IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Civil Revision No.32 of 2019
Reserved on: 11.08.2026
Decided on: 29.09.2026
Uploaded on: 29.09.2026

Vivek Saini and others **...Petitioners**

Versus

M/s Vardhman Industries and others **...Respondents**

Coram
Hon'ble Mr. Justice Jiya Lal Bhardwaj, Judge
Whether approved for reporting?[1] ***Yes***

For the petitioners:	Mr. Sudhir Thakur, Senior Advocate with Mr. Karun Negi, Advocate.
For the respondents:	Mr. Pratap Singh Goverdhan, Senior Advocate with Mr. Rakesh Thakur, Advocate.

Jiya Lal Bhardwaj, Judge

The petitioners have laid challenge to the order dated 13.12.2018 passed by the learned Senior Civil Judge, Kasauli, District Solan H.P., whereby the application filed by them under Order 37 Rule 4 read with Section 151 of the Code of Civil Procedure for setting aside an ex-parte decree dated 06.01.2016, passed in Civil Suit No.131/1 of 2015 titled, ***M/s Vardhman Industries and others vs. Vivek Saini and***

[1] *Whether reporters of Local Papers may be allowed to see the judgment?*

others, has been dismissed with costs.

2. The respondents-plaintiffs had filed a suit under Order 37 Rule 1 and 2 of the Code of Civil Procedure (in short "CPC") read with Section 80 of the Negotiable Instruments Act, against the petitioners-defendants for recovery of an amount of Rs.16,94,000/- along with future interest @18% with costs. In the said suit instituted by the respondents-plaintiffs, the petitioners-defendants were proceeded against ex-parte vide order dated 06.01.2016, since they did not put in appearance and the suit filed by the respondents-plaintiffs against the petitioners-defendants for recovery of Rs.16,94,000/- along with simple interest @12% from the date of filing of the suit till the final realization of the amount was decreed.

3. The petitioners-defendants filed an application under Order 37 Rule 4 read with Section 151 of the CPC, for setting aside the ex-parte decree, on the plea that they were never served in the suit and if the endorsement of the Process Server on summons issued is perused, it shows that

the father of petitioner No.1-defendant No.1 refused to receive the summons and hence a report in this regard was made, whereas in the impugned order which was passed, it is referred that petitioner No.1-defendant No.1 had refused to receive the summons and it is also referred that summons were served by way of affixation, whereas affixation has also not been done, which fact can be borne out from the report of the Process Server. It was further averred that since the petitioners-defendants were not properly served and alleged refusal by any other person other than the petitioners-defendants, cannot amount to effecting service on the petitioners-defendants. Moreover, substituted service by way of affixation is only to be effected under law, if ordinary mode of service is not possible. It is clear from the report of the Process Server that neither summons were refused by the petitioners-defendants nor summons were tried to be delivered on them or their agents. The non-appearance of the petitioners-defendants on 06.01.2016 was neither intentional nor deliberate, but due to the reasons stated above. Further

the documents filed with the plaint refers to M/s Vardhman Industries and not refers to M/s Om Sai Industries, M/s Sai Industries or M/s Maa Durga Industries. The alleged cheque dated 01.01.2012, bearing No.112511 amounting to Rs.11,00,000/- if perused, the same amount is written by making forgery on the cheque and writing on the cheque is not the writing of the petitioners-defendants and amount of Rs.1,00,000/- has been forged and tampered to make it Rs.11,00,000/-. Moreover, the plaintiff-firm is an unregistered firm and no record of the same firm is placed on record and it is settled law that an unregistered firm cannot sue, hence technically the suit is to be dismissed on this ground. There is no liability of the petitioners-defendants as false and frivolous documents are alleged to have been prepared. Hence, under these circumstances, leave to defend is to be accorded to the petitioners-defendants and the petitioners-defendants hereby apply under the provisions of law seeking leave to defend the suit under the circumstances referred to above.

