

(2018) 09 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : Civil Revision No..30 Of 2018

Rajesh Madanlal Anand @APPELLANT@Hash Rakesh Madanlal Anand And Another

Date of Decision : 05-09-2018

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Section 104
Code of Civil Procedure, 1908 — Section 115
Negotiable Instruments Act, 1881 — Section 138
Jammu and Kashmir State Ranbir Penal Code, 1989 — Section 420

Citation : (2018) 09 J&K CK 0003

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

1.This petition purportedly filed under Section 104 of the Constitution of Jammu and Kashmir is directed against the order dated 12.07.2018 passed by

the learned 2nd Additional District Judge, Jammu (hereinafter referred to as the trial Court) in File No.23/Civil titled Rajesh Madanlal Anand v.

Rakesh Madanlal Anand and another whereby the trial Court has refused to entertain the suit filed by the petitioner under Order 37 of the Code of

Civil Procedure (hereinafter referred to as the CPC) and has treated the same as a regular suit.

2. At the outset, it may be noted that this Petition has been filed by the petitioner purportedly under Article 227 of the Constitution of India, but the

same has been numbered by the Registry as Civil Revision. Admittedly, the order impugned does not determine the rights of the parties finally. By

virtue of the order impugned, the trial Court has simply refused to entertain the suit under Order 37 of CPC and has treated the same as a regular

suit. The rights of the parties are, therefore, yet to be determined in the suit

which would be tried as a regular suit in view of the order of the trial

Court impugned in this petition. In that view of the matter, I am of the opinion that the order impugned is not revisable under Section 115 of the Code

of Civil Procedure. Notwithstanding the fact that the Revision Petition against the order impugned is not maintainable, the petition in hand if falls

within the parameters of law laid down for invoking supervisory jurisdiction of this Court, this Court has ample powers to interfere and render justice

as may be required in the facts and circumstances of the case. It is in this backdrop, I have considered the rival contentions of the petitioner who has

appeared in person, and, learned counsel appearing for the respondents.Â

3. Before dealing with the rival contentions of the parties, it would be necessary to give brief resume of the factual antecedents leadings to the filing

of this petition.

4. The petitioner and respondent No.1 are the sons of late Madanlal Anand whereas respondent No.2 is daughter. The petitioner claims that late Sh.

Madanlal Anand, during his life time was holding 550 equity shares and 750 preference shares in the Company known by the name of Macks Hard

Pvt. Ltd. and was also holder of 5 equity shares in Lal-Roe Measuring Tools Pvt. Ltd. It is further claimed that after the death of late Shri Madanlal

Anand, the plaintiff along with respondents and their mother Mrs. Swaraj Madanlal Anand succeeded to the estate of late Shri Madanlal Anand

including the aforementioned shares in the two companies named above. The mother of the parties, namely, Smt. Swaraj Madanlal Anand allegedly

advised the petitioner to adopt a combined and unified approach with the company and not to put up separate claims. It is stated that during the

course of negotiation which took place between the petitioner and his mother, it was decided that the mother would issue to the petitioner a cheque of

Rs.59.00 lakh in consideration of signing of certain documents for relinquishing his shares and the balance of 1/4th of the petitioner's share of the

dividend declared, i.e., Rs.31941/- would be paid later on. It is stated that as per the negotiation held, the mother of the parties Smt. Swaraj Madanlal

Anand issued a cheque No.085296 dated 17.10.2017 in favour of the petitioner for a sum of Rs.59.00 lakh drawn on Dena Bank Maheshwari Udyan

Matunga Branch, Mumbai representing part payment of th share in the total dividend of the plaintiff's 1/4 Rs.2,37,27,764/-. The petitioner claims that

after receiving the cheque for the aforesaid amount, he signed all the requisite documents in favour of his mother and the cheque was presented by

him to the Dena Bank, Kunjwani Talab, Jammu for encashment on 23.10.2017. The petitioner was informed that the drawer of the cheque had

stopped the payment and that the funds in the account of the drawer were insufficient to meet the cheque amount. The petitioner claims to have sent

a Legal Notice dated 24.10.2017 giving Smt. Swaraj Madanlal Anand 15 days? time to make the payment. The drawer of the cheque Smt. Swaraj

