

HIGH COURT OF DELHI**Bench: Justice Prateek Jalan****Date of Decision: October 31, 2023**

RFA 690/2023 & CM APPL. 44338/2023

ANIL KUMAR KAUSHIK**..... Appellant****Versus****RAJNISH****..... Respondent****Sections, Acts, Rules, and Articles:**

Section 96, Order XXXVII Rule 4, IX Rule 13 of the Code of Civil Procedure, 1908 (CPC)

Section 138 of the Negotiable Instruments Act, 1881

Subject: Civil Procedure – Appeal against judgment and decree – Challenge to judgment and decree passed by the Trial Court in a suit under Order XXXVII of the CPC – Suit decreed in favor of the plaintiff for ₹16 lakhs with interest – Defendant's application under Order XXXVII Rule 4 of the CPC dismissed – Defendant contends that summons were not duly served – Plaintiff presents evidence of defendant's address at the same location – Bailiff's report also confirms defendant's presence at the same address – Defendant's claim not established on a balance of probabilities – Order of the Trial Court upheld.

Headnotes:

Civil Appeal – Code of Civil Procedure, 1908 – Summary Suits – Appeal against Trial Court's judgment and decree awarding ₹16 lakhs to the respondent-plaintiff under Order XXXVII of the CPC – Issue surrounding the service of summons and validity of loan transaction – Trial Court's decree upheld. [Para 1, 8, 13]

Loan Agreement – Financial Transaction – Respondent-plaintiff claimed loan of ₹16 lakhs given to appellant-defendant – Appellant disputes nature of transaction, attributing it to a financial committee both parties participated in – Trial Court decreed in favor of respondent due to unchallenged claims. [Para 2, 5, 6]

Summons – Service and Address Verification – Central issue being whether summons were duly served on appellant-defendant – Trial Court and High Court affirm proper service based on documents showing defendant resided at the address where summons were delivered – Unrebutted evidence

weighed against appellant's claims of not residing at the mentioned address. [Para 10-13]

Order XXXVII Rule 4 of the CPC – Maintainability – Appellant's application initially under Order IX Rule 13 – Re-characterized by Trial Court under Order XXXVII Rule 4 of the CPC due to relevancy – Application dismissed based on merits and proper service of summons. [Para 6, 7]

Alternative Dispute Resolution – Failed Settlement Attempt – Defendant's expressed interest in settling the matter – No progress made in the settlement, leading to adjudication on merits. [Para 8]

Burden of Proof – Balance of Probabilities – Appellant failed to establish, on a balance of probabilities, the truth of his claims concerning separate residence and nature of the financial transaction – Multiple documents and lack of rebuttal weighed against appellant. [Para 12, 13]

Consistency in Address – Memo of Parties – Appellant's address mentioned consistently in legal documents including the memo of parties in the appeal – Undermines appellant's claim of not residing at the given address where summons were served. [Para 13]

Representing Advocates:

Mr. Kishore M. Gajaria & Mr. Aayush Paranjpe, Advocates for the Appellant-Defendant.

Mr. S.B. Pandey, Advocate for the Respondent-Plaintiff.

J U D G M E N T

1. By way of this appeal, under Section 96 of the Code of Civil Procedure, 1908 [hereinafter, "CPC"], the appellant-defendant challenges a judgment and decree dated 09.10.2019, passed by the learned Trial Court in CS No. 297/2019, by which a suit filed by the respondent-plaintiff under Order XXXVII of the CPC was decreed in the sum of ₹16 lakhs, with *pendente lite* interest and future interest @7% per annum and costs. The defendant also assails an order dated 11.07.2023, by which his application under Order XXXVII Rule 4 of the CPC [wrongly filed under Order IX Rule 13 of CPC] was dismissed.¹
2. The cause of action asserted by the plaintiff in the plaint was that the defendant runs a financial committee, in the course of which he was required to return certain amounts to its members. He requested the plaintiff for financial assistance. Having had cordial relations for a substantial period of time, the plaintiff gave the defendant a loan of ₹16 lakhs on 29.08.2014, against which the defendant issued a post-dated cheque of the same amount dated 25.02.2018. At the request of the defendant, the plaintiff advanced a

further amount of ₹1,50,000/- to him in the month of January, 2016, which was returned on 30.07.2017. The cheque for ₹16 lakhs was presented for encashment, but returned by the defendant's bankers *vide* memo dated 28.02.2018 for want of funds. The amount having remained unpaid, the plaintiff instituted the suit under Order XXXVII of the CPC on 04.06.2019 for recovery of the aforesaid sum of ₹16 lakhs, alongwith *pendente lite* and future interest at the rate of 18% per annum.

