



GAHC010178352022

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/210/2022

PROKASH DATTA
S/O SRI PRABIN DATTA, R/O HOUSE NO. 10, RUKMINI NAGAR MAIN
ROAD, GUWAHATI-781006, HAVING HIS PLACE OF BUSINESS AT M/S
CLEANOPOLIS ENERGY SYSTEMS INDIA PVT. LTD., BARPAKHIAJHAR,
VILL-DIPOTA, DIST-SONITPUR, ASSAM, PIN-784150

VERSUS

PRANJIT AGARWALA
S/O LATE DEBABRATA AGARWALA, R/O FLAT NO. 102, PARTHA ENCLAVE,
BELTOLA WIRELESS, GUWAHATI, KAMRUP (M), ASSAM-781006

Advocate for the Petitioner : MR. M K DAS
Advocate for the Respondent : MR. B PATHAK

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

Date of hearing : 29.3.2023
Date of Judgment : 26.4.2023

JUDGMENT AND ORDER(ORAL)

1. Heard Mr. A. R. Borooah learned counsel for the petitioner and Mr. B. Pathak, learned counsel for the sole respondent.
2. The present application is filed assailing an order dated 29.10.2021 passed by



the learned Civil Judge No.1, Kamrup (M) in Misc. (J) Case No.453 /2020 arising out of Money Execution Case No.36/2018.

3. The background facts:

- I. The respondent as plaintiff instituted a suit being Summary Suit No. 334/17 in the court of Civil Judge, No.1 Kamrup (M) at Guwahati for recovery of an amount of Rs 15 lacs with interest and the cost of the suit. The present petitioner is arrayed as sole defendant in the said suit.
- II. Thereafter, the learned trial court issued summons to the petitioner and the learned trial court satisfied that summons have duly been served upon the defendant /present petitioner on 28.12.2017.
- III. As none did appear for the defendant, the learned trial court on 12.2.2018, fixed the suit for judgment on 17.3.2018. Thereafter, ex parte judgment was delivered on 23.5.2018 and decreed the suit in favour of the plaintiff.
- IV. Subsequently, the petitioner herein filed an application under Order 37 Rule 4 of the CPC which was registered as Misc (J) No.453/2020 with a prayer to set aside the ex parte judgment and decree dated 23.5.2018. As there was delay in preferring such application under Order 37 Rule 4 of the CPC, another application was filed for condonation of delay which was registered as Misc (J) Case No. 206/2009 and the learned court below condoned such delay under its order dated 11.2.2020.
- V. The plaintiff / respondent filed an objection in the aforesaid

application filed by the petitioner inter alia contending that the applicant has failed to show and plead any substantial defence that he is likely to succeed in the petition filed under Order 37 Rule 4 of the CPC and therefore in view of absence of such pleadings the application filed by the Judgment debtor was liable to be dismissed.

VI. In support of such contention the decree holder /respondent relied on the judgment of the Hon'ble Apex Court in the case of **Rajni Kumar Vs. Suresh Kumar Malhotra and Another** reported in **(2003) 5 SCC 315**.

VII. The learned court below after considering the materials dismissed the petition filed under Order 37 Rule 4 of CPC on the ground that the judgment debtor has not been able to show any substantial defence in his favour or raised any issues which may be triable issues in the petition.

VIII. Being aggrieved the present application is filed.

4. Submission on behalf of the petitioner:

Learned counsel Mr. Borooah, appearing for the petitioner has advanced the following arguments:

I. The ratio laid down in the case of Rajni Kumar(supra) is not applicable in the given facts of the present case inasmuch as the provision of Order 37 Rule 4 of the CPC is not couched in the mandatory form and an applicant shall have liberty to file separate application for setting aside the decree, for stay or setting aside the execution and for grant of leave to defendant to defend and therefore such applications can be determined at

different stages.

II. Relying on the judgment of Hon'ble Apex Court in the case of ***Mahesh Kumar Joshi Vs Madan Singh Negi*** reported in ***AIR 2015 (SC) 974***, the learned counsel contends that the provision under Order 37 Rule 3 is a stringent provision and therefore Court is to balance the equities and to safeguard the interest of both the plaintiffs and the defendants, such decree can be vacated by putting certain conditions. In this regard Mr. Borooah, learned counsel submits that this court while issuing notice under its order dated 7.9.2022 stayed the execution proceeding subject to furnishing of indemnity bond by the petitioner before the executing court and same has duly been submitted before the executing court. Therefore, in that view of the matter, this matter should be remanded back to the learned trial court below for deciding the matter afresh with a liberty to the petitioner to file another application seeking leave to defend.