Madanlal Anand, however, did not make the payment and, accordingly, the petitioner filed a complaint under Section 138 of the Negotiable

Instruments Act and under Section 420 RPC in the Court of Sub Judge (JudicialÂ Magistrate Ist Class),Â Jammu on 06.12.2017. The statement of

the petitioner was recorded and the cognizance of the complaint was taken by the Magistrate. The accused Smt. Swaraj Madanlal Anand was

summoned in the Court. While the complaint was pending adjudication, the accused Smt. Swaraj Madanlal Anand expired on 12.06.2018 and

consequently, learned Magistrate closed the proceedings of the complaint. It is further case of the petitioner that with the demise of Smt. Swaraj

Madanlal Anand, the share of the plaintiff in the dividend declared as due paid by the two companies aforementioned came to be increased from

1/4th to 1/3rd, i.e., Rs.59,31,941 and Rs.79,09,255. Asserting that the liquid assets of Smt. Swaraj Madanlal Anand afterÂ her death came to the

hands of the respondents, the petitioner filed a suit for recovery of Rs.79,09,255/- on the basis of cheque issued by late Smt. Swaraj Madanlal Anand.

5. The suit was presented before the trial Court who without proceedings further in the suit in terms of the provisions of Order 37 CPC considered

the averments made in the plaint and came to the conclusion that the suit involved triable issues and raised certain complicated questions of fact and

therefore, the same was not liable to be treated as a suit under Order 37 CPC. It was also noted by the trial Court that the cheque in question on the

basis of which the suit has been filed was issued by the mother of the petitioner as the share of the plaintiff in the dividend and there was no

document appended with the plaint to suggest that the said amount of cheque had actually passed on to the respondents to make them liable in

accordance with the provisions of Order 37 CPC. On these grounds, the trial

Court refused to try the suit under Order 37 CPC and instead treated the same as a regular suit.Â

6. The petitioner is aggrieved of the order passed by the trial Court and has challenged the same inter alia on the following grounds:-

(i) That the observations of the trial Court that the suit filed by the petitioner involved adjudication of the complicated questions of fact cannot be a

ground to refuse to entertain a suit under Order 37 CPC if the same is otherwise covered. The observations of the trial Court, it was submitted by the

petitioner, are, therefore, perverse and have resulted into serious mis-carriage of justice, and that, the petitioner has been deprived of speedy remedy

of summary suit as envisaged under Order 37 CPC;

(ii) That the observations of the trial Court that the cheque on the basis of which the suit has been filed is signed by the mother, namely, Smt. Swaraj

Madanlal Anand and therefore, in absence of the documentary proof on record to indicate that the amount represented by the cheque has been

actually received by the respondents, the petitioner had no right to maintain a summary suit against the respondents is erroneous both on facts and in

laws.

7. Per contra, learned counsel appearing for the respondents vehemently submitted that the order of the trial Court refusing to entertain the suit of the

petitioner as one under Order 37 CPC is perfectly legal and in consonance with the provisions of Order 37 CPC. It is submitted that a summary suit

based upon a cheque can only be entertained against the maker of cheque and not against his/her legal representatives/heirs. It is further submitted

that a liability on account of cheque being bill of exchange as defined under Negotiable Instrument Act is only that of the maker and not of his legal

representatives/heirs. He, therefore, submitted that perhaps suit against Smt. Swaraj Madanlal Anand in terms of Order 37 CPC would have been

maintainable had she been alive, but no suit against the respondents being the legal heirs of the maker of the cheque is maintainable in law.