3. By an order of the learned Trial Court dated 06.06.2019, summons in the form prescribed under Order XXXVII of the CPC were issued to the defendant at the address mentioned in the memo of parties, namely House No. 83, *Gali No. 3, Puth Kalan Road, Near Kaushik Telecom Pehlampur Bangar Delhi-110042* [hereinafter, "the *Puth Kalan* address"]. Summons were received by the defendant's father, Mr. Chander Singh, on 11.07.2019.

4. As the defendant did not enter appearance in the suit, the Trial Court decreed the suit in the sum of ₹16 lakhs, with costs, *pendente lite* and future interest at the rate of 7% per annum, by the impugned judgment and decree dated 09.10.2019.

5. The defendant thereafter filed an application, purportedly under Order IX Rule 13 of the CPC. He contended that he acquired knowledge of filing of the suit only when he was informed by his friend, one Mr. Praveen Mann ¹. The parties will be referred to in this judgment by their status in the Trial Court. (who was informed by the defendant's father) of summons being issued to the defendant in execution proceedings filed by the plaintiff. It is contended that the *Puth Kalan* address was the address of the defendant's father, and that the defendant and his father and brother were not on visiting and talking terms since the year 2005. In support of his contention that he had been residing separately since then, the defendant placed before the Court a rent agreement in respect of a separate residential property, being *Flat No. 565, Pocket 6, Sector B-4, Narela, Delhi-110040*, which was effective from September, 2018. On merits, it was contended that the defendant had not taken the sum of ₹16 lakhs by way of a loan from the plaintiff, but as part of the transactions of the financial committee operated by the defendant of which the plaintiff was also a member.

6. The application was contested by the plaintiff, both on the issue of maintainability under Order IX Rule 13 of the CPC and on merits. The plaintiff relied upon several documents to demonstrate that the defendant continued to reside at the address at which the summons were served upon his father.

7. By the impugned order dated 11.07.2023, the learned Trial Court accepted the plaintiff's contention on maintainability but treated the

application as one filed under Order XXXVII Rule 4 of the CPC. On the question of service of summons, the learned Trial Court found that the documents placed on record by the plaintiff, which had not been rebutted by the defendant, show that the defendant had been residing at the *Puth Kalan* address, being the very same address as disclosed by the plaintiff in the suit. Summons were, therefore, held to have been served in accordance with law and the application was rejected.

8. Notice was issued in the appeal on 28.08.2023, and execution of the impugned judgment and decree was stayed, subject to deposit of the entire decretal amount, alongwith up-to-date interest. By a further order dated 22.09.2023, the amount of deposit was reduced to the principal decretal amount of ₹16 lakhs. Learned counsel for the defendant's submission was also recorded, to the effect that the defendant would like to make effort to settle the disputes with the plaintiff and at his request, the matter was adjourned. No amount was, in fact, deposited in this Court and the efforts at settlement were also unsuccessful. The appeal was, therefore, heard on merits.

9. I have heard Mr. Kishore M. Gajaria and Mr. Aayush Paranjpe, learned counsel for the defendant, and Mr. S.B. Pandey, learned counsel for the plaintiff.

10. The principal issue in this case is whether summons issued by the Trial Court under Order XXXVII of the CPC were duly served upon the defendant at his address or not. In this connection, the defendant's contention is that he was not on talking terms with his father and brother since the year 2005 and had moved out of the residence at the *Puth Kalan* address. The only document filed by the defendant in support of this plea was a rent agreement executed on 15.09.2018 in respect of a different property. On the other hand, the plaintiff placed before the Court the following documents, wherein the defendant has mentioned his address as the *Puth Kalan* address, at which summons were served upon his father:-

- a. Registration certificate dated 09.06.2019 of a "Scooty" purchased by the defendant;
- b. Compromise deed dated 06.12.2018 between the defendant and one Mr. Bijender placed before the concerned Court in Panipat, Haryana;
- c. A criminal complaint under Section 138 of Negotiable Instruments Act, 1881, filed by the defendant against one Mr. Ashwani Kumar in the year 2016; and
- d. Report of the bailiff in execution proceedings arising out of the decree in the present suit wherein it was stated that the bailiff had gone to the *Puth Kalan*

address and found the defendant, his wife, daughter, son and father present therein, but the defendant fled upon seeing the plaintiff and the bailiff.

