
(2012) 05 DEL CK 0522

In the Delhi High Court

Case No : CM (M) 842 of 2008 and CM No. 9902 of 2008

Agrbandhu Footwears P. Ltd

APPELLANT

Vs

Dayanand Jain

RESPONDENT

Date of Decision : 01-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 4, 151

Citation : (2012) 05 DEL CK 0522

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Shambhu Prasad Singh and Ms. Manjula Gupta, for the Appellant;
Ajay Mehra, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.

1 The impugned judgment is dated 26.03.2008 vide which the application filed by the defendant under Order XXXVII Rule 4 read with Section 151 of the CPC (hereinafter referred to as the "Code") seeking a setting aside of the judgment and decree dated 05.12.005 had been dismissed. Record shows that the present suit has been filed by the plaintiff under Order XXXVII of the Code. The defendant had appeared and was represented through his counsel; power of attorney was filed; contention of the defendant was that he misunderstood the provisions of Order XXXVII of the Code and was not aware of the fact that the memo of appearance is required to be filed within the stipulated period of 10 days; after his appearance on 30.08.2005, matter was adjourned for 27.09.2005. The contention of the defendant was that the date was wrongly noted in his diary as 28.09.2005.

2. Record shows that the summons were sent to the defendant by ordinary process, registered A.D. as also by speed post; receipt of dispatch of notice by speed post had been placed on record by the plaintiff. The registered A.D.

envelop was also a part of the record; report of the process server on the ordinary process was to the effect that the defendant had refused the summons. These summons were sent in the prescribed format meant for suits under Order XXXVII of the Code. There is also no dispute to the factum that the defendant had filed the power of attorney of his Advocate duly signed by the defendant.

3. Provisions of Order XXXVII of the Code are clear and categorical. Once summons have been issued in the prescribed format pursuant to which the defendant has put an appearance, the procedure contained therein has to be mandatorily followed; if this is not done, the purport and import of the summary procedure as contained in this aforementioned provision of law which is for a special class of suits would be defeated and this is not the intent of the legislature.

4. It is not the case of the defendant that he was not aware of the procedure; he had appeared through his counsel and signed the power of attorney for his counsel; however thereafter he chose not to appear; he did not file his memo of appearance within the period prescribed. This period of 10 days had expired on 10.09.2005; appearance of the defendant through his counsel Mr. Sandeep Singh had been noted in the order of the Court dated 30.08.2005. On 27.09.2005, again none had appeared for the defendant and so also the subsequent date i.e. on 20.10.2005.

5. Record further shows that the present suit is a suit for recovery of Rs.1,77,436/-. The plaintiff claims himself to be the sole proprietor of M/s Jai Gopal Enterprises; parties had business transactions; the defendant was purchasing goods from the plaintiff on invoices/bills duly acknowledged by the defendant. As per the accounts maintained by the plaintiff, a sum of Rs1,77,436/- was the balance outstanding due from the defendant as on 19.02.2005; as per the contract between the parties, the defendant was also liable to pay interest @ 24% per annum on each bill which amounted to Rs.16,038.50 paise; pendente lite and future interest was also claimed. Suit on the aforementioned pleadings and documents annexed along with was maintainable under Order XXXVII of the Code; objection of the petitioner on this count is without any merit.

6. It has thus been established that the memo of appearance which is a mandatory requirement had not been filed within the stipulated period of ten days. Order XXXVII (2) & (3) makes it absolutely clear that a defendant shall not be allowed to defend the suit unless he first enters his appearance; it categorically provides that in default of entering appearance allegations in the plaint shall be entitled to a decree for a sum as prayed for along with interest and costs as may be determined by the Court. Consequently, on the defendant's default in entering appearance, the Court has little option but to pass a decree against non- appearing defendant as was done in the instant case. Allegations in the plaint had been rightly adverted to by the trial Court pursuant to which the decree has been followed in favour of the plaintiff.

7. No special circumstances have been made by the petitioner/defendant. For invoking this rule, the defendant must satisfy the twin conditions i.e. (i) that there was no valid service of summons upon the defendant or that he was prevented by sufficient cause from getting leave to defend and (ii) through a sufficient defence, raised in the suit. Before the ex parte decree is set aside the court must be satisfied that there were special circumstances entitling the petitioner/defendant to get such a relief. Each case would depend upon on its own facts.

Admittedly the defendant has been served of the aforementioned provisions; his Advocate's power of attorney was on record. Thus the submission that there was no due service of summons in the suit fails; no sufficient cause for non-appearance on the aforementioned dated i.e. on 27.09.2005, 20.10.2005 and thereafter on 17.11.2005 (when the ex-parte judgment was passed) have been detailed; even presuming that the petitioner had wrongly noted the date as 28.09.2005, there is no explanation for his non-appearance on the subsequent date on 20.10.2005; the present application came to be filed only in November, 2005. The application under scrutiny also does not disclose the special circumstances qua the defence which the defendant wishes to raise. The impugned judgment decreeing the suit of the plaintiff on 17.11.2005 thus suffers from no infirmity as no special circumstance has even prima-facie been established by the defendant/petitioner in terms of his averments made in his application under Order XXXVII Rule 4 of the Code. Impugned order calls for no interference. Petition is without any merit. Dismissed.