

CASE NO.:
Appeal (civil) 230 of 2007

PETITIONER:
Ajay Bansal

RESPONDENT:
Anup Mehta & Ors

DATE OF JUDGMENT: 16/01/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T
(Arising out of SLP(C) No. 10166/2006)

S.B. Sinha, J.

Leave granted.

This appeal is directed against a judgment and order dated 30.01.2006 passed by a learned Single Judge of the High Court of Delhi whereby and whereunder an application filed under Article 227 of the Constitution of India filed by the respondents herein against a judgment and order dated 27.05.2005 passed by a learned Civil Judge, Karkardooma, Delhi was allowed.

Appellant herein filed a suit which was marked as Suit No. 303 of 2004 for recovery of a sum of Rs. 2,93,987/- with interest on account of dishonoured cheques. The said suit was filed in terms of Order XXXVII of the Code of Civil Procedure (Code). The respondents filed an application purported to be under Order XXXVII, Rule 3 (5) of the Code praying for grant of leave to defend the said suit. The learned Civil Judge refused to do so by an order dated 27.05.2005 opining:

"I am convinced with the plaintiff's contention that the defence as disclosed by defendant in their application is sham and illusory and in my considered opinion, the defendants are not entitled for leave to defend the present suit and the plaintiff is entitled to have the judgment signed. Accordingly, the application under Order 37, Rule 3(5) CPC of the defendants is devoid of any merits. The same is hereby dismissed. Application is disposed of accordingly."

On the said date itself, a final judgment and decree was passed for a sum of Rs. 2,83,987/- with interest at the rate of 12% thereon holding:

"4. It is contemplated under Order 37, Rule 3(5) CPC that if any application for leave to defend the suit has been made by the defendant and is refused, the plaintiff shall be entitled to judgment everywhere. Since the application under Order 37, Rule 3(5) CPC of the defendants has been dismissed as the defendants failed to raise any triable issue or disclose any defence in their

application, in my considered opinion, the plaintiff has become entitled to have the judgment signed. Accordingly, suit of the plaintiff is hereby decreed with cost plaintiff is entitled for a decree to recover a sum of Rs. 2,83,987/- from the defendants. However, since the plaintiff has failed to establish his claim of interest @ 18% per annum which he has claimed is the market rate for commercial transaction, I am inclined to award the interest at the prevailing rate only which is @ 12% per annum on the decretal amount from the date of institution of the present suit till realization. Decree sheet be prepared\005"

An application filed thereagainst by the respondents has been allowed by the impugned judgment. The appellant is, thus, before us.

The short contention raised by Mr. Jitender Sharma, learned senior counsel appearing on behalf of the appellant, is that keeping in view of the fact that an appeal was maintainable under Section 96 of the Code against the judgment and decree passed by the learned Civil Judge, the application under Article 227 of the Constitution of India was not maintainable.

The contention of Mr. V.L. Madan, learned counsel appearing on behalf of the respondents, on the other hand, is that the writ petition was maintainable as the respondents could not have been put to undue hardship of depositing the entire decretal amount in terms of Order XLI Rule 1 of the Code of Civil Procedure although it had made out a good case for obtaining leave to defend the suit.

Order XXXVII, Rule 3(5) of the Code reads, thus:

"(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."

A "decree" is defined under Section 2 (2) of the Code to mean:

""decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include

the rejection of a plaint and the determination of any question within section 144, but shall not include\027

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default."

A "judgment" is defined under Section 2(9) of the Code to mean "the statement given by the Judge on the grounds of a decree or order".

An order refusing to grant leave is a judgment within the meaning of Letters Patent of the Chartered High Courts. [See *Shah Babulal Khimji v. Jayaben D. Kania and Another*, (1981) 4 SCC 8]

A decree passed in a summary suit where leave to defend the suit has been refused is almost automatic. The consequence of passing a decree cannot be avoided.

Ordinarily, an application under Article 227 of the Constitution of India would not be maintainable where an appeal lies. An appeal lay from the decree under Section 96 of the Code. When an appeal could be filed, ordinarily, an application under Article 227 of the Constitution of India would not be entertained.

A decree passed subsequent to the refusal of leave to defend could either be under Order XXXVII Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and the documents produced or even based on oral evidence formally proving, say, the execution of a promissory note by the defendant. It may not be proper or necessary to apply the theory of "dependent order" in such circumstances. For one, the theory may not apply. Even if this Court were to set aside the order of the court below and give the defendant leave to defend the suit, the decree that is passed may not go automatically. It may have to be set aside. Secondly, the defendant can always go to the court which passed the decree and move under Rule 4 of Order XXXVII of the Code to reopen the decree.

The theory of "dependant order" may not apply in a case of this nature because even if this Court were to set aside the order refusing leave to defend, the decree subsequently passed may not fall by itself. It has still to be set aside either by resort to Order XXXVII Rule 4 or by way of an appeal, or by some other mode known to law. In a given case like the present one as it may not be proper to interfere with the decree merely because in an appeal against an order refusing leave to defend, this Court is inclined to take a different view. [See *V.S. Saini & Anr. v. D.C.M. Ltd.*, AIR 2004 Delhi 219.]

The defendant in such a case can also be left to appeal against the decree and therein challenge the order refusing leave to defend in terms of Section 105(1) of the Code.

A contentious issue, viz., maintainability of writ petition without challenging the decree has been raised. We, however, in this case, do not intend to go into the said issue, inter alia, for the reason that the learned Judge has not assigned any reason in support of the impugned judgment. It merely directed the respondents to deposit a sum of rupees two lakhs. We are informed at the bar that such deposit has been made. What remains to be deposited is, therefore, a sum of Rs. 83,987/-. We are further informed that certified copy of the impugned order has been filed. The certified copy of the judgment and decree may also be filed.

In the aforementioned situation, we are of the opinion that interest of justice would be met if we direct the writ petition to be converted into a first appeal. The respondents may file certified copy of the judgment and decree. Deficit court fee, if any, should also be paid by the respondents. Filing of

such certified copy and deposit of court fee, if any, must be completed within eight weeks from date. Indisputably, it would be open to the appellant to raise the contention that it was a fit case where the learned Civil Judge could have granted leave to defend the suit. All the contentions of the parties shall, however, remain open.

For the reasons aforementioned, the impugned judgment is set aside. This appeal is allowed with the aforementioned directions. No costs.

JUDIS