5. Submission on behalf of the respondent:

Per contra, Mr B. Pathak, learned counsel for the respondent relying on the judgment of the Hon'ble Apex Court in ***Rajni Kumar*** (supra) contends that it is by now well settled that it is not enough for the defendant judgment debtor to plead special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise facts which should entitle him to leave to defend the suit in this respect and it is also well settled that Rule 4 of Order 37 of CPC is different from Rule 13 of Order 9 of the CPC. Therefore, in view of such mandate, the learned court below has rightly rejected the application of the petitioner inasmuch as there is no whisper

whatsoever in the shape of pleading which shows that the judgment debtor petitioner was prevented from appearing or applying for the leave to defend.

6. Finding and determination:

- I. This court has given anxious consideration to the arguments advanced by the learned counsel for the parties and also perused the materials available on record. The petition for vacating ex-parte judgement and decree has been rejected on the ground that no prayer for grant of leave to defend has been sought nor such ground has been shown which prevented the petitioner from appearing in the Court and in terms of **Rajni kumar** (Supra), a joint application ought to have been filed.
- II. The ratio as laid down in the case of **Rajni Kumar(supra)** can be summarised as follows:
 - A. Rule 4 of Order 37 of the CPC, 1908 empowers the court to grant any one of the following reliefs:
 - i) To stay or set aside execution, and
 - ii) To give leave to the defendant to appear to the summons and
 - iii) To defend the suit.
 - B. The special circumstances in ordinary dictionary meaning connotes something exceptional in character, extraordinary, significant and uncommon.
 - C. Non-service of summons will undoubtedly be a special circumstance. The issue of special circumstances is to be

determined in the given facts and circumstances of each case. As Rule 4 of Order 37 specifically provides for setting aside decree, provision of Rule 13 of Order 9 will not apply to a suit filed under Order 37 of the CPC, 1908.

- D. Normally the court will not refuse leave unless the court is satisfied that the facts disclosed by the defendant do not indicate substantial defence or defence intended to be put up is frivolous or vexatious.
- E. Rule 4 of Order 37 of the CPC, 1908 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.
- F. If on an application more than one, among the specified reliefs may be granted, such reliefs should be claimed in one application.
- G. It is in the spirit of the provision of Rule 4 of Order 37 of the CPC, 1908 to file separate application. Therefore it is not enough for the defendant to show special circumstances, it is also to be shown by affidavit or otherwise entitling him to leave to defend.
- H. Thus, from the aforesaid it is clear that the Hon'ble Apex Court in **Rajni Kumar** (supra) at paragraph 8 held that Rule 4 of Order 37 empowers the court to grant multiple reliefs i.e. to set aside the decree and if necessary stay or set aside the execution or and grant leave and to defend

the suit. It is also the ratio that spirit of Order 37 Rule 4 of the CPC 1908 requires filing of application in one go.

- III. Thus, from the aforesaid, it is clear that the spirit as discussed and held by the Hon'ble Apex Court in **Rajni Kumar(supra)** relates to procedural aspect of Order 37 Rule 4 of CPC i.e. filing of joint application together, as the court is empowered to grant different reliefs in an application under Rule 4 of Order 37 of the CPC. Basically Order 37 Rule 4 of the CPC is procedure which empowers the court to grant certain reliefs and as held in **Rajni Kumar(supra)** to grant one or all of the reliefs.
- IV. In the case of **State of Punjab Vs Shamlal Murari and Another** reported in **AIR 1976 (SC) 1173**, Hon'ble Apex Court while dealing with the aspect of procedural law held that a court must always remember that procedural law is not to be a tyrant but to be a servant, not an obstruction but an aid to justice. Similar view was taken by the Hon'ble Apex Court in the case of **Rani Kusum Vs Smti Kanchan Devi** reported in **AIR 2005 (SC) 3304**.
- V. While dealing with the provision of Order 8 Rule 1 of the CPC, 1908 in **Kailash Vs. Nanhku reported in AIR 2005 SC 2441** the Hon'ble Apex court came to a conclusion that non-granting of extension of time to file written statement may amount to failure of justice. It further went on to hold that the object of procedural rule is not to promote failure of justice and procedural rules deserved to be laid down to mean that where sufficient cause exist or events are beyond the control of party, the court would have

inherent power to extend the time to file written statement.

