

SUPREME COURT OF INDIA

Mahesh Kumar Joshi

Vs.

Madan Singh Negi

C.A.No.450 of 2015

(T.S.Thakur and Adarsh Kumar Goel JJ.)

15.01.2015

ORDER

ADARSH KUMAR GOEL, J.

1. Leave granted.
2. This appeal has been preferred against the judgment and order dated 11th May, 2012 passed by the High Court of Delhi at New Delhi in CM(M) No.564 of 2012.
3. The question raised for consideration is whether the courts below are justified in declining the prayer of the appellant to set aside the ex-parte decree and to grant leave to appeal to defend the summary suit.
4. The respondent-plaintiff filed suit under Order XXXVII of the Code of Civil Procedure (for short "the Code") on 4 th November, 2009 seeking a decree for Rs.3 lacs with costs and interest alleging that the appellant-defendant gave two cheques for Rs.3 lacs towards purchase price of Plot No.71-A, measuring 233 sq. yard situated in Ram Park Extension Colony, being Khasra No.196(Main), village Loni, District Ghaziabad, Uttar Pradesh which were dishonoured inspite of plaintiff having executed the requisite documents and handed over peaceful vacant possession of the plot in question. Though the summons were duly served on the wife of the appellant on 19th December, 2009, the appellant failed to enter appearance within ten days on which the trial Court passed the ex-parte decree on 24th February, 2010.
5. The appellant sought setting aside of the said decree by filling the application dated 25th March, 2010 under Order XXXVII Rule 4 of the Code. He submitted

that the power of attorney dated 10th October, 2004 in favour of the plaintiff by Smt. Asha Negi, the alleged owner of the plot in question, did not specify the plot number and the appellant found no such plot in existence in the records of the Ghaziabad Development Authority. Instead of Plot No.71-A, the number of the plot was 71 which did not belong to Asha Negi but to someone else. Thus, the appellant did not get possession of the plot and the cheques in question could not be taken to be in discharge of any liability. The transaction was without any lawful consideration and was void.

6. The application was contested by the respondent and the trial Court vide Order dated 12 th January, 2012 dismissed the application which order has been affirmed by the High Court.

7. Dealing with the objection of the appellant, the Courts below held that the suit was for recovery on account of dishonour of cheques and was not in respect of the transaction of property. Presumption under Section 118 of the Negotiable Instruments Act was available. The appellant had failed to enter appearance without any justification in spite of service, there was no ground to set aside the ex parte decree.

8. We have heard learned counsel for the parties.

9. Learned counsel for the appellant categorically stated that the appellant was not in possession of the plot in question and no such plot existed. The plaintiff-respondent was at liberty to take over the same to which the appellant had no objection. He submitted that the transaction in question was without any consideration. He also submitted that though the wife of the appellant received the summons which were handed over to the counsel, for want of ignorance, the appearance could not be filed. Thus, even if the appellant is not granted unconditional leave to defend, such leave could be given subject to reasonable conditions. If leave to appeal is not granted, there will be perpetuation of injustice to the appellant by making him to suffer the decree in respect of a transaction without any consideration.

10. Learned counsel for the respondent supported the finding recorded by the courts below.

11. After due consideration, we are of the view that a debatable issue does arise for consideration and it will be fair and just to give the appellant an opportunity to

contest the suit subject to the appellant depositing the entire amount claimed in the suit but without interest or costs, i.e. Rs.3 lacs.

In pursuance of interim order dated 8 th March, 2013, the appellant claims to have deposited 50% of the decretal amount before the trial Court. On depositing the rest of the amount to make up the deficit of Rs.3 lacs within six weeks from today, the decree will stand set aside and the appellant will be entitled to leave to defend. The deposit will abide by further order of the trial Court.

12. We are conscious of the fact that setting aside of ex- parte decree under Order XXXVII Rule 4 of the Code cannot be allowed in routine and special circumstances are required to be established. However, the expression “special circumstances” has to be construed having regard to the individual fact situations. The Court has to balance the equities and while safeguarding the interest of the plaintiff, appropriate conditions can be laid down if the defendant makes out a debatable case which may prime facie show injustice if the ex-parte decree was not set aside. As already observed, in the present case, it will be in the interests of justice that the ex-parte decree is set aside but the interest of the plaintiff is safeguarded by the deposit of the amount in question by the defendant as a condition precedent for setting aside the decree.

13. Accordingly, the appeal is allowed in the above terms. It is made clear that we have not expressed any final opinion on merits and the trial Court will be free to take decision in the matter without being bound by the observations made in this order which are only for deciding this appeal.