4. It was further averred in the application that the

petitioners-defendants were unaware of the suit filed by the respondents-plaintiffs against them and it is only on 21.01.2016, during winter vacation, they came to know about the decision of the case from their counsel Sh. Manish Sharma, Advocate, who was immediately instructed by them to apply for copies and then the copies were applied on 21.01.2016 and thereafter there were winter vacation up to 14.02.2016 and Civil Courts were closed. After perusing the record, the present application was moved without any delay immediately after opening of the Civil Courts.

5. The respondents-plaintiffs filed reply to the application and in preliminary objections averred that the application is not maintainable in the present form. The petitioners-defendants are estopped from filing the application due to their own act, conduct and acquiescence and the application is time barred. The petitioners-defendants have concealed and suppressed the material facts from the Court and further the application has been filed with ulterior motive to harass the decree holders/respondents-

plaintiffs and to delay the payment. The plea taken by the petitioners-defendants is illusory or sham or practically moonshine and are not entitled for any relief. The application has been filed without pleading, sufficient reason and special circumstance having any substantial defense to raise. The petitioners-defendants have miserably failed to show reasonable cause or special circumstances with regard to their non-appearance after duly being served.

6. On merits, it was averred that the petitioners-defendants were duly served for 06.01.2016, but despite having knowledge with regard to the pendency of the suit, no appearance was put in and hence they were proceeded against ex-parte. Petitioner No.1-defendant No.1 namely Sh. Vivek Saini had refused to accept the summons and he was served by way of affixation, but he did not opt to contest the suit, despite having knowledge with regard to the pendency of the suit. It is denied that the father of the petitioner namely Sh. Dharam Pal Saini was not present at the time of service of summons, but he had intentionally concealed

himself from receiving the summons and with the intention to evade the service of summons. It was also denied that the affixation of summons was not made, which otherwise can be borne out from the report of the Process Server. It was further averred that petitioner No.1 namely Vivek Saini is living with his father and when his father refused to receive the summons, a report in that regard was made by the Process Server and thereafter the summons were again issued for the service of the petitioners-defendants by way of affixation and accordingly. They were served on their addresses by way of affixation for 06.01.2016, but they despite being duly served by way of affixation intentionally and deliberately did not put an appearance before the Court despite having knowledge with regard to the pendency of the suit and accordingly proceeded against ex-parte. It was also averred that petitioner No.1/defendant No.1 was served by way of ordinary process, wherein he refused to receive the summons and thereafter he was served by way of affixation. From a perusal of the report made by the Process Server, it is clear

that the father of petitioner No.1-defendant No.1 was present in the house alongwith the family, but he refused to receive the summons for effecting service. Petitioner No.1-defendant No.1 was aware about the pendency of the suit and he was watching the proceedings of the case through his local counsel, who was intimating him each and every development of the case and he was having due knowledge with regard to the pendency of the suit against him. It is wrong to aver that the summons were not served upon the petitioners-defendants for 06.01.2016, whereas petitioner No.1-defendant No.1 had refused to accept the summons as per the report of the Process Server.

7. It was further averred that the petitioners-defendants did not put in appearance before the Court and due to their non-appearance, they were proceeded ex-parte. It was specifically denied that the cheque dated 01.01.2012 bearing No.112511 amounting to Rs.11,00,000/- has been written by making forgery on the cheque and the writing on the cheque is not the writing of the petitioner-defendant-

