

\$~65(Appellate)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) 826/2022 & CM APPL. 36337/2022, CM
APPL.36338/2022

KAILASH SEWANI Petitioner

Through: Mr. Jeewan Chandra, Adv.

versus

MANISH KUMAR CHAUDHARY Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T (O R A L)

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22.08.2022

1. This petition under Article 227 of the Constitution of India assails order dated 11th July 2022 passed by the learned Single Judge in CS SCJ 518/17 (*Manish Kumar Choudhary v. Kailash Sewani*). The petitioner was the defendant in the said suit. By the impugned order, the learned Civil Judge has rejected the petitioner's request to have the written statement taken on record.

2. CS SCJ 518/17 was filed by the respondent as a summary suit under Order XXXVII of the Code of Civil Procedure, 1908 (CPC). The petitioner applied for leave to defend. The application for leave to defend was allowed on 18th September 2019, on which date the following order was passed:

“CS SCJ 518117

18.09.2019

Present: Ld. Counsel for the plaintiff.

Ld. Counsel for the defendant.

Memo of appearance filed on behalf of defendant.
Seeks time to file fresh vakalatnama.

Arguments heard on maintainability of the suit under
O 37 CPC.

Plaintiff submits that even though the invoices in question are not counter-signed by the opposite party, yet there is tacit admission on behalf of the defendant and the same can be read as a "written contract" under O 37 CPC. It is submitted that there is no denial in the leave to defend application to the said invoices. There is admission of liability in the extract of Whatsapp conversations between the parties. Lastly, after raising of the invoice the defendant has availed the services of the plaintiff. Hence, there is consent of the defendant to the said invoices raised by the plaintiff.

Even though availing of services of the plaintiff is not denied by the defendant however, the amount to be paid as compensation/fee is disputed by the defendant.

Considering the aforementioned and the fact that the invoices in question are not counter-signed/acknowledged by the defendant, the instant suit does not fall under the purview of O 37 CPC.

Therefore, the instant suit stands converted to Ordinary suit.

WS to be filed within 30 days.

Put up for completion of pleadings on 13.11.2019.

Sd/-
Civil Judge-02,SE/Saket,
18.09.2019”

3. Thus, 30 days' time was granted as the first opportunity to file written statement, consequent to the petitioner's application for leave

to defend the suit being allowed.

4. No written statement having been filed till the next date of hearing which was 23rd December 2019, the learned Civil Judge, *vide* the following order passed on the said date, closed the right to file written statement and proceeded *ex parte* against the petitioner:

“23.12.2019

At 2.08 PM

Present: Plaintiff in person.

On 18.09.2019 defendants were directed to file WS within 30 days. No WS has come through till date. Therefore, right of the defendant to file WS is hereby closed.

None has appeared on behalf of defendants despite repeated calls. Defendants had not appeared on LDOH as well. It seems that defendants are not interested in contesting the matter. Therefore, defendants are proceeded against *ex-parte*.

Put up for *ex-parte* PE on 24.02.2020.”

5. On 24th February 2020, the petitioner filed an application under Order IX Rule 7 of the CPC, for setting aside the aforesaid order dated 23rd December 2019. By the following order dated 29th April 2022, the petitioner’s application under Order IX Rule 7 of the CPC was allowed, the order dated 23rd December 2019, proceeding against him as *ex parte* was recalled and, *qua* filing of written statement, the learned Civil Judge ruled thus:

“8. The only question that remains to be decided is if the defendants should be allowed to file the written statement. The defendants have asserted that it was due to the negligence of the previous counsel of the defendants that they could not

appear and take requisite steps on the previous dates. Though the submissions of the defendants are unsubstantiated and there is no proof of negligence of the previous counsel, I deem it fit in the interest of justice and for a fair decision of the suit on merits, to allow the application. However, the application under Order 9 Rule 7 CPC, is allowed, subject to a cost of Rs 3000/- to be paid by the defendants to the plaintiff within three weeks.

9. Written statement to be filed by the defendants within three weeks. It is made clear that if the timelines given above are not adhered to, the written statement will not be taken on record.”

6. Despite this, no written statement was filed till 11th July 2022. The only submission of the petitioner before the learned Civil Judge on the said date was that he was not aware of the order dated 29th July 2022. The learned Civil Judge observes, correctly, that the petitioner was represented by Counsel on 29th July 2022 and could not, therefore, claim ignorance of the order passed on the said date. The order dated 29th April 2022 having been passed on the application filed by the petitioner under Order IX Rule 7 of the CPC, allowing the application, the petitioner was expected to be aware of the contents of the said order. In any case, he could not, possibly feign ignorance of the order till 11th July 2022.

7. It is in these circumstances that the learned Civil Judge has, by the impugned order dated 11th July 2022, rejected the petitioner's prayer to take the written statement on record.

8. Mr. Jeewan Chandra, learned Counsel for the petitioner, to a query from the Court as to when the petitioner was first granted an

opportunity to file written statement, submitted that the first opportunity was granted on 29th April 2022. This is obviously incorrect. The first opportunity to file written statement was granted to the petitioner on 18th September 2019. From 18th September 2019 till 11th July 2022, no written statement was forthcoming on the record.

9. That being so, there can be no question of this Court, in exercise of its supervisory jurisdiction, interfering with the impugned order dated 11th July 2022 passed by the learned Civil Judge.

10. The jurisdiction vested in this Court by Article 227 of the Constitution of India is not expected to be used as an avenue for a party to tide over the negligence exhibited by it before the Court below. Nor is Article 227 in the nature of mercy jurisdiction. Litigants cannot be casual about prosecuting the proceedings before the Court below and expect sanctuary from the High Court under Article 227.

11. For the aforesaid reasons, this petition is completely devoid of merit and is accordingly dismissed in *limine*. Pending applications are also disposed of as such.

C.HARI SHANKAR, J

AUGUST 22, 2022/kr