

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

CM(M) No.19/2023

MOHD. MAQBOOL MIR

...PETITIONER(S)

Through: Mr. I. Sofi, Advocate.

Vs.

GH. MOHAMMAD PAHLOO & ANR.

...RESPONDENT(S)

Through: Mr. Vaseem Aslam, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

ORDER(ORAL)

16.05.2025

1. The petitioner has filed the present petition to challenge order dated 04.02.2023 passed by the learned Sub Judge, Bandipora, vide which an application filed by the petitioner seeking setting aside of the execution proceedings before the said Court has been dismissed.

2. The facts emanating from the pleadings of the parties are that the respondent/plaintiff filed a suit under Order 37 CPC against the petitioner/defendant before the Court of learned Sub Judge, Bandipora (hereinafter referred to as "the trial court"). In the said suit, the petitioner/defendant did not put in his appearance, whereafter the trial court passed an exparte judgment and decree dated 08.11.2021, whereby the respondent/plaintiff was held entitled to

recover a sum of Rs.50,000/ from the petitioner/defendant along with interest and litigation charges of Rs.10,000/.

3. It seems that the petitioner/defendant filed an application under Order 37 Rule 4 of the CPC seeking setting aside of exparte judgment and decree dated 08.11.2021 before the trial court. It also appears that another application came to be filed by the petitioner/defendant seeking setting aside of the execution of judgment and decree dated 08.11.2021. The learned trial court, vide impugned order dated 04.02.2023, has dismissed the aforesaid application of the petitioner/defendant seeking setting aside of the execution proceedings.

4. The petitioner has challenged the impugned order passed by the trial court on the grounds that summons in the main suit was not issued by the trial court in the proforma prescribed in Order 37 Rule 2 CPC in Form-4 Appendix-B. It has been further submitted that even the copy of the plaint was not annexed with the summons, as such, service of the petitioner/defendant in the main suit has not been effected in accordance with the provisions contained in Order 37 of CPC. It is being contended that the learned trial court, while rejecting the application of the petitioner, has not adverted to this aspect of the matter.

Thus, according to the petitioner, the learned trial court has failed to exercise its jurisdiction, as a result of which the impugned order is rendered illegal.

5. Heard and considered.

6. The record of the trial court reveals that even though the respondent/plaintiff had filed the suit for recovery against the petitioner/defendant by styling it as suit under Order 37 CPC, yet the procedure that was adopted by the learned trial court does not conform to the provisions contained in Order 37 CPC. It appears from the perusal of the trial court record that the summons was not issued to the defendant in the prescribed proforma i.e. Form-4 Appendix-B. Besides this, the learned trial court, after holding that despite service of summons upon the defendant, he has failed to appear before the court, has not proceeded against the defendant in terms of sub-rule (3) of Rule 2 of Order 37 of the CPC, in terms whereof, if the defendant fails to enter his appearance, the allegations in the plaint are deemed to be admitted and the plaintiff becomes entitled to a decree. Instead of adopting this procedure, the learned trial court has proceeded *exparte* against the defendant and called upon the plaintiff/respondent to lead evidence in *exparte*. In fact, the plaintiff, besides examining himself as witness, has also

examined one more witness and filed affidavit by way of evidence of another witness to support the assertions made in the plaint. On the basis of exparte evidence led by the plaintiff, the exparte judgment and decree came to be passed by the learned trial court on 08.11.2021.

7. The aforesaid sequence of events clearly goes on to show that the learned trial court has tried the suit of the plaintiff by adopting ordinary procedure instead of adopting the special procedure prescribed under Order 37 of the CPC. In the face of this position, the argument that summons issued to him was not in the prescribed proforma, is not available to the petitioner. The only course open to the petitioner in these circumstances was to either file an appeal against the exparte judgment and decree or to file an application under Order 9 Rule 13 CPC before the trial court. Instead of doing so, the petitioner has filed an application under Order 37 Rule 4 CPC before the trial court and along with said application, he has filed an application seeking setting aside of the execution proceedings, which has been dismissed in terms of the impugned order.

8. The ground urged by the petitioner for challenging the impugned order, as already stated, is not available to him. Although the learned trial court has, while dismissing the

application of the petitioner, assigned different reasons, which, perhaps were not available to the learned trial court, yet the fact of the matter remains that the contention of the petitioner for challenging the exparte judgment and decree is specious and, as such, the conclusion arrived at by the learned trial court while dismissing the application of the petitioner cannot be interfered with.

9. In view of the above, there is no ground either to stay or to quash the execution proceedings initiated by the trial court against the petitioner because the petitioner has not availed the proper remedy for challenging the exparte judgment and decree which is sought to be executed.

10. The petition lacks merit and is dismissed accordingly, leaving it open to the petitioner to avail appropriate remedy against the exparte judgment and decree.

11. Copy of this order be sent to the learned trial court for information.

(Sanjay Dhar)
Judge

Srinagar
16.05.2025
“Bhat Altaf-Secy”

Whether the order is reportable: Yes/No