

(1992) 03 MP CK 0027

In the Madhya Pradesh High Court

Case No : Civil Revision No. 131 of 1991

Rameshchandra Jaiswal and Others

APPELLANT

Vs

Central Bank of India and Another

RESPONDENT

Date of Decision : 12-03-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2, Order 37 Rule 3, Order 37 Rule 3(4), Order 37 Rule 3(5), Order 37 Rule 3(6)

Citation : (1992) J LJ 434

Hon'ble Judges : V.S. Kokje, J

Bench : Single Bench

Advocate : M.A. Khan, for the Appellant; A.S. Kutumbale, for Non-Applicant No. 1, for the Respondent

Final Decision : Allowed

Judgement

V.S. Kokje, J.—This revision petition is against the refusal of grant of leave to defend under Order 37 CPC Shri Khan learned Counsel for the applicants submits that a perusal of the record would show that the provisions of Order 37, Rule 3 CPC were not followed by the trial Court. According to him, there was no occasion for the Defendant to apply for leave to defend, in absence of the Plaintiffs serving on the Defendants a summons for judgment in form 4-A in Appendix B, supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there was no defence to the suit. According to him (Shri Khan) the Defendant cannot be punished for having applied for leave to defend without insisting on the compliance with Sub-rule 4 of Rule 3 of Order 37 Code of Civil Procedure

2. Shri AS. Kutumbale learned Counsel for the non-applicants submits that the applicant himself is responsible for the situation he found himself in now. According to him the applicant entered appearance and filed an application for leave to Defendant without waiting for the Plaintiff serving a summons for judgment on him as required by Sub-rule 4 of Rule 3 of Order 37 CPC Learned

Counsel submits that in the circumstances of the case, if the Court dispensed with the service of summons for judgment it cannot be said that it committed to any illegality or even irregularity.

3. Having heard the learned Counsel for the parties and having perused the record of the case, I find that this application for revision has to be allowed.

4. The suit was filed on 20-12-90. On the next date i.e. 21-12-90 a summons was directed to be issued for 27-2-91. On 11-1-91 Defendants 1,2 and 4 entered appearance by filing wakalatnama. The same day the applicant applied for leave to defend. On 27.2.91 a copy of the application was given to the Plaintiff's counsel along with a copy of the affidavit and on the Plaintiffs asking for time to reply the case was adjourned to 9- 3-91, on which date the reply to the application was filed by the Plaintiff and the case was adjourned for arguments on the application for leave to defend. Ultimately, on 1-4-91 the Court passed the order and rejected the application for leave to defend on merits by the impugned order. The Court appeared to be fully aware of the situation that the provisions of serving summons for judgment on the Defendant were not followed in the case and observed in the order that as the application for leave to defend was presented by the Defendant, there was no need to serve a summons for judgment on him. The view taken by the Court appears to be on the basis that the provisions for serving of summons for judgment on the Defendant are directory and not mandatory. A detailed discussion on the topic can be found at page 233 onwards of the "Principles of Statutory Interpretation" by Justice G.P. Singh - Fifth Edition 1992. It has been observed by the learned author on the basis of several English and Indian authorities that no universal rule can be laid down to distinguish mandatory provisions from directory provisions, and the question as to whether a provision is mandatory or directory, depends upon legislative intent and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it one way or the other. For ascertaining the real intention of the legislature the Court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other. If the object of the enactment will be defeated by holding the same directory, it will be construed as mandatory whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory. If a provision is mandatory an act done in breach thereof will be invalid, but if it is directory the act will be valid although the non-compliance may give rise to some other penalty if provided by the statute. When consequence of nullification on failure to comply with a prescribed requirement is provided by the statute itself, there can be no manner of doubt that such statutory requirement must be interpreted as mandatory. When the statute does not expressly provide for nullification as a consequence of the non-compliance of the statutory

injunction but imposes expressly some other penalty, it is a question of construction in each given case whether the legislature intended to lay down as absolute prohibition or merely to make the offending person liable for the penalty.

