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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 22.12.2022

\+ **CS(COMM) 267/2021**

TRANSASIA PRIVATE CAPITAL LIMITED & ANR.

..... Plaintiffs

Through: Mr.Atul Shankar Mathur, Ms.Priya Singh, Mr.Shubhankar & Mr.Umang Katariya, Advs.

versus

PARMANAND AGARWAL & ORS.

..... Defendants

Through: Mr.Ayush Negi & Mr.Vivek Aggarwal, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. 22013/2022

1. This application has been filed by the defendant no.2 under Order XXXVII Rule 4 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'), praying for the setting aside of the Decree dated 26.11.2021 (wrongly mentioned as 27.04.2022 in the prayer of the said application) passed by this Court.

2. The present suit was filed by the plaintiff under Order XXXVII Rule 1 of the CPC, seeking recovery of Rs. 28,51,72,991/- alongwith interest from the defendants.

3. Summons in the suit were issued to the defendants vide order dated 02.06.2021. The defendant no.2 was duly served with the summons on 20.07.2021, however, did not enter appearance as required in Order XXXVII Rule 3 of the CPC.

4. Thereafter, the plaintiff filed the application, being I.A. 15447/2021, under Order XXXVII Rule 2(3) of the CPC on 14.11.2021, praying for passing of a Decree against the defendant nos.2, for his default in appearance. An advance copy of the application was duly served on the defendant no.2.

5. As the defendant nos. 2 and 3, despite receipt of summons, did not enter appearance, a Decree was passed against them on 26.11.2021.

6. The defendant no.2 has now filed the present application seeking recall of the said Decree. The only ground urged by the learned counsel for the defendant no.2 before this Court is that the plaintiff had not filed the original documents in support of its plaint.

7. Placing reliance on the judgments in ***Goyal MG Gases Ltd. v. Premium International Finance Ltd. & Ors.***, 2006 SCC OnLine Del 839 and ***Neebha Kapoor v. Jayantilal Khandwala & Ors.***, 2008 SCC OnLine Del 154, the learned counsel for the defendant submits that in absence of the documents in original, the Decree against the defendant no.2 could not have been passed.

8. On the other hand, the learned counsel for the plaintiff submits that the present suit was filed electronically. The 'Practice Directions for Electronic Filing (E-Filing) in the High Court of Delhi' (hereinafter referred to as the 'Practice Directions') provide that

scanned copy of the documents can be filed at the time of e-filing. The only obligation on the plaintiff is to keep the original documents preserved for production upon a direction in that regard being passed by the Court. He submits that therefore, no fault can be found in the decree having been passed without insisting upon the documents in original being produced, especially as the defendant no. 2 did not even care to enter appearance in the Suit.

9. He submits that in the present case, even otherwise, this Court would refuse to exercise its discretion to recall of the Decree dated 26.11.2021 against the defendant no.2, inasmuch as the defendant no.2 has failed to show any '*special circumstances'* warranting the recall of the Decree under Order XXXVII Rule 4 of the CPC. He submits that the case history on the website of this Court would show that on receipt of summons, the defendant no.2, instead of filing his appearance, filed a written statement on 11.09.2021. The said written statement never came on record. The plaintiff on 28.09.2021 then e-filed the original personal guarantees of defendant nos.1 and 2, which were duly served on the defendant no.2. The application under Order XXXVII Rule 2(3) of the CPC was also served on the defendant no.2. The case history would further reflect that some filing was done by the defendant no.2 on 18.11.2021, details whereof are not available with the plaintiff as they were not served on the plaintiff. Further filings were done by the defendant no.2 on 22.11.2021 and 23.11.2021, however, again without serving any advance copy thereof on the plaintiff. The defendant no.2 was, therefore, fully aware of the pendency of the suit and nature thereof, however, chose not to appear