- VI. In view of the aforesaid settled proposition of law, now let us consider the procedure as mandated under Rule 4 of Order 37 of the CPC, 1908 and whether in view of the decision of **Rajni Kumar** (supra) the courts are not at all empowered to deal separately the issue of setting aside the decree, or staying the execution or grant of leave to defend under the aforesaid provision.
- VII. In the case of **Rajni Kumar** (supra) the Hon'ble Apex Court without any ambiguity held that non-service of summon will undoubtedly be a special circumstance so far that relates to Order 37 of the CPC. In the case in hand, the petitioner also contends non service of summon. Whether, the summon was duly served or not is required to be decided for vacating the ex parte judgement and decree.
- VIII. Again, the Hon'ble Apex Court in **Rajni Kumar**(supra) also observed that normally Court will not refuse leave unless the court is satisfied that no substantial defence is there or that such defence is frivolous or vexatious .
- IX. As held in the aforesaid judgment and as it discernible from the provision of Order 37 Rule 4 of the CPC, the court is empowered to vacate ex parte order, grant leave to defend the suit or to stay or set aside execution. Such power can be exercised only when proper applications with such prayer are made.
- X. The Hon'ble Apex Court in **Rajni Kumar** (supra) held that when on an application multiple reliefs can be granted, such relief

should be claimed in one application. Thus, the filing of application praying for relief jointly and filing separate applications at different stages, ultimately relates to a procedure of filing applications under order 37 Rule 4 of the CPC.

XI. At the same time, the procedure under summary suit are stringent in nature and are exception to the general procedure of defence as provided in defending other suits under the Code. To defend a suit in either of the case is a valuable right and such valuable right should not be rejected on technicality inasmuch as the Hon'ble Apex Court time and again held that procedure is handmaid of justice. Therefore, in the considered opinion of this court reading as a whole the decision of Hon'ble Apex Court in **Rajni Kumar(supra)** will invariably lead to a conclusion that the hon'ble Apex Court while holding that when multiple prayers/application can be dealt with by court, that the same should be filed in one application, is not mandatory as the same relates to procedural aspect of dealing with an application filed.

XII. In the case in hand, the application of the petitioner has been dismissed only on the ground that the reliefs were not sought jointly and the Hon'ble Apex Court in the case of **Rajni Kumar** (supra) held that relief cannot be granted when all the reliefs are not sought for in one application.

XIII. In view of the discussions made hereinabove, this Court is of the considered opinion that the Hon'ble Apex Court in **Rajni Kumar(supra)** has not made an absolute bar that the courts are not at all empowered to deal separately the issue of setting aside the

decree, or stay of the execution or grant of leave to defend under the provision of Order 37 Rule 4 of the CPC inasmuch if the aforesaid judgment is interpreted in that way, procedure will overtake substantive right. At the same time the Hon'ble Apex Court in **Rajni**, in no unambiguous term held that the special circumstances are to be determined in the given facts and circumstances of each case.

XIV. Further, in the considered opinion of this Court, the spirit of Order 37 R.4 is to advance cause of justice and not to defeat it. Therefore, such rule/procedure is required to be interpreted, which promotes justice and prevents miscarriage of justice, as held in **Zolba Vs Keshao**, reported in **AIR 2008 SC 2099**. Therefore this court is of the considered opinion that the ends of justice would be met and failure of justice can be avoided, if an opportunity is given to the petitioner to file a fresh application claiming all the reliefs as provided under Order 37 Rule 4 of the CPC, 1908.

XV. This court is of the considered opinion that such opportunity given to the petitioner shall also not prejudice the respondent, as the respondent shall have a chance to file objection to such application.

7. Direction:

i. In view of the above, the impugned order dated 29.10.2021 is set aside and quashed and the petitioner is given a liberty to file a fresh application as discussed hereinabove. Such application shall be filed within a period of **20 (twenty)** days from today. In the event of filing such application within the stipulated



period, the plaintiff respondent be given a reasonable time to file objection and thereafter the learned court below shall determine the issues afresh. If, such application is not filed within the period as stipulated above, the impugned order set aside shall revive, without further reference to this Court.

8. While parting with the record, it is made clear that this court has not expressed any opinion on the merit of the claim of either of the parties. Therefore, such application shall be dealt with by the learned court below without being influenced by any of the observations made by this court in this order touching the merit of the claim of the parties.

9. With the aforesaid reason, discussion and direction the present revision petition stands allowed, however the parties to bear their own cost.

JUDGE

Comparing Assistant