5. Viewed in the light of the aforesaid discussion Sub-rule 4 of Rule 3 of Order 37 CPC clearly appears to be mandatory. The procedure to be followed by a Court under Order 37 CPC step by step is prescribed by the rules under the Order. Rule 3 prescribes the procedure to be adopted after Defendant appears. Sub-rule 1 provides that together with the summons under Rule 2 a copy of the plaint and annexures thereto be served on the Defendant and on such service, the Defendant may enter in appearance either in person or by pleader in the case. Sub-rule 3 provides that on the day of entering the appearance, notice of such appearance shall be given by the Defendant to the Plaintiff's pleader, or the Plaintiff himself, either by notice delivered or sent by post. Sub-rule 4 then prescribes that if the Defendant enters as appearance, the Plaintiff shall thereafter serve on the Defendant summons for judgment in Form No. 4A 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 This is a very important step, because of Form No. 4 of Appendix B in which the initial summons in summary suit has to be sent, Paragraph 2 of Form No. 4 provides as follows:

If you cause an appearance to be entered for you, the Plaintiff will thereafter serve upon you a summons for judgment at the hearing of which you will be entitled to move the Court for leave to defend the suit.

Form No. 4A of Appendix B which is the form for summons for judgment in a summary suit opens with the sentence:

Upon reading the affidavit of the Plaintiff the Court makes the following order....

This affidavit mentioned in the Form No. 4A is the affidavit spoken of in Sub-rule 4 of Rule 3 of Order 37 CPC which has to be given in support of the summons for judgment verifying the cause of action and the amount claimed and stating that in the Plaintiffs belief there is no defence to the suit. Thus reading Sub-rule 4 of Rule 3 of Order 37 CPC together with Form No. 4 and 4A of Appendix B it is clear that the Court has to make up its mind whether to issue a summons for judgment or not upon reading the affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence in the suit Thus a summons for judgment in Form 4A aforesaid supported by an affidavit verifying the cause of action and the amount claimed and stating that in Plaintiff's belief, there is no defence to the suit is a sine qua non for decision by the Court whether the Defendant would be called upon to apply for leave to defend or not The subsequent Sub-rule 5 of Rule 3 of Order 37 provides that on such summons for judgment being served on him the Defendant may apply for leave to defend within ten days from the service of such summons on him. It is after all this that

the Court has to consider whether leave to defend is to be granted in the case or not

6. Sub-rule 6 of Rule 3 of Order 37 CPC further provides that at the hearing of such summons for judgment 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 if the Defendant is permitted to defend as to the whole or any part of the claim, the Court may ask for security. Thus the consequences of not applying for leave to defend or refusal to grant leave to defend are severe and drastic.

7. From a perusal of Sub-rules 4, 5 & 6 of Rule 3 of Order 37 it is clear that the entire action is based on summons for judgment. If summons for judgment is not issued as required by Sub-rule 4, there is nothing on the basis of which the Defendant could ask for leave to defend and there is nothing on the basis of which the Court could grant judgment. The provisions are, therefore, clearly mandatory and in fact the summons for judgment is a basis to any judgment which may be pronounced under Order 37 CPC. If there is no affidavit verifying the cause of action and the amount claimed and stating that in Plaintiffs belief there is no defence to the suit, there is nothing for the Defendant to defend against and there is nothing against which leave to defend could be asked for.

8. In the present case though the Defendant jumped into the Court with an application for leave to defend, the Court could not have overlooked the mandatory provisions of Sub-rules 4, 5 and 6 of Rule 3 of Order 37 CPC and entertained the application for grant of leave to defend and then rejected it. The entire action from the stage of dispensing with the service of summons for judgment on the Defendant is, therefore, without jurisdiction and illegal. The impugned order refusing grant of leave to defend is, therefore, vitiated by a procedural fault going to the root of the case affecting the jurisdiction of the Court. The impugned order is, therefore, set aside.

9. In the result the revision petition is allowed and the trial Court is directed to serve on the Defendant a summons for judgment in form No. 4A in Appendix B making it returnable not less than ten days from the date of service. The summons for judgment shall be accompanied by an affidavit verifying the cause of action and the amount claimed stating that in the Plaintiffs belief there is no defence to the suit. Within ten days of service of summons for judgment the Defendant may apply afresh for leave to defend and the trial Court shall then decide afresh as to whether leave to defend could be granted in the case or not. With this direction, the case is disposed of. Parties shall bear their own costs as incurred.