
(2005) 02 J&K CK 0026
In the Jammu And Kashmir High Court
Case No : C.I.A. No. 120 of 1999

Gh. Qadir Naikoo and Others

APPELLANT

Vs

Gh. Hussain Drabu

RESPONDENT

Date of Decision : 07-02-2005

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 37 Rule 2, Order 37 Rule 3

Citation : (2006) 2 BC 30 : (2005) 2 JKJ 570

Hon'ble Judges : Hakim Imtiyaz Hussain, J

Bench : Single Bench

Advocate : G.A. Lone, for the Appellant; M.A. Makhdoomi, for the Respondent

Judgement

Hakim Imtiyaz Hussain, J.—This appeal is directed against the judgment and decree passed by District Judge, Pulwama on 3.12.1999 in a

suit No. 6/Numbri of 1999 titled Gh. Hussain Draboo v. Gh. Qadir Naikoo and Ors.

2. Gh. Hussain Draboo S/o Gh. Hassan Drabu R/o Gogjibagh, Srinagar filed a suit under Order 37 of CPC against Gh. Qadir Naikoo, Jamal

Rather and Haji Mohd. Sultan Rather. It was alleged by said Gh. Hussain Draboo (hereinafter referred to as the plaintiff) that the defendants have

jointly taken an amount of Rs. 60,000/ from him on 25.5.1993 on a pronote as loan to be realised by him as loan cum debt and that the same was

to be repaid by the defendants on demand of the plaintiff at Pulwama. It was further alleged by the plaintiff that apart from the promissory note he

obtained a separate receipt jointly from defendant Nos. 1 & 3 on the same date for the same amount which bear the thumb impression and finger

prints of all the defendants. It was the case of the plaintiff before the trial court that despite demand the defendants did not return the amount to

him. He sent registered notices to the three defendants but even after receiving the notices they did not return the money. He, therefore, prayed for

a decree for recovery of the amount of Rs. 60,000/- from defendants alongwith interest at the rate of 18% on such amount from the date of first

notice of demand till the realisation of the amount. Alongwith the plaint the plaintiff filed a pronote as well as a receipt dated 25.05.1993.

3. The defendants were summoned. They appeared through an Advocate and filed an application for permission to defend the suit. During the

proceedings it was found that defendant No. 3 namely Haji Mohd. Sultan Rather had already expired. Accordingly, an application for bringing the

legal representatives of the deceased on record was moved and both the application for leave to defend and bringing on record the legal

representatives of the deceased defendant were disposed of by the trial court by means of the impugned order. By means of the impugned order

the trial court in fact decided the whole case resulting in passing a decree in favour of the plaintiff. The court passed the following decree in favour

of the plaintiff.

A decree for recovery of Rs. 60,000/- alongwith interest at the rate of 18% from the date of institution of the suit till final realization of decretal

amount alongwith costs is passed in favour of the plaintiff and against the defendants. File after due completion be consigned to records.

4. The trial court found that there were no malafides on the part of plaintiff in filing the application for bringing legal heirs of defendant No. 3 on

record. The court, therefore, allowed Mst. Taja wife of Gula Rather (daughter of defendant No. 3) R/o Chugal pora Tehsil Kulgam to be

substituted as defendant No. 3 from the date of institution of the suit.

5. The court while dealing with the application for leave to defend the suit found that the defendants have not been able to make out a case for

leave to defend. The application filed by the defendants was, therefore, rejected and the suit of the plaintiff was decreed with costs.

6. Being aggrieved by the said order of the trial court the defendants have filed the present appeal on various grounds. It is alleged that the suit had

been filed against a dead person and therefore, was a nullity. The court below, according to the appellants had no jurisdiction to array appellant

No. 3 (Mst. Taja) as a defendant from the date of institution of the suit and pass

decree against her. It is further alleged that no summons or notice of the suit in prescribed form have ever been served upon the defendants or upon Mst. Taja and that the court below has thereby committed a serious breach of law rendering the trial of the suit invalid. It was further alleged that Mst. Taja was arrayed as defendant in the case by the court on 3.12.1999 and that on the same date the judgment in the case was passed. Relying on an authority of the Apex Court reported in AIR 1997 SC 577 the defendants-appellants have prayed that the appeal be accepted and the judgment and decree passed by the court below be set aside.

7. Heard. I have considered the matter. On going through the impugned judgment I find that the trial court has not proceeded in the case in accordance with law. By the single order the trial court has disposed of the application for bringing the legal representatives of the deceased defendant on record, the application filed by the defendants for leave to defend as well as the main case.

