

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

RFA No.88/2024

**Reserved On: 12.02.2025
Pronounced On :21.02.2025**

AHSAN AHMAD MALIK **...APPELLANT(S)**

Through: Mr. Zahid Hussain,
Advocate.

Vs.

BASHARAT FEROZ **...RESPONDENT(S)**
GANIE Through: Mr. T. A. Lone,
Advocate

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

JUDGMENT

1. Through the medium of present appeal, the appellant has challenged judgment and decree dated 16.03.2023 passed by the Court of learned Additional District Judge, Pulwama, in a suit filed by respondent against the appellant. By virtue of the impugned judgment and decree, the respondent/plaintiff has been held entitled to recovery of an amount of Rs.7,32,000/ along with interest @6% per annum from the appellant/defendant in a suit filed by the respondent against the appellant under Order 37 of Civil Procedure Code.

2. It appears that the respondent/plaintiff had filed a suit for recovery of an amount of Rs.7,32,000/ against the appellant/defendant by invoking the provisions contained in Order 37 of the Code of Civil Procedure. According to the respondent/plaintiff, the appellant/defendant had purchased cardboard boxes from him and after settlement

of accounts, the defendant had to pay an amount of Rs.7,82,000/ to the plaintiff. In discharge of the said debt, the defendant is stated to have issued six cheques for a total amount of Rs.7,82,000/ on different dates but when these cheques were presented for encashment, the same were returned unpaid to the plaintiff on account of insufficiency of funds. A legal notice of demand is stated to have been served by the plaintiff upon the defendant but he paid only an amount of Rs.50,000/ to the plaintiff and rest of the amount i.e. Rs.7,32,000/ remained outstanding, which has not been paid by the defendant to the plaintiff constraining him to file the suit against the defendant.

3. It appears that after service of summons upon the defendant in the prescribed proforma, he caused his appearance and filed the memo of appearance indicating therein his address. Thereafter the summons for judgment was served upon the defendant and in response, he filed an application for leave to defend the suit before the trial court. However, when the defendant failed to cause appearance before the trial court, his application for leave to defend was dismissed in default on 06.12.2022.

4. It appears that the defendant filed an application seeking recall of order dated 06.12.2022 on the same very date but the said application was dismissed by the learned trial court on 27.02.2023. Since application of the defendant seeking leave to defend was dismissed by the learned trial court for non-prosecution, as such, the trial court proceeded to pass impugned judgment and decree by presuming that the defendant has not applied for leave to defend the suit.

5. It also appears that the defendant moved an application under Order 37 Rule 4 CPC before the learned trial court seeking setting aside of the exparte decree passed by the said court. However, the said application came to be dismissed by the trial court on 04.07.2024 on the ground that the same has been filed beyond the prescribed period of limitation.

6. The appellant has challenged the impugned judgment and decree passed by the learned trial court on the ground that the court has dismissed his application for leave to defend in default of his appearance and not on merits, which is impermissible in law. It has been further contended that it was incumbent upon the trial court to adjudicate the defence raised by defendant in his application for leave to defend before passing the decree against him. It is also contended that the appellant/defendant had raised a plausible defence in his application for leave to defend and, as such, the same could not have been dismissed by the trial court for non-prosecution.

7. I have heard learned counsel for the parties and perused record of the case including the grounds of appeal.

8. Before proceeding to deal with the contentions raised in the appeal, it is apt to notice that in the instant case, the appellant had moved an application for setting aside exparte decree before the trial court by invoking the provisions contained in Order 37 Rule 4 of the CPC but the said application was dismissed by the trial court.

9. A defendant, against whom an *exparte* decree is passed, has two options; (1) to file an appeal under Section 96 of the CPC, and (2) to file an application under Order 37 Rule 4 CPC. Recourse can be taken to both the said proceedings. If appeal under Section 96 of CPC is dismissed, as a result of which *exparte* decree merges with the order of the Appellate Court, an application under Order 37 Rule 4 of CPC would not be maintainable but when an application under Order 37 Rule 4 of CPC is dismissed, it is open to the defendant to file an appeal under Section 96 of the CPC against the decree passed by the trial court as the said provision provides for remedy of appeal against an original decree, whether passed after the contest or in *exparte*. Therefore, the instant appeal filed against the impugned judgment and decree passed by the trial court is maintainable despite application of the appellant/defendant under Order 37 Rule 4 of CPC having been dismissed by the trial court.

