

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

CM(M) No.221/2024

NISAR AHMAD RATHER

... Petitioner(s)

Through: -Mr. S.N.Ratanpuri, Advocate and
Ms. Fiza, Advocate

Vs.

TAJAMUL AHMAD RESHI

...Respondent(s)

Through: -Mr. Shahid Zameer, Advocate for cavetor

CORAM:

HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

03.07.2024

1. The petitioner has challenged order dated 15.06.2024 passed by learned 4th Additional District Judge, Srinagar, whereby his application for setting aside of judgment and decree dated 29.04.2023 has been dismissed. Challenge has also been thrown to the judgment and decree dated 29.04.2023 passed by learned 4th Additional District Judge, Srinagar.

2. Issue notice to the respondent. Mr. Shahid Zameer, Advocate who is on caveat accepts notice on behalf of the respondent.

3. Heard learned counsel for the parties and perused the record of the case.

4. It appears that the respondent had filed a suit under Order 37 of CPC, seeking recovery of an amount of Rs.35,00,000/- (rupees thirty

five lacs) from the petitioner before the Court of learned 4th Additional District Judge, Srinagar (hereafter referred to as 'the trial court'). It seems that pursuant to the service of summons upon the petitioner/defendant, he appeared before the learned trial court on 19.12.2022 and his counsel sought time to file Vakalatnama. On the next date of hearing, i.e on 24.01.2023 again the petitioner/defendant put in his appearance before the trial court and his counsel sought time to file Vakalatnama. On 17.02.2023 counsel for the petitioner/defendant produced Vakalatnama and the matter was adjourned to 09.03.2023, on which date, learned Presiding Officer was on leave and the matter was posted to 17.04.2023. On the said date nobody appeared on behalf of the defendant and the trial court recorded that application seeking leave to defend the case has not been filed by the defendant and the matter was posted for appropriate orders to 29.04.2023. On the said date the learned trial court passed the impugned judgment and decree in favour of the respondent/plaintiff and against the petitioner/defendant, thereby holding the plaintiff entitled to amount of Rs.35,00,000/- (rupees thirty five lacs) alongwith interest @6% per annum with costs of the suit to the tune of Rs.5000/-. While passing the said judgment and decree the learned trial Court recorded that in terms of Rule 6 of Order 37 of CPC, the defendant has failed to apply for the leave to defend the suit, as such the plaintiff is entitled to judgment and accordingly the impugned judgment and decree came to be passed.

5. It seems that the petitioner/defendant made an application under Order 37 Rule 4 of CPC before the trial Court seeking setting aside of *ex* CM(M) No.221/2024

parte judgment and decree dated 29.04.2023. It was contended by the petitioner before the trial court that he had been arrested on 02.02.2023 and was released on 21.04.2023, as such he could not appear before the Court. It was also pleaded that summons for judgment in the prescribed form had not been served upon him (defendant). On these two grounds he had sought setting aside of *ex parte* judgment and decree. The learned trial court vide impugned order dated 15.06.2024 rejected both the contentions of the petitioner and dismissed his application.

6. As is clear from the minutes of the proceedings recorded by the learned trial court, summons for judgment has neither been issued by the trial court nor the same has been served upon the petitioner/defendant. The question that arises for determination is as to whether the trial Court could have proceeded to pass the impugned judgment and decree without service of summons for judgment upon the defendant. In this regard provisions contained in Rule 3 of Order 37 of CPC are required to be noticed and the same are reproduced as under:-

[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 a copy of the plaint and annexures thereto and 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 summonses, 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 plaintiff's 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 plaintiff's 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. 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.

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by 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.]

7. From a perusal of the aforesaid provision it is manifest that once summons in respect of the suit filed in terms of Order 37 of the CPC in the prescribed form are served upon a defendant, the plaintiff has to serve upon him alongwith summons a copy of the plaint and annexures, whereafter the defendant can enter appearance at any time within ten days either in person or by a pleader. As per sub rule (4) of Rule 3, once defendant enters the appearance, the plaintiff has to serve on the defendant a summons for judgment in Form No.4-A in Appendix B 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 behalf there is no defence to the suit. Sub rule (5) of

Rule 3 provides that the defendant may at any time within ten days from

the service of summons for judgment, apply for leave to defend the suit and the leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court to be just.

8. From the fore going sequence provided in Rule 3 of Order 37 of CPC it is clear that a defendant is obliged to apply for the leave to defend only after he has been served with summons for judgment and he has to make such application within a period of ten days of service of summons for judgment. In the instant case, admittedly neither the respondent/plaintiff had applied for summons for judgment nor any summon for judgment had been issued by the trial Court for its service upon the defendant. Therefore, there was no occasion for the petitioner/defendant to apply for leave to defend in terms of sub rule (5) of Rule 3 of Order 37 of CPC. The provisions contained in Rule 3 of Order 37 of CPC are mandatory in nature and the same admit of no deviation. Therefore, the observation of the trial court that because the defendant had failed to apply for leave to defend as such plaintiff is entitled to judgment, is not in accordance with law.

9. The petitioner/defendant while applying for setting aside of judgment and decree had specifically contended in his application that summons for judgment was never served upon him. But the said contention has been brushed aside by learned trial court by observing that the petitioner had not filed address for service of notice upon him. In this regard it is to be noted that the address of the petitioner was available in the plaint itself and his counsel had also filed Vakalatnama before trial court. Therefore, it is not a case where address of the

petitioner was not available with the trial Court, nor is it a case where the petitioner had claimed that he was actually residing at a place different from the one recorded in the title of the plaint. The address of the defendant was available with the trial court and summon for judgment could have been served upon defendant on the said address. The approach adopted by trial court is, therefore, not in accordance with law.

10. For what has been discussed herein before, it is clear that the learned trial court has committed a grave illegality in declining to set aside the *ex parte* judgment and decree, because the petitioner had succeeded in showing to the trial Court that the provisions of sub rule (4) and (5) of Rule 3 of Order 37 of CPC have not been adhered to while passing the *ex parte* judgment and decree. The impugned order dated 15.06.2024 passed by learned trial Court is, therefore, not sustainable in law.

11. Accordingly, the petition is allowed and the impugned order dated 15.06.2024 passed by learned trial court is set aside. Consequently, the impugned *ex parte* judgment dated 29.04.2023 is also set aside. The parties are directed to appear before the trial Court on 22nd July, 2024 and the learned trial court shall proceed further in the matter in accordance with law.

(SANJAY DHAR)
JUDGE

SRINAGAR

03.07.2024

Sarveeda Nissar

Whether the order is speaking: Yes/No

Whether the order is reportable: Yes/No