

(2019) 12 DEL CK 0218

In the Delhi High Court

Case No : Civil Miscellaneous (Main) No. 1787 Of 2019, Civil Miscellaneous Application No. 53925 Of 2019

Sarvesh Bisaria

APPELLANT

Vs

Anand Nirog Dham Hospital Pvt Ltd

RESPONDENT

Date of Decision : 17-12-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 89, Order 8, Order 37, Order 39 Rule 1, Order 39 Rule 2, Order 37 Rule 2, Order 39 Rule 3, Order 18 Rule 4, Order 8 Rule 5, Order 5 Rule 9, Order 8 Rule 10, Order 5 Rule 17, Order 5 Rule 18

Citation : (2019) 12 DEL CK 0218

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Prakash Chandra Sharma

Final Decision : Disposed Of

Judgement

Prathiba M. Singh, J

1. The grievance in this petition is that the Petitioner/Plaintiff (hereinafter, "Plaintiff") has filed a suit for recovery of Rs. 1,65,75,000/-against the Respondent/Defendant (hereinafter, "Defendant") under Order XXXVII CPC. Despite service having been effected and the memo of appearance having not been filed within the ten days' period, as specified under Order XXXVII CPC, the Trial Court has not passed the decree.

2. Ld. counsel for the Plaintiff relies upon the recent Single-Judge Bench judgment of this Court in M/s SS Steel Industry v. M/s Shri Guru Hargobind Steels [C.R.P. 42/19, decided on 5th September, 2019], which in turn relies upon a Division Bench judgment of this Court in Comba Telecom Ltd. v. S. Tel Pvt. Ltd., 2016 (28) DLT 713, to submit that if the memo of appearance is not filed, a decree under Order XXXVII Rule 2 CPC would have to automatically be passed by the Trial Court.

3. Having heard Id. counsel for the Plaintiff and perusing the record, it is seen that the suit has been preferred under Order XXXVII CPC. The plaint records that the six cheques which were issued by the Defendant were all dishonoured, leading to the filing of the suit under Order XXXVII CPC. The principal amount claimed is Rs. 1,50,00,000/- along with interest at 18% p.a., from March, 2019 to October, 2019 totaling to a sum of Rs. 1,65,75,000/-.

4. It is noticed that though the suit has been filed under Order XXXVII CPC, the order passed by the Id. ADJ, dated 20th November, 2019, is completely inexplicable. It is a templated order which simply sets out various portions of the Civil Procedure Code, 1908, without recording any satisfaction under Order XXXVII CPC. Summons have also not been issued under Order XXXVII CPC.

5. In order to appreciate the fundamental errors in the order dated 20th November, 2019, the same is set out in herein-below: -

"Arguments heard on summoning.

Part I - Issuance of Summons/Notice- Issue summons of the suit and notice of the application to defendant no. 1 on filing of PF within Three (3) to seven (7) days as per (0.5 r.9 CPC) through:

1. Process Server.
2. Registered post.
3. Speed Post.
4. Authorised courier.

Part II - Timely Service by Nazarat - Incharge Nazarat Branch is hereby directed to ensure that the processes issued shall be executed and served preferably within one week (7 days) but not later than 15 days.

Part III - Fixation on Refusal- In case the defendant refuses to accept the service or is not found available despite Three (3) mandatory visits, Process Server shall affix the summons at a conspicuous place of the defendant's address and leave the copy of plaint and annexures there as per 0.5 r.17 CPC alongwith affidavit of service.

Incharge Nazarat Branch shall ensure that the served/unserved/affixation report shall reach the Court within, outer limit of 15 days as per 0.5 r. 18 CPC.

Left without Address Report- In case the defendant is reported to have left without address, then fresh process be issued at the fresh address if any available with the plaintiff on new PF. In case no other address is available, then defendant be served by way of affixation at the last available address on new PF to be filed within 7 days of inspection of the file.

Part IV- Substituted Service- In case no service is effected upon the defendant for any reason and Id. Counsel for plaintiff deems fit that service needs to be

effected by substituted means he shall move an application within one week of receipt of unserved process.

Part V- Timely Filing of Written Statement under Order 8 CPC- In case of due service of summons of the suit, defendant shall file Written Statement within 30 days of receipt thereof. Advance copy of Written Statement shall be sent to the plaintiff by registered post/courier and email, if any.

In case no Written Statement is filed by the defendant within 30 days and no extension of time is sought, then the Court may pronounce judgment under 0.8 r.5 and 0.8 r.10 CPC, or may, strike off right to file WS of reply.

Service of Incomplete Plaint- In case defendant finds that the paper book of the plaint received by him is incomplete or illegible, he/she shall move an interim application before Court within 7 days of receipt of summons instead of waiting for the next date. No such plea shall be entertained thereafter.

Part VI - Replication, if any, - Plaintiff may file replication, if any, within 15 days of receipt of Written Statement. Plaintiff shall serve the copy of the replication upon the defendant through registered post/courier and email, if any.

Part VII - Admission/Denial by Affidavit in Given

Format - Both the sides are directed to file a separate affidavit qua Admission/Denial of each or every document filed alongwith the pleadings in the annexed format, on the date of framing of issues.

* Admitted/Denied/Partly admitted/Only signatures admitted, Content denied (any other reason/please specify)

Deponent

Verification:

Verified at Delhi on this ____ day of _____ that the contents of my affidavit are true and correct to my knowledge and no part of it is incorrect and nothing material has been concealed therefrom.

Deponent

Part VIII- File Interim Applications before hearing- In case either of the parties is desirous of moving an interim application, they shall do so in between the date of hearings by serving advance copy to the other side by registered post/courier and speed post, if any.

