

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

RFA 25/2023
CM(4262/2024) CM(4878/2023) CM(4879/2023)

UT of J&K and others

... Petitioner/Appellant(s)

Through: Mr. Ileyas Laway, GA

V/s

Mudasir Farooq Malik

... Respondent(s)

Through: Mr. Saqib Amin Parray, Advocate

CORAM: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
07-10-2024

ORAL

CM no. 4878/2023

Objections have not been filed by the respondent non-applicant.

The instant application has been filed by the appellants applicants herein for condonation of delay in preferring appeal against judgment and decree dated 25th April 2023, passed by the Court of Principal District Judge, Shopian in civil suit titled as "Mudasir Farooq Malik vs. UT of J&K and others".

There seemingly is sufficient and plausible explanation offered by the appellants applicants herein in the instant application warranting condonation of delay. Accordingly, application is allowed and delay is condoned.

Application disposed of.

RFA 25 of 2023

1. In the instant appeal the appellants herein have thrown challenge to judgment and decree dated 25th April 2023 (for short "impugned judgment and decree") passed by the Court of Principal District Judge, Shopian (for short "trial court") in case titled as "**Mudasir Farooq Malik versus UT of J&K and others**".

2. Facts giving rise to the filing of the instant appeal reveal that the respondent herein filed a suit for recovery of Rs. 9,18,876/- from the appellants herein being defendants in the said suit on the premise that the plaintiff respondent herein executed a civil work being construction of drug store in the premises of Chief Animal Husbandry Office, Shopian against which construction a liability of Rs. 9,18,876/- arose against the defendants appellants herein which amount was not paid to the plaintiff respondent herein necessitating the filing of the suit under Order 37 of the Civil Procedure Court before the trial court.
3. After filing of the suit, *supra*, before the trial court, the defendants appellants herein filed an application seeking leave to defend the suit and while denying the claim lodged by the plaintiff respondent herein in the suit, urged in the application that certain triable issues are involved in the matter, whereupon the trial court, after considering the application as also the objections filed thereto by the plaintiff respondent herein, granted conditional leave to the defendants appellants herein on 28th December 2022, requiring the defendants appellants herein to deposit 10% of the amount in question before the court, which amount, however, was not deposited by the defendants appellants herein, as a consequence whereof the trial court passed the judgment and decree impugned in the instant appeal.
4. The defendants appellant herein have challenged the judgment and decree dated 25.04.2023 on the grounds urged in the appeal.

Heard learned counsel for the parties and perused the record.

5. According to counsel for the appellants, the judgment and decree impugned in the instant appeal besides being liable to be set aside on the grounds urged in the memo of appeal, is also bad in law and liable to be set aside on the ground that the trial court while granting leave to defend to the defendants appellants herein in terms of order dated 28th December 2022 opined that the defendants appellants herein have averred that there are triable issues involved in the case yet granted conditional leave to the defendants appellants, non-fulfilment of which condition could not have weighed with the trial court to proceed further in the suit and pass the impugned judgment and decree.
6. On the contrary, the counsel for the plaintiff respondent herein while opposing the submission of the counsel for the appellants would submit that the judgment and decree under challenge in the instant appeal has been legally and validly passed by the trial court after the defendants appellants herein failed to fulfil the condition subject to which the defendants appellants came to be granted leave to defend by the trial court in terms of order dated 28th December 2022. Learned counsel would further contend that the issue *qua* the grant of conditional leave by the trial court to the defendants appellants herein in terms of order dated 28th December 2022 was never called in question by the defendants appellants herein and the same assumed finality, as such the defendants appellants herein are precluded in law from raising any issue *qua* the validity of the said conditional leave.