8. Having heard the petitioner in person and learned counsel for the respondents and perused the record, it would be necessary to first appreciate the

ambit and scope of Order 37 CPC. The Order 37 CPC provides for summary procedure in respect of certain suits. The essence of the summary suit

is that the defendant is not, as in ordinarily suit, entitled as of right to defend the

suit. The defendant is required to apply for leave within ten days from the date of service upon him and such leave will be granted by the Court only if the affidavit filed by the defendant discloses such facts as the Court may deem sufficient for granting the leave to the defendant to appear and defend the suit. It is further provided that if the Court declines to grant leave to the defendant, the plaintiff becomes entitled to a decree straightway. It is not that all types of suit can be tried summarily by having resort to Order 37 CPC. The Order 37 Rule (1) Sub Rule (2) CPC classifies suits which can be tried by the summary proceedings laid down in the Order 37 CPC. Indisputably, the suits upon bills of exchange, hundies and promissory notes fall within the ambit of Order 37 CPC. It is also not in dispute that the cheque is a "bill of exchange" as defined in the Negotiable Instruments Act. No suit on the basis of cheque under Order 37 CPC would lie unless the cheque has been presented to the banker and has been bounced for one or the other reason and the amount represented by cheque remains unpaid.

9. Admittedly, the suit filed by the petitioner is based on the cheque issued by late Smt. Swaraj Madanlal Anand which has not been honoured by the banker of the petitioner. It is also admitted position that the cheque was presented during the life time of late Swaraj Madanlal Anand. On refusal on the part of the banker of late Smt. Swaraj Madanlal Anand to honour the cheque, the petitioner after following the procedure filed a complaint under Section 138 of the Negotiable Instruments Act against late Smt. Swaraj Madanlal Anand. It is, however, a different matter that during the pendency of the complaint, Smt. Swaraj Madanlal Anand died and criminal complaint was closed by the concerned Magistrate. Obviously, the Magistrate, could not have proceeded in the complaint against the legal representatives, who might have inherited the estate. In these circumstances, the plaintiff having been left with no option filed a suit claiming recovery of the cheque amount. As is seen from the plaint, apart from the recovery of the amount represented by dishonour of cheque, the petitioner has also made a claim for further amount which of course, cannot be made subject matter of summary trial in the suit. Be that as it may, it is a specific case of the petitioner that after the death of his mother Smt. Swaraj Madanlal Anand, all his liquid assets came to be inherited by the respondents to his

exclusion. I find specific averments\ made in the plaint in this regard. It is on this assertion made by the petitioner, the suit was filed against the respondents by having resort to Order 37 CPC. The trial Court summarily declined to entertain the suit as one under Order 37 CPC and treated the same as a regular suit. This course was not open to the trial Court. A bare reading of the plaint would disclose that the suit was filed on the basis of cheque, which is indisputably a bill of exchange and therefore, maintainable under Order 37 Rule 1 Sub Rule 2 CPC. The trial Court should have entertained the suit and followed the procedure laid down in the Order 37 CPC. Reference in this regard is invited to Rule 2 of Order 37 CPC which specifically provides that if the suit is one falling under Rule 1 (2) and the plaint complies the requirements enumerated in Rule 2, the trial Court is bound to proceed and issue summon in the Form No.4 given in Appendix B or any such Form as may, from time to time, be prescribed. This, however, does not mean that the trial Court cannot have preliminary scrutiny of the plaint to find out as to whether the suit is one falling under Order 37 CPC but such inquiry has to be limited. The trial Court at the stage of entertaining the suit cannot look to the merits of dispute involved and the probable defences that would be taken by the defendants and come to the conclusion that the suit involves complicated disputed questions of fact and triable issues. The trial Court cannot return such finding unless notice is served upon the defendants and his version comes on record in the shape of an application seeking leave to defend. As is appropriately provided in Rule 3 that the defendant, if within ten days from the date of service of summons for judgment, by affidavit or otherwise discloses such facts as the Court deems sufficient to entitle him to defend, the Court may grant him leave to defend either unconditionally or upon such term as may appear to the Court to be just. It is perhaps at this stage, the Court would try the suit in the same manner as is done in suits instituted in the ordinary manner. As rightly submitted by the petitioner appearing in person, the trial Court jumped the gun and erroneously treated the suit as a regular suit.