before this Court or avail of the remedy as is available in law to him. Even till date, the plaintiff is not aware of the nature of filings that have been done by the defendant no.2 in the suit on 22.11.2021 or 23.11.2021. In fact, after passing of the Decree, the defendant no.2 appears to have filed a Review Petition on 04.02.2022; copy thereof was again not served on the plaintiff. The fate of this review is also not known. The plaintiff was then served with a copy of a purported appeal by the defendant no.2. The learned counsel for the plaintiff further submits that thereafter a Decree against the defendant no.1 was passed on 27.04.2022. It is only thereafter and now that the defendant no.2 has finally filed this present application. He submits that much less than showing any special circumstance warranting an indulgence of this Court, in fact, the conduct of the defendant no.2 would show that the defendant no.2 is merely abusing the process of this Court. In support, he places reliance on:-

(i) ***Rajni Kumar v. Suresh Kumar Malhotra & Anr.,*** *(2003) 5 SCC 315;*

(ii) ***TVC Skyshop Ltd. v. Reliance Communication and Infrastructure Ltd.,*** *(2013) 11 SCC 754;*and

(iii) ***National Small Industries Corp. Ltd. v. Myson Electronics P. Ltd. & Ors.,*** *2016 SCC OnLine Del 4937*

10. The learned counsel for the defendant no.2 admits the fact of filing above pleadings as also that an appeal was filed, however, is lying in defects.

11. I have considered the submissions made by the learned counsels for the parties. Order XXXVII Rule 4 of the CPC is reproduced hereinunder: -

> *"**4. Power to set aside decree.**- After decree the Court may, under special circumstances set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."*

12. It is only where 'special circumstances' are shown by the defendant for setting aside the Decree that the Court may, if necessary, stay or set aside execution of the Decree, and grant leave to the defendant to appear to the summons and to defend the suit. In ***Rajni Kumar*** (supra), the Supreme Court explained the limited expanse of the power of a court to recall the decree under Order XXXVII Rule 4 CPC, as under:-

> *"**9**. The expression "special circumstances" is not defined in the Civil Procedure Code nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extraordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37 Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extraordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to*

post-decree matters, namely, staying or setting aside the execution and also in regard to pre-decree matters viz. to give leave to the defendant to appear to the summons and to defend the suit.

***10**. In considering an application to set aside ex parte decree, it is necessary to bear in mind the distinction between suits instituted in the ordinary manner and suits filed under Order 37 CPC. Rule 7 of Order 37 says that except as provided thereunder the procedure in suits under Order 37 shall be the same as the procedure in suits instituted in the ordinary manner. Rule 4 of Order 37 specifically provides for setting aside decree, therefore, provisions of Rule 13 of Order 9 will not apply to a suit filed under Order 37. In a suit filed in the ordinary manner a defendant has the right to contest the suit as a matter of course. Nonetheless, he may be declared ex parte if he does not appear in response to summons, or after entering appearance before framing issues; or during or after trial. Though addressing arguments is part of trial, one can loosely say that a defendant who remains absent at the stage of argument, is declared ex parte after the trial. In an application under Order 9 Rule 11, if a defendant is set ex parte and that order is set aside, he would be entitled to participate in the proceedings from the stage he was set ex parte. But an application under Order 9 Rule 13 could be filed on any of the grounds mentioned thereunder only after a decree is passed ex parte against the defendant. If the court is satisfied that (1) summons was not duly served, or (2) he was prevented by sufficient cause from appearing when the suit was called for hearing, it has to make an order setting aside the decree against him on such terms as to cost or payment into court or otherwise as it thinks fit and thereafter on the day fixed for hearing by court, the suit would proceed as if no ex parte decree had been passed. But in a suit under Order 37, the procedure for appearance*