8. The plaintiff has definitely remained negligent in the case while instituting the plaint as admittedly defendant No. 3 was dead at the time the suit was instituted in the court. He later took the plea that he had no knowledge about the death of defendant No. 3 and as soon as he got the knowledge he moved an application for arraying his daughter as a defendant in the case. The trial court has while disposing of the application, came to the conclusion that there seems no malafides on the part of the plaintiff in filing the application for bringing legal heirs of defendant No. 3 on record. It is not necessary to go to this aspect of the case as arraying of Mst. Taja as the defendant in the case is not seriously disputed by the defendants before this Court. Accepting this finding of the trial court I hold that bringing of Mst. Taja on record was perfectly within the provisions of law, as such, that part of the order impugned shall stand.

9. The question which is seriously disputed by the defendants is that alongwith the application for bringing the legal representatives of the deceased defendant on record their application for leave to defend has been rejected without discussing its merits and without assigning any reason. On going through the order impugned I find force in the submissions on two counts. Firstly, while dealing with the application for leave to defend the court has not discussed its merits at all and has simply recorded a finding that the

defendants have not been able to make out a case of leave to defend. It was mandatory on the part of the court to discuss the pleas raised by the defendants in the application and decide the same after giving due reasons. Secondly, no opportunity has been provided to Mst. Taja to apply for permission to defend the suit. She has been arrayed as party in the suit on 03.12.1999 and on the same day the decree in favour of the plaintiff and against her has been passed by the trial court.

10. Rule 3 of Order 37 of the CPC lays down provisions relating to powers of the court to grant/or refuse to grant leave to appear and to defend

the suit. It provides:

3. Procedure for the appearance of defendant: (1) In a suit to which this Order applies, the plaintiff shall, together with the summons under Rule 2,

serve on the defendant, may at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he

shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summons, notices and other judicial processes, required to be served on the defendant, shall be deemed to have

been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiffs pleader, or, if the plaintiff sues

in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiffs pleader or of the

plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4-A in

Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an

affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant, may at any time within ten days from the service of such summons for judgment, affidavit or otherwise disclosing such facts as

may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him

unconditionally or upon such terms as may appear to the Court or judge to be

just:

Provided that leave to defend shall not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a

substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit

shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to

judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and

within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or

to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in

applying for leave to defend the suit.

11. In *Mechalec Engineers and Manufacturers v. Basic Equipment Corporation* AIR 1977 SC 77 the Apex Court referred with approval the

principles applicable to cases covered by Order 37, C.P.C. as stated by Das J in *S. Kiranmoyee Dassi v. Dr. J. Chatterjee* 49 CWN 246, as

under: (at para 8).

(a) If the defendant satisfied the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and

the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the

plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively

and immediately make it clear that he had a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may

be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in

such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave

to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to

leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or

otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a

defence.

12. In AIR 1990 2218 (SC) the Supreme Court held that when triable issues arise out of the case, leave to defend should be granted. The court

observed: (at para 3)

Leave is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising

untenable and frivolous defences. The test is to see whether the defence ddddraises a real issue and not a sham one, in the sense that if the facts

alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the Court is satisfied about that leave

must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is

based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the

plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on, a fair probability he has a

bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or

where any difficulty on issues as to law arises. The Court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.

13. Whether the leave is to be granted or not and whether there are triable issues arising out of the case or not can be decided only when the defendant is given an opportunity to duly apply for permission to defend the suit. Where the court without providing any opportunity to the defendant to apply for the purpose, refuses to grant permission under Order 37 Rule 3, the order is illegal and without jurisdiction.

14. Once Mst. Taja was arrayed as party in the case she got a right under Order 37 Rules 2 and 3 of the CPC to apply to the court to defend the suit. The court has not provided any opportunity to her to make an application under the provisions of CPC in this behalf on the assumption that she was arrayed as defendant in the case from the date of institution of the suit. I find it totally a misconception of law and facts of the case. The

trial court has fell into patent error in not providing Mst. Taja any opportunity by holding that she was arrayed as party in the suit from the date of the institution of the suit. When a person is arrayed as defendant in the proceedings under Order 37 C.P.C., he gets a right to apply under Order

37 Rule 3 from the date he is made party in the suit. Once Mst Taja was arrayed as defendant in the case she got a right under the provisions of

Order 37 Rules 2 and 3 and to exercise such a right the court should have given her due opportunity to move the court in accordance with these

provisions. This having not been done by the court a grave illegality has been committed which has resulted in failure of justice. The judgment and

decree impugned cannot therefore stand. It is set aside. The case is remanded back to the trial court with the direction that it should provide an

opportunity to Mst. Taja to file an application as required by the above mentioned provisions. The time to file such an application will run from the

date the parties first appear before the trial court. Once Mst. Taja files such application the applications filed by other defendants shall be

considered by the court afresh alongwith the application filed by Mst. Taja and decided after giving due reasons for the same. The parties shall

appear before the trial court on 02.03.2005. The record be transmitted to the trial court immediately.

Order accordingly.