7. Before proceeding to advert to the rival submissions of the appearing counsel for the parties it would be appropriate and significant to note here that the underlying public policy behind Order 37 CPC is expeditious disposal of suits of commercial nature in this regard that Order 37 CPC provides for such disposal as expeditiously as possible by prescribing timeframe therefor.
8. Having regard to the rival submissions of the appearing counsel for the parties, a reference to Order 37, Rule (3) Sub-Rule (5) becomes imperative, which for the sake of convenience and brevity is extracted and reproduced hereunder:

ORDER XXXVII

SUMMARY PROCEDURE

[3. Procedure for the appearance of defendant—

(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 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.

A bare reading of Sub-Rule (5) of Rule (3) of Order 37 supra would clearly indicate that leave to defend may be granted to a defendant in a suit filed under Order 37 CPC unconditionally or upon such terms as may appear to the court to be just, manifestly

suggesting that discretion is left to the court to put the defendant on terms in the facts and circumstances of a particular case on compliance whereof the defendant is entitled to defend the suit. A reference to law laid down by the Apex Court in regard to the aforesaid Sub-Rule (5), Rule (3) of Order 37 passed in case titled as **“Mechelec Engineers and Manufacturers v. Basic Equipment Corporation reported in (1976) 4 SCC 687”** would be relevant wherein at para 8 following has been laid down:

“8. In Smt. Kiranmoyee Dassi & Anr. v. Dr. J. Chatterjee, Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions:

- (a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the Defendant is entitled to unconditional leave to defend.
- (b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the Defendant is entitled to unconditional leave to defend.
- (c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.
- (d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.
- (e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence”.

9. The aforesaid principles laid down by the Apex Court in the judgment *supra* came to be referred by it as well in case titled as **“M/S Sunil Enterprises and another v. Sbi Commercial and International Bank Ltd.** reported in (1998) 4 SCC 354. The Apex Court further in case titled as **“Sify Limited v. First Flight Couriers Limited** reported in (2008) 4 SCC 246” while considering the law laid down by it in the aforesaid judgments, ruled that it is only in cases which fall in class (e) of the judgment passed in case **Mechelec Engineering** *supra* that an imposition of the condition to deposit an amount in the court before proceeding further is justifiable and that grant of leave by a court under Order 37 CPC to the defendants to defend the case is discretionary in nature.
10. Keeping in mind the aforesaid position and principle of law and reverting back to the case in hand, it is not in dispute that the defendants appellants herein came to be granted a conditional leave to defend the suit by the trial court in terms of order dated 28th December 2022, which order indisputably has not been called in question by either of the parties in general and the defendants appellants herein in particular. Thus the contention of the counsel for the defendants appellants herein that the trial court ought not to have granted conditional leave to the defendants appellants herein after having opined that triable issues are involved in case, and that on account of non-fulfilment of the conditions subject to which the leave came to be granted to the defendants appellants herein, the trial court could not have proceeded to pass the impugned judgment and decree,

cannot at this stage either be entertained or accepted firstly in view of the fact that the order of grant of conditional leave dated 28th December 2022 passed by the trial court was never ever either questioned by the defendants appellants herein, and secondly, that the said plea cannot be adverted to by this court while adjudicating upon the instant appeal filed against the impugned judgment and decree, and not against the discretionary order of grant of leave dated 28th December 2022.

11. It is emerging from the record that the trial court has passed the impugned judgment and decree upon failure of the defendants appellants herein to fulfil the condition imposed by the trial court upon granting conditional leave to the defendants appellants herein to defend the suit in terms of order dated 28th December 2022, and law is settled in this regard that a court trying a suit under order 37 CPC is within its powers to pass a decree under Rule (3) (6) of Order 37 CPC in favour of the plaintiff forthwith on account of the failure of a defendant to comply with the conditions upon which the leave is granted.
12. Viewed thus, what has been observed, considered and analysed hereinabove, the only inescapable conclusion that could be drawn is that the impugned judgment and decree passed by the trial court does not call for any interference.
13. Resultantly, the appeal fails and is accordingly dismissed.

(JAVED IQBAL WANI)
JUDGE

Srinagar
07-10-2024
N Ahmad

Whether the order is speaking: Yes
Whether the order is reportable: Yes