10. I have carefully gone through the provisions of Order 37 CPC and find that nowhere in the order, a power is conceded in favour of the trial Court to refuse to treat the suit based on cheque and otherwise complying with the provisions of Order 37 CPC Rule 2 as summary suit triable under

Order 37 CPC and treat the same as a regular suit. In my considered opinion, learned trial Court has exercised the jurisdiction not vested in it and has

consequently caused serious mis-carriage of justice. The right of the plaintiff to have his suit tried in summary manner is a vital right conferred under

Order 37 CPC and said right cannot be trampled by overstepping the jurisdiction and taking the view which is not countenanced in law. This Court,

thus, finds it a fit case for exercising the supervisory jurisdiction vested under Section 104 of the Constitution of J&K.

11. I shall be failing in my duties if I do not refer to the case law cited by the parties in support of their contentions.

12. Learned counsel for the respondents has relied upon Single Bench judgment of the High Court of Delhi rendered in the case of Vijay Singh and

others V. Manali Malik and others(2009 160 DLT 259) decided on 05.05.2009 wherein the Single Bench of Delhi High Court in paragraph No.12

held as under :-

“12. Section 30 also requires due notice of dishonour to be given to the drawer of the cheque for maintaining a claim for compensation on

account of dishonour of the cheque. Thus, the dishonour of the cheque is actionable under Order 37 of the CPC only if notice of dishonour has been

given to the drawer. If the drawer is dead on the date of dishonour or even on the date of presentment, no notice can possibly be given to him. That

also leads to the inevitable conclusion that in such a eventuality no suit under Order 37 of the CPC is maintainable on the basis of a cheque.”

13. The facts of the aforesaid case are clearly distinguishable. In the aforesaid case decided by the Delhi High Court, the drawer of the cheque had

died even before the date of presentation of cheque. In that situation, it was held that no notice could have been possibly given to the drawer. Since

the liability against the drawer of the cheque had not matured and therefore, the Court held that in such circumstances, the suit under Order 37

against the legal representatives was not maintainable. It would not be out of place to refer the observations made by the Delhi High Court in

paragraph No.17 of the judgment which reads as under:-

“17. I, therefore, reach a conclusion that the cheques on the basis of which the present suit has been filed, since not presented for payment in the

lifetime of the drawer, ceased to be a cheque on the demise of the drawer in as

much as they ceased to be the order of a person entitled to make an order to the bank to pay the money thereupon and thus the suit under order 37 of the CPC would not be maintainable on the same.â??

14. In the instant case as noted above, the cheque was presented during the life time of the drawer of the cheque, namely, Smt. Swaraj Madanlal

Anand, the same was dishonoured during her life time. As a matter of fact, complaint under Section 138 of the Negotiable

Instruments Act was filed during her life time, which was being contested by her when she expired on 12.06.2018.

15. The next judgment relied upon by the learned counsel for the respondents is rendered by the Delhi High Court again in the case of Sarla Devi

v. Daya Ram 1995 (57) DLT 126. The Delhi High Court relying upon the judgment of Bombay High Court in the case of Rajesh Steel Centre

v. Smt Rashmi K. Aggarwal, 1986 Mh. LJ 1993 held that a summary suit cannot lie against the parties who are sued as legal heirs and representatives

of the deceased and who are not personally liable and such suit is liable to be tried as a regular suit. This judgment of the Single Bench of Delhi

High Court became subject matter of challenge in LPA before the Division Bench and the Division Bench of the same High Court in the case

reported as 1995 (60) DLT 3 set aside the judgment of the learned Single Judge and directed that the suit shall be tried as summary suit under Order