Vivek Saini and the amount of Rs.1,00,000/- is forged and tampered to Rs.11,00,000/- as alleged. It was further averred that since there was a business transaction between the respondents-plaintiffs and the petitioners-defendants and petitioner No.1-defendant No.1 in order to make the payment of the complete transaction, which took place between them, the balance amount was acknowledged by petitioner No.1-defendant No.1 and he had issued the cheque of Rs.11,00,000/- in order to discharge his liability towards the respondents-plaintiffs and the cheque amount is duly reflected in words also, which shows that the cheque was issued for Rs.11,00,000/-. It is wrong to aver by the petitioners-defendants that there is no liability and the suit has been filed on false and frivolous documents. The documents were acknowledged through the authorized representative of the petitioners-defendants namely Mr. Rajiv, whose signatures are duly reflected on the bills, which shows that the material was received by the petitioners-defendants. Since the petitioners-defendants could not prove the special

reason or circumstances and special defense, under which they could not put in appearance before the Court, the permission to leave to defend the suit cannot be granted to the petitioners-defendants. They could not show reasonable cause or substantial defense for the same and the application has been filed by manipulating the facts, things and circumstances on false story and on false pretext, which is not maintainable and liable to be rejected.

8. The learned trial Court on the basis of the pleadings framed the issues in the application, which read as under:

> *"1. Where there exists special circumstances to set aside the decree dated 6-1-2016 in suit titled M/S Vardhman Industries and others versus Vivek Saini and others ? OPA.*
> *2. Whether the present petition is not maintainable ? OPR.*
> *3. Relief."*

9. After framing the issues, the parties led their evidence and thereafter the learned trial Court was pleased to dismiss the application filed by the petitioners-defendants, holding that they were properly served in Form No.4 for

06.01.2016. The report of the Process Server clearly shows that he met petitioner No.1-defendant No.1 Vivek Saini in the company, who refused to receive the summons and, therefore, affixation of summons was made on the wall of the factory. Since petitioner No.1-defendant No.1 namely Vivek Saini himself refused to receive the summons, therefore, the Process Server had made the affixation of summons and thus, the plea set up by petitioner No.1-defendant No.1 namely Vivek Saini, that he was never served in the case and the report of the Process Server saying that his father refused to receive the summons, was the basis on which he was proceeded ex-parte, is wrong. Petitioner No.1-defendant No.1 namely Vivek Saini was proceeded against ex-parte on the basis of the summons issued by the Court vide order dated 11.12.2015 and not on the basis of the summons issued earlier when the endorsement was made by the Process Server, when his father had refused to receive the summons dated 24.11.2015. Therefore, the plea taken by petitioner No.1-defendant No.1 namely Vivek Saini is totally in contrast

to the record. Further, in cross examination, petitioner No.1-defendant No.1 Vivek Saini had specifically admitted that the addresses on the summons Exhibits R1 to R4 are his correct address. His admission also clearly shows that the summons was issued at the correct address, where the Process Server had met him, but he refused to receive the summons. The petitioner did not examine the concerned Process Server in order to show that the report is wrong. Therefore, petitioner No.1-defendant No.1 has failed to show special circumstances, which prevented him from appearing before the Court. He has also failed to show a sufficient cause for not appearing before the Court, despite his valid service and thus he is not entitled for getting the ex-parte decree set aside.

10. The leaned trial Court had dismissed the application on the ground that the same was time barred in view of the fact that the application for setting aside the ex-parte decree dated 06.01.2016 was filed on 19.02.2016 on the plea that petitioner No.1-defendant No.1 came to know about the order from his counsel Manish Kumar, Advocate and

thereafter, he applied for copies and there were winter vacation and thus the application was filed on 19.02.2016. The report of the Process Server clearly reveals that he had met petitioner No.1-defendant No.1 Vivek Saini on 23.12.2015 and when he had refused to receive the summons, affixation of summons was made. This report was made on the summons, which were issued as per the office order dated 11.12.2015 dispatched on 16.12.2015 and once petitioner No.1-defendant No.1 Vivek Saini had refused to receive the summons on 23.12.2015, his plea that he was unaware about the ex-parte decree is not correct. Since no separate application seeking condonation of delay was filed by him, the application was also dismissed as time barred.

11. The petitioners-defendants feeling aggrieved by the impugned order dated 13.12.2018, whereby the application for setting aside the ex-parte decree has been rejected, has approached this court *inter alia* on the grounds that the ex-parte order is