Framing of Issues - Upon completion of pleadings issues would be identified on law as well as facts while placing specific onus on the parties to prove them as per Order 14 CPC.

Referral to Mediation/Lok Adalat - Upon completion of pleadings, parties would be given an option to go for ADR (Viz. Arbitration, Mediation and Lok Adalat) as

per Section 89 CPC.

Recording of Evidence by LC- In case no settlement is arrived at then the evidence would be recorded either by the Court or by Ld. Local Commissioner/ Advocate appointed or empaneled with, DSLSA/DLSA in terms of Order 18 Rule 4 CPC, Rameshwari Devi Case and Salem Bar Association Case of Hon'ble Supreme Court.

Hearing of Final Arguments- Upon completion of recording of evidence in the Court or before LC, case shall be taken up for final arguments followed by passing of judgment.

Copy of this order be sent to defendant alongwith summons of the suit.

Now to come up for service, completion of pleadings and disposal of miscellaneous application, if any and framing of issues on date 11.12.2019."

6. A perusal of the above shows that a standard template has been prepared for issuance of summons and the order records the entire proceedings to be effected in the suit, beginning with issuance of summons, filing of written statement, format for admission/denial, framing of issues, recording of evidence, till final arguments.

7. The order suffers from fundamental errors as it fails to recognise the fact that the suit is under Order XXXVII CPC and a standard order which almost simply replicates the various stages of a suit, has been passed with complete non-application of mind. There is no satisfaction recorded in the order as to whether the suit qualifies to be a suit under Order XXXVII CPC or not. The paragraph relating to the filing of the written statement also provides that the Defendant has to file a written statement within 30 days of the receipt of summons. This Court is unable to comprehend as to how in a suit under Order XXXVII CPC, the Defendant is being told to file the written statement within 30 days of receipt of the summons. The said order directs the issuance of summons in the ordinary manner, instead of in the form as required under Order XXXVII CPC i.e., Form No.4 in Appendix B.

8. The Id. counsel has also handed over a copy of the summons which was issued in this matter which also shows that the summons had been issued in Form No.2 and not Form No.4. Clearly, the Trial Court has completely erred in this regard.

9. The non-examination of the question as to whether the suit was maintainable under Order XXXVII CPC, the non-issuance of summons in the required format and following a templated order is completely contrary to law.

10. Whenever summons are issued, the Court has to be conscious of the provision under which the summons is to be issued. The summons in a summary suit is completely different from the summons in Form No.2, for settlement of issues in an ordinary suit. Clearly, the Court has not taken into consideration that the suit was filed under Order XXXVII CPC and the Plaintiff's grievance is thus

completely justified.

11. Even in the impugned order dated 11th December, 2019, the Court does not notice these facts and has simply adjourned the matter by observing as under:

"Ld. counsel for plaintiff has filed affidavit thereby submitting that defendant was served on 29.11.2019 but has not appeared till date and 10 days period is already over, hence he is entitled to judgment put up for further arguments, if any, and orders on 24.02.2020."

12. The Defendant, having not been served with a summons under Order XXXVII CPC, would not have been made aware of the fact that the memo of appearance was to be filed within ten days. Thus, the entire matter requires re-consideration by the Trial Court. In view of the fact that the procedure adopted in the present suit was itself wrong, much to the Plaintiff's detriment, a decree cannot be passed for non-filing of the memo of appearance. However, the returnable date in the summons being 11th December, 2019, and none having appeared for the Defendant, despite service of the ordinary summons, the prayer under Order XXXIX Rules 1 and 2 CPC ought to have been considered by the Trial Court, which has not been done.

13. A perusal of the suit shows that six cheques for a sum of Rs.1.5 crores were, in fact, issued as per paragraphs 11 and 12 of the plaint. The same read as under:

"11. That the plaintiff acknowledged all the six cheques and accordingly deposited all the cheques into his bank account at UCO Bank, Supreme Court of India, New Delhi on 27.03.2019 for encashment.

12. That all the six cheques submitted by the plaintiff for encashment were returned by the bankers of the plaintiff on 28.03.2019. All the six cheques have been dishonoured the bankers of the defendant with the returning memos mentioning the following reason "funds insufficient". The plaintiff acknowledged received the returning the memos along with the original cheques from his bankers on 28.03.2019 itself."

14. In view of the above factual background, let summons be issued to the Defendant under Form 4 Appendix B returnable on 20th January 2020, before the Trial Court. In order to protect the Plaintiff, the Defendant is restrained from operating the bank accounts listed below, to the extent of Rs.1.5 crores:

? PUNB0181900 Punjab National Bank 1819002100020703;

? PUNB0620400 Punjab National Bank 4007002100055332;

? PUBN0620400 Punjab National Bank 6204002100001320;

? HDFC0001911 HDFC Bank 19118480000011;

? UT1B0000177 Axis Bank 177010200014979;

? ALLA0210674 Allahabad Bank 50177821207;
? HDFC0001911 HDFC Bank 19118260000018;
? ANDB0001911 Andhra Bank 147411100001042;
? PUNB0181900 Punjab National Bank 18190021000325889"

15. Compliance of Order XXXIX Rule 3 CPC be done within three days.

16. Ld. counsel for the Plaintiff prays for an early date. The application and the suit be now listed before the Trial Court on 20th January, 2020 for further proceedings.

17. The petition and all pending applications are disposed of in the above terms. For immediate issuance of summons in the prescribed Form 4 Appendix B, let this order be communicated by Special Messenger to ADJ-03/Patiala House Courts, New Delhi in CS No.836/19 titled Servesh Bisaria v. Anan Nirog Dham Hospital.

Dasti under signature of Court Master.