

06

Final hearing

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CFA No. 114/2008

Farooq Ahmad Dar

..... Appellant (s)

Through: Mr. Z A Qureshi, Sr. Adv.
with Ms. Rehana, Adv.

V/s

Ghulam Nabi Dar

..... Respondent(s)

Through: None.

Coram:

Hon'ble Mr. Justice Sanjay Dhar, Judge.

JUDGMENT(Oral)

23.11.2023

1. This appeal is directed against the judgment and decree dated 13.10.2008 passed by learned 2nd Additional District Judge, Srinagar whereby suit filed by the respondent for recovering an amount of Rs. 2.75 lacs under Order 37 of Code of Civil Procedure has been decreed against the appellant.
2. A perusal of the minutes of the proceedings reveals that nobody has been appearing on behalf of the respondent/plaintiff in this case for last several years. It seems that the respondent/plaintiff has lost interest in defending this appeal. Therefore, the respondent is set *exparte*.

3. Heard learned Senior Counsel for the appellant and perused the impugned judgment/decreed, grounds of the appeal and the trial court record.
4. It appears that respondent had filed a suit under Order 37 of CPC before the trial court seeking recovery of amount of Rs. 2.75 lacs along with interest from the appellant/defendant. The suit was based upon cheques dated 10.03.2007, 04.03.2007 and 05.03.2007 for amount of Rs. 5000/-, Rs. 1.00/- lacs and Rs. 1.70 lacs respectively that were allegedly issued by the defendant/appellant in favour of the plaintiff/respondent but were returned unpaid upon presentation for encashment with the banker.
5. Record of the trial court reveals that the suit was presented on 08.05.2008 and summons under prescribed proforma were directed to be issued. Pursuant to the service of the summons upon the appellant/defendant on 10.05.2008, he filed memo of appearance before the trial court. After appearance of the appellant/defendant before the trial court on 30.05.2008, respondent/plaintiff filed an application for serving upon the appellant/defendant summons for judgment in terms of Order 37 Rule 3(4) of the Code of Civil Procedure. The trial court issued the summons for judgment on the same date. As per the report of the Process Server, the appellant/defendant, who was residing in a Hotel at Srinagar at

relevant time, his room was found locked and the owner of the Hotel informed the Process Server that the appellant had gone out to Delhi. It was further conveyed by the owner of the Hotel to the process server, that as and when the defendant comes back, he would inform him and provide him photocopy of the summons.

6. It appears that the appellant/defendant filed an application for leave to defend before the trial court on 23.06.2008. Minutes of the trial court reveals that after filing of the application for leave to defend by the appellant, some negotiations for settlement were going on between the parties but ultimately the learned trial court on 13.10.2008 passed the impugned judgment and decree holding that the appellant had filed application for leave to defend in terms of Sub Rule (5) of Rule 3 of the Order 37 of Code of Civil Procedure beyond the stipulated period of 10 days and accordingly leave to defend the suit was refused to the appellant and a decree for an amount of Rs. 2.75 lacs along with interest @ 9% per annum was passed in favour of the plaintiff/respondent.
7. The only question that falls for determination in this case is as to whether the service of the summons for judgment upon the appellant has been effected properly and if so, on which date it has been effected upon him. As already indicated the summons for judgment was issued by the trial court on 30.05.2008 on the basis of

application made by defendant/appellant under Sub Rule (4) of Rule 3 of Order 37 of CPC. In order to find an answer to the question, the report of the Process Server on the summons for judgment has assumed great significance. As per the said report the appellant/defendant who at the relevant time was residing in a Hotel at Srinagar was not found there and his room was found locked. As per the report of the Process Server, when he went to the Hotel on 06.06.2008, he was told by the owner of the Hotel that the respondent/plaintiff had proceeded to Delhi. The Process Server handed over a copy of the summons to the owner of the Hotel who conveyed to him that whenever the respondent/plaintiff comes back from Delhi, he will provide to him a copy of the summons.

8. So far as the service of summon upon defendant is concerned, the provisions contained in Rule 9 to 30 of Order 5 of the CPC govern this subject. Rule 9 of the Order 5 provides that summon has to be served upon the defendant or his subordinates. As per Rule 10, service of summon has to be made by delivering or tendering copy thereof to the defendant. Rule 12 provides that service of the summons has to be effected on the defendant in person or his agent empowered to accept the summon. Rule 15 provides that when defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and

there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of summons on his behalf, service can be made on any adult member of the family whether male or female who is residing with him. Rule 17 provides the procedure when the defendant refuses to accept service or cannot be found. It provides that in such an eventuality the serving officer has to affix a copy of the same on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business.

9. From a perusal of the aforesaid provisions contained in Order 5 CPC, it is clear that summons have to be served upon the defendant in person or it has to be tendered to him/her through an agent duly empowered to accept the summons on his/her behalf. Procedure for service of summons in a case where the defendant cannot be found at the given address is also provided in Rule 15, according to which the service of summons in such cases, has to be effected upon any adult member of the family who is residing with the defendant that too in a case where there is no likelihood of defendant being found in his residence within a reasonable time.

10. In the instant case, the defendant was residing as a guest in a Hotel at Srinagar. It is nobody's case that the owner was empowered to accept summons on behalf of the defendant. It is also not a case

where the owner of the Hotel was in any manner related to the appellant. The report of the process server does not suggest that there was no likelihood of appellant returning from Delhi within a reasonable time. Therefore, acceptance of summons by owner of the Hotel can by no stretch of imagination be termed as proper service of summons upon the appellant/defendant. In the instant case, the procedure prescribed under Order 5 of CPC has not been adhered to. Therefore, it cannot be stated that summons for judgment has been properly served upon the defendant.

11. Once it is held that there was no proper service of summons for judgment upon the appellant/defendant, the finding of the trial court that the defendant did not apply for leave to defend within stipulated period of 10 days from the date of service, is unsustainable in law. In the instant case, the service of summons for judgment upon the defendant is not proper as the same is *dehors* the procedure prescribed under Order 5 of the CPC. Therefore, the inference drawn by the learned trial court that the defendant was served on 06.06.2008 is based upon no material.

12. The only ground on which the learned trial court has refused to grant leave to defend to the appellant is that he had not filed the application within stipulated period of 10 days from service of

summons for judgment upon him. Having held that the summons for judgment was not served upon the appellant properly, the very basis of the impugned judgment and decree passed by the learned trial court gets knocked down.

13. For the foregoing reasons, the appeal is allowed and the impugned judgment and decree passed by the learned trial court is set aside. The case is remanded to the learned trial court with a direction to consider and decide the application of the appellant for leave to defend on its merits after affording opportunity of hearing to both the parties.

14. Copy of the judgment along with the record of the trial court be sent to the learned trial court with a direction to proceed further in the matter in accordance with law.

(Sanjay Dhar)
Judge

SRINAGAR
23.11.2023
Aasif

Whether the order is speaking Yes/No

Whether the order is reportable Yes/No