10. The main and only issue which is required to be determined in this appeal is as to whether an application filed by a defendant for leave to defend the suit in terms of sub-rule (5) of Rule 3 of Order 37 of CPC can be dismissed in default for non-prosecution. In this context it would be apt to notice the provisions contained in sub-rule (5) of Rule 3 of Order 37 of CPC, which read as under:

3. Procedure for the appearance of defendant.

- (1) xxx xxx xxx xxx
- (2) xxx xxx xxx xxx
- (3) xxx xxx xxx xxx
- (4) xxx xxx xxx xxx

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed

sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

11. The first proviso to afore-quoted sub-rule casts an obligation upon the Court not to refuse leave to defend unless it is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious. Once an application for leave to defend is filed by a defendant before the Court, it is duty of the said Court to consider the facts disclosed by the defendant in the said application and thereafter determine as to whether the defendant has raised any substantial defence. If upon undertaking such an exercise, the Court comes to a conclusion that the defendant has raised a substantial defence, leave to defend the suit has to be granted in his favour and if the Court is of the view that the defence put up by the defendant in his application is frivolous or vexatious, the application has to be declined. In short, once an application for leave to defend the suit is filed by a defendant within the period specified in sub-rule (5) (supra), the same has to be considered by the Court on its merits and it cannot be dismissed for non-prosecution nor can defendant be set exparte.

12. In the above context, it would be apt to refer to the observations made by the High Court of Delhi in the case of **Sukhbir Singh vs. Jatinder Sharma and others**, 169 (2010) DLT 78:

“5. Thus, even if the petitioner was absent and had not appeared on the date fixed for arguments, the application for leave to defend could have been disposed of by the trial court in absence of the petitioner considering the defence of defendant. In terms of Order XXXVII Rule 3(5), the trial court was obliged to consider the facts raised by defendant and pass an order on the application for leave to defend even in absence of the petitioner. The petitioner was respondent in application for leave to defend. If the petitioner had not appeared, still the facts set out by defendant were before the trial court and the trial court in absence of the petitioner could have considered the application for leave to defend and passed a speaking order.”

13. The aforesaid position of law has been reiterated and reaffirmed by this Court in the case of **Balwant Rai vs. Mohan Lal**, AIR 2009 J&K 71. In the said case the Court had not proceeded to decide the application of the defendant for leave to defend the suit and without deciding such application, the suit was decreed after proceeding ex parte against the defendant. This Court, while setting aside the order of the trial court, termed the approach of the trial court as incorrect and held that the said approach has resulted in causing prejudice to the defendant resulting in failure of justice.

14. Again, in the case of **Gh. Ahmad Wani vs. Gulzar Ahmad Guroo**, 2014 (4) JKJ 76, this Court, while observing that in a suit under Order 37 of CPC, the procedure and mechanism prescribed therein has to be followed in its true spirit, held that if the defendant had failed to appear, he was not required to be proceeded in ex parte and the court had to consider the application seeking leave to defend and to proceed further in the matter thereafter.

15. From the foregoing analysis of law on the subject, there is no doubt to the legal position that once a defendant files an application for leave to defend the suit, the Court is legally bound to consider the defence put up by the defendant in such application on its merits notwithstanding the absence of the defendant on the date on which the said application is taken up for consideration. Thus, the approach of the learned trial court in dismissing the application of the appellant for leave to defend the suit for non-prosecution, is not countenanced by law.

16. Learned counsel for the respondent has contended that the appellant has not carved out any special circumstances for setting aside of the impugned judgment and decree and in view of the provisions contained in Order 37 Rule 4 of CPC, which provide for setting aside of a decree only in case special circumstances are carved out by a defence, the impugned judgment decree cannot be set aside. In this regard, the learned counsel has relied upon the judgment of the Supreme Court in the case of **Rajni Kumar vs. Suresh Kumar Malhotra & anr**, AIR 2003 SC 1322, judgment of Andhra Pradesh High Court in the case of **Karumili Bharathi vs. Prichikala Venkatachalam**, AIR 1999 AP 427, and the judgment of this Court in the case **Noor Mohammad Rah vs. Bashir Ahmad Wandroo**, 2018(2) JKJ 245.

17. The contention raised by learned counsel for the respondents is misconceived for the reason that this Court is considering the regular first appeal that has been filed by the appellant/defendant against the impugned judgment and decree not an application under Order 37 Rule

4 CPC. The requirement of carving out special circumstances for succeeding to get an exparte decree set aside is mandated under Order 37 Rule 4 of CPC and not in a regular first appeal. The ratio laid down in the cases referred to and relied upon by learned counsel for the respondent is, therefore, not applicable to the facts of the present case. Even otherwise non-consideration of application of the appellant/defendant for leave to defend the suit on its merits by the trial court definitely constitutes a special circumstance for inviting the intervention of this Court.

18. As already stated, the learned trial court has not considered the application for leave to defend the suit filed by the appellant/defendant on merits which is a legal imperative, as such, the impugned judgment and decree becomes unsustainable in law.

19. For the foregoing reasons, the appeal is allowed and the impugned judgment and decree passed by the trial court is set aside and the case is remanded to the trial court with the direction to consider the application of the appellant/defendant for leave to defend the suit on its merits and pass appropriate orders thereon in accordance with law.

20. A copy of this judgment be sent to the learned trial court for information and compliance.

(Sanjay Dhar)
Judge

Srinagar,
21.02.2025
“Bhat Altaf-Secy”

Whether the order is speaking:	Yes/No
Whether the order is reportable:	Yes/No