37 CPC. The judgment of the Bombay High Court rendered in the case of Rajesh Steel Centre (supra) relied upon by the Single Bench of Delhi High

Court in Sarla Devi's case was distinguished by the Division Bench by holding that the Bombay High Court had proceeded on the basis that legal

representatives may not be able to comply with the direction under Order 37 CPC because no liquid assets of the deceased may have come to their

hands during the time prescribed to furnish security, but in Sarla Devi (supra), the same was not the case. In the similar manner, the facts of the

instant case are also different and distinguishable from the facts which were before the Bombay High Court in the case of Rajesh Steel Centre.

There is specific averment in the plaint made by the petitioner that all liquid assets of the deceased, the drawer of the cheque, namely, Smt. Swaraj

Madanlal Anand have come to the hands of the respondents and at this very initial stage, there was no material before the trial Court to disbelieve it.

That being the position, the Single Bench judgment of Sarla Devi's case rendered by the Delhi High Court is of no help to the petitioner,

more so when the same has been set aside by the Division Bench of the same Court. It may be noted that in a later case, which came before the

Division Bench of Bombay High Court in case titled as Bank of India v. Industrial Polymer reported as 1991 (93) BOMLR 218, a Single Bench

judgment of the Bombay High Court passed by placing the reliance upon the judgment rendered in Rajesh Steel Centre's case, was set aside and the

view taken by the Single Bench in the case of Rajesh Steel Centre was disapproved. The Division Bench of the Bombay High Court in paragraph

No.9 of the judgment observed as under :-

9. In our view, therefore, the difficulty expressed by the learned Single Judge in the case of Rajesh Steel Centre (supra) is misconceived. A

summary suit can be filed against the heir and legal representative of a deceased defendant and the provisions of Order XXXVII CPC apply in full to

such a suit also. The decree, however, can be executed only to the extent of the estate of the deceased in the hands of judgment debtor. We,

therefore, agree with Variava-J that the summons for judgment against the heirs of the defendant No.3 is maintainable.

16. The judgment of the Division Bench of Bombay High Court (supra) is the complete answer to the arguments raised by the learned counsel for the

respondents that in no case the suit against the legal representatives is maintainable.

17. From the conspectus of the judicial opinion on the issue, the following conclusion are deductible:-

(i) That a summary suit is maintainable and can be filed against the legal heirs/representatives of a deceased defendant and a decree which may be

ultimately passed, however, can be executed only to the extent of the estate of the deceased in the hands of judgment debtor;

(ii) That in a suit filed on the basis of a dishonoured cheque, if the cheque is presented and dishonoured during life time of the drawer

and the drawer is intimated the aforesaid facts, the summary suit under Order 37 CPC would lie against his/her legal heirs/representatives who have

succeeded to his/her estate and the liquid assets, if deceased by that time has expired;

(iii) That once a suit is filed, which is covered by the Order 37 Rule 1 Sub Rule 2 and complies with the requirement as laid down in the Order 37

Rule (2), the trial Court shall not examine the merits of the controversy, but would proceed to issue summons to the defendants in the prescribed

Form.Â

(iv) That it is only when leave to defend is granted to the defendants, the defendant would be permitted to file written statement and suit would be

tried in the manner an ordinarily suit is tried under the Code of Civil Procedure.

18. In view of the aforesaid stated position of law and the facts and circumstances of the case, I am of the considered view that order impugned

passed by the trial Court is against all canons of law and the trial Court not only exceeded his jurisdiction but exercised the one not vested in it and

thereby caused serious miscarriage of justice. Accordingly, I allow this petition and set aside the order impugned in exercise of supervisory

jurisdiction vested in the Court under Section 104 of the Constitution of Jammu and Kashmir. The trial Court shall proceed in the suit in the manner

prescribed under Order 37 CPC.

The parties to appear before the trial Court on 24.09.2018.

19. Disposed of as above along with connected MP(s).