thinks fit."

8. A careful reading of Rule 4 shows that it empowers, under special circumstances, the court which passed an ex parte decree under Order 37 to set aside the decree and grant one or both of the following reliefs, if it seems reasonable to the court so to do and on such terms as the court thinks fit :

- (i) to stay or set aside execution and
- (ii) to give leave to the defendant (a) to appear to the summons and (b) to defend the suit

9. The expression 'special circumstances' is not defined in the C.P.C. 11 or is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extra-ordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37, Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extra ordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre decree matters viz., to give leave to the defendant to appear to the summons and to defend the suit.

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 C.P.C. 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 then 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.

12. Now advertng to the facts of this case, though appellant has shown sufficient cause for his absence on the date of passing ex parte decree, he failed to disclose facts which would entitle him to defend the case. The respondent was right in his submission that in the application under Rule 4 of order 37, the appellant did not say a word about any amount being in deposit with the respondent or that the suit was not maintainable under Order 37. From a perusal of the order under challenge, it appears to us that the High Court was right in accepting existence of special circumstances justifying his not seeking leave of the court to defend, but in declining to grant relief since he had mentioned no circumstances justifying any defence.

13. In this view of the matter, we do not find any illegality much less jurisdictional error in the order under challenge to warrant interference of this Court. Inasmuch as having regard to the provisions of Section 34 of the C.P.C. and the facts of the case that the liability does not arise out of a commercial transaction, we are of the view that the grievance of the appellant with regard to rate of interest is justified. We, therefore, reduce the rate of interest from 18 per cent to 6 per cent per annum.

11. So the aforesaid judgement of Hon'ble Supreme Court makes it very clear that not only the applicant in the present case has to show sufficient cause of non appearance, which even if it is accepted that he has shown, he also had to plead the grounds which would entitle him to a leave to defend because while allowing the application under Order XXXVII Rule 4 CPC, the court has also to grant him leave to defend and then try the case on its merits. In the



application, the applicant has not pleaded any such facts which would entitle him to a leave to defend. So without getting into technicalities, the court could have treated this application under Order IX Rule 13 CPC to be application under Order XXXVII Rule 4 CPC if the grounds, which could entitle the applicant for leave to defend, would have been detailed in the application. However, same has not been done and therefore, the court cannot treat this application under Order XXXVII Rule 4 CPC also.

12. With regard to the contention of Id. Counsel for applicant that the decree holder did not have money lending license. It is only a argument raised during the course of arguments before this court but had not been pleaded as a ground entitling the applicant for grant of leave to defend in the application under Order IX Rule 13 CPC, as money lending is a fact which is required to be proved. Therefore, mere oral submission on this regard is not sufficient.

13. Thus, I find that there are no grounds to allow this application. The application at hand is dismissed. File be consigned to record room.”

12. On a careful perusal of the aforesaid order, this Court is unable to find any illegality, perversity or incorrect approach adopted by the learned Trial Court in dismissing the application.

13. However, at this stage, as requested, the present appeal is dismissed as withdrawn with liberty to the appellant to institute a fresh application under Order 37 Rule 4 of the CPC and seek relief in accordance with the law.

14. Further, the period which has been consumed in filing and pursuing application under Order 9 Rule 13 of the CPC read with Order 21 Rule 26 of the CPC shall be exempted under Section 14 of the Limitation Act, 1963.

15. The present appeal is disposed of without prejudice.

DHARMESH SHARMA, J.

APRIL 04, 2025/sp/ss