of the defendant is governed by provisions of Rule 3 thereof. A defendant is not entitled to defend the suit unless he enters appearance within ten days of service of summons either in person or by a pleader and files in court an address for service of notices on him. In default of his entering an appearance, the plaintiff becomes entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, up to the date of the decree together with costs. The plaintiff will also be entitled to judgment in terms of sub-rule (6) of Rule 3. If the defendant enters an appearance, the plaintiff is required to serve on the defendant a summons for judgment in the prescribed form. Within ten days from the service of such summons for judgment, the defendant may seek leave of the court to defend the suit, which will be granted on disclosing such facts as may be deemed sufficient to entitle him to defend and such leave may be granted to him either unconditionally or on such terms as the court may deem fit. Normally the court will not refuse leave unless the court is satisfied that facts disclosed by the defendant do not indicate substantial defence or that defence intended to be put up is frivolous or vexatious. Where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, no leave to defend the suit can be granted unless the admitted amount is deposited by him in court. Inasmuch as Order 37 does not speak of the procedure when leave to defend the suit is granted, the procedure applicable to suits instituted in the ordinary manner, will apply.

11. *It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to*

> *ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the court to grant leave to the defendant to appear to summons and defend the suit if the court considers it reasonable so to do, on such terms as the court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the court, all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the court is empowered to grant leave to the defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9."*

13. Applying the above yardstick to the facts of the present case, it is to be noted that the defendant no.2 was well aware of the pendency of the present suit, having been duly served with the summons of the suit. In fact, as contended by the learned counsel for the plaintiff and not denied by the learned counsel for the defendant no.2, various steps were taken by the defendant no.2, though not in accordance with law, by filing certain pleadings in the suit. The defendant no.2 merely filed these pleadings without even bothering to have them listed before this

Court. No explanation has been given by the defendant no. 2 for not having these pleadings listed before court or entering appearance in Court in response to the Summons or filing the application under Order XXXVII Rule 4 of the CPC at an earlier stage. The defendant no.2 also did not enter appearance in the suit before this Court, not only till when the Decree was passed against him, but even thereafter when the Decree was passed against the defendant no.1, and even thereafter, till the date of the filing of the present application. By his very conduct, the defendant no.2, therefore, is disentitled from any relief from this Court. The defendant no. 2 has been unable to show any 'special circumstance' for recalling the decree.

14. On the submission of the learned counsel for the defendant no.2, that in absence of the original documents being filed by the plaintiff, the Decree could not have been passed in favour of the plaintiff, I again find no merit. While there can be no dispute that even in absence of the defendants to enter appearance, the Decree in a Summary Suit may not be automatic and the Court must consider the claim of the plaintiff on merit, at the same time, keeping in view the position of the Rules of this Court, insistence on filing of the original documents by the plaintiff cannot be insisted upon.

15. In this regard, I may refer to Rule 1 of Chapter 4 of the Delhi High Court (Original Side) Rules, 2018, which states that all plaints are to be accompanied with documents, either in original or copies thereof. The Practice Directions also state in Clause 6.1 thereof that scanned copies of the same are to be filed, and that the party filing the same must preserve the original of the documents for production

before the Court on being so directed at any time. Therefore, the Rules do not any longer require the plaintiff to file documents in originals along with the plaint.

16. In view thereof, the plea of the defendant no.2 that the suit could not have been decreed in favour of the plaintiff in absence of the original documents being filed cannot be accepted.

17. At this stage, the learned counsel for the defendant no.2 submits that even in accordance with Clause 4 read with Clause 6.1 of the Practice Directions, the documents had to be digitally signed by counsel for the plaintiff or the plaintiff itself, and in absence thereof, again the documents could not have been considered by this Court.

18. I am not impressed with the said argument inasmuch as there was and still is no dispute raised by the defendants on the documents that have been filed by the plaintiff along with the suit. The requirement of digitally signing the documents is a matter of procedure, and, therefore, could have been remedied had the defendant no.2 entered appearance and contested the suit. It is now too late in the day for the defendant no.2 to be allowed to take benefit of such technical objections.

19. Accordingly, I find no merit in the present application. The same is dismissed.

NAVIN CHAWLA, J

DECEMBER 22, 2022/*rv*