

CS 84/23

MEHBOOB ALI Vs. SHAKIR

06.08.2024

Pr.: Sh. Suhail Azhar, Counsel for the plaintiff.

This suit is fixed today for order on maintainability of suit under Order XXXVII CPC, as the defendant had earlier taken an objection that since the plaintiff is claiming pre-instituted interest along with the cheque amount, the suit is not maintainable under Order XXXVII CPC.

Brief facts of the case are that plaintiff has filed the present suit under Order XXXVII CPC for recovery of Rs.32,24,000/-which includes principal amount of cheque for an amount of Rs.26,00,000/- + interest @ 24% per annum i.e. Rs.6,24,000/-. Summons of the suit in the prescribed format under Order XXXVII CPC were sent to the defendant. In order dated 29.03.2023, it is recorded that summons sent to the defendant at Delhi address received back with the report that a lady Rubi met the process server at the given address and told that the defendant is admitted in the hospital with brain tumor. Ld. Counsel for the plaintiff had filed receipt of registered post and submitted that summons were sent at both address of the defendant by registered post. Thus, my Ld. Predecessor vide his order dated 29.03.2023 considered that it was a proper service on the defendant, as per report of process server dated 14.03.2023. He also observed as under:-

“As per Order XXXVII Rule 3 CPC, defendant within 10 days of such service is required to enter an appearance either in person or by pleader. As per Order XXXVII Rule 2(3) CPC, in default by the defendant in entering the appearance, the plaintiff is held entitled to a decree for any sum, no exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, to the date of decree.”

Ld. Counsel for the plaintiff filed copy of cheque involved in this case on 29.03.2023 and seeks time to file certified copy of the same on next date of hearing.

Thereafter, Ld. Counsel for the defendant filed application under Order XXXVII Rule 3(1) CPC for entering appearance and application under Order XXXVII Rule 3(7) CPC for seeking condonation of delay in filing appearance on 19.04.2023. Reply to these applications was filed on behalf of plaintiff on 06.07.2023. Thereafter, on 11.08.2023, Ld. Counsel for the defendant raised an objection that since the plaintiff is claiming pre-instituted interest along with the cheque amount, the suit is not maintainable under Order XXXVII CPC and matter was fixed for arguments on maintainability of present suit under Order XXXVII CPC. On 31.10.2023, Ld. Counsel for the plaintiff filed an application under Order XXII Rule 4 r/w Section 151 CPC stating that the defendant had expired on 14.10.2023. Notice of application was ordered to be issued to LRs of deceased defendant. Memo of appearance has been filed on record on behalf of LRs of deceased defendant. However, inadvertently without disposing application under Order XXII Rule 4 CPC, LRs of defendant were proceeded exparte on 04.04.2024, as they absented themselves on that day.

After considering the facts, as mentioned above, it appears that inadvertently case has been listed today for order on maintainability of the suit under Order XXXVII CPC. Once the defendant has expired, an application under Order XXII Rule 4 CPC was filed by the plaintiff for bringing on record LRs of the

defendant and notice was served on LRs of defendant, the only option available to the Court was to decide application either in the presence of LRs of the defendant or in their absence, if they chose not to appear in the Court. Therefore, I am of the opinion that by order dated 04.04.2024, application under Order XXII Rule 4 CPC should have been allowed and LRs of the defendant should have been brought on record. **The said application under Order XXII Rule 4 CPC now stands allowed and amended memo of parties is taken on record.**

Since earlier suit was filed under Order XXXVII CPC, which provides for summary procedure, but as the defendant has expired and his LRs have been brought on record, I am of the opinion that this suit should be treated as an '**Ordinary suit**' for recovery.

Let summons of the suit be issued to LRs of defendant on filing of PF/RC and through all other permissible modes, returnable for **13.09.2024**.

(Shail Jain)
Principal District & Sessions Judge,
East District, KKD Courts, Delhi.
06.08.2024 (mk)