11. Noticing that these documents were not denied or rebutted by the defendant, the Trial Court held that summons have been duly served and, therefore, rejected the application. The relevant extracts of the impugned order dated 11.07.2023 in this connection are reproduced below:

“14. Now, coming to the said application on merits, the address of the defendant as disclosed in the plaint is H. NO. 83, Gali no. 3. Puth Kalan Road. Near Kaushik Telecom. Pehladpur Bangar, Delhi-110042. The defendant claims that he has been residing separately from his family since the year 2005. The defendant has placed on record photocopy of the rent agreement dated 15.09.2018, copy of the electricity bill which is in the name of Sh. Devender Kaushik together with photocopies of certain cheques and some calculation sheet. On the other hand, the plaintiff has placed on record the copy of the criminal complaint case u/s 138 of the NI Act which bears the same address or the defendant which has been disclosed in the plaint. In the vakaltnama filed on record by the defendant, in the application for cancellation of the non-bailable warrants, in the summons issued by the Ld. MM in the criminal complaint case, etc., the defendant himself has disclosed the same address which has been disclosed by the plaintiff in the plaint. Even in the bail bond, the defendant has furnished the very same address. The above said documents are of the year 2018 and 2019. In the criminal complaint case u/s 138 of the NI Act which was instituted by the defendant herein against one Sh. Ashwani Kumar, the defendant has disclosed the very same address. In the copy of the RC which is in the name of the defendant herein the address of the defendant is the same and the date of registration of the vehicle i.e. scooty in the name of the defendant is 09.06.2019. Even in the compromise deed, in between Sh. Bijender and the defendant herein, the address is the same. There is no rebuttal to the above said documents which have been placed on record by the plaintiff to show that the defendant has been residing at the very same address which has been disclosed by the plaintiff in the plaint. As stated hereinabove, the report of the process server dated 11.07.2019, reveals that summons for appearance were received by the father of the defendant and the report of the process server is bearing the signatures of the father of the defendant.

15. In these circumstances, I have no hesitation to hold that the defendant was duly served with summons for appearance of the present suit u/o XXXVII of the CPC and since the appearance was not filed by the defendant as per the provisions of Order XXXVII of the CPC, the suit of the plaintiff was rightly decreed vide judgment dated 09.10.2019.”

12. I do not find any infirmity in the view taken by the learned Trial Court. The case pleaded by the defendant was that he has been residing separately from his father since the year 2005. As against the rent agreement produced by him, the plaintiff relied upon several unrebutted documents, in which the defendant himself has declared his address as the one where summons were issued. These documents pertain to the relevant period of 2018-19, proximate to the date when summons were served at the said address. The defendant

has not been able to establish, on a balance of probabilities, that he was not residing at the said address. Further, the bailiff's report in execution proceedings, relied upon by the learned Trial Court, also shows the presence of the defendant at the same residence even after the passing of the impugned order.

13. Further, it may be mentioned that even in the memo of parties filed in the present appeal, the defendant has disclosed his address as House No. 83, Gali No. 3, Puth Kalan Road, Near Kaushik Telecom Prahladpur Bangar Delhi-110042. This is also the address of the defendant mentioned in the affidavit dated 22.08.2023, accompanying the present appeal, and each of the affidavits filed in support of the accompanying applications and in the *vakalatnama* signed by the defendant in favour of his counsel.

14. In these circumstances, the order of the learned Trial Court rejecting the defendant's application under Order XXXVII Rule 4 of the CPC calls for no interference in appeal. Consequently, the summons under Order XXXVII having been duly served upon the defendant, and the defendant having failed to enter appearance within the time granted, the challenge to the judgment and decree dated 09.10.2019 also.

15. For the aforesaid reasons, the appeal, alongwith pending application, is dismissed with costs of ₹30,000/-, payable to the plaintiff- respondent within four weeks from today. If the costs are not paid within the time granted, the respondent will be additionally entitled to recover the said amount in the proceedings for execution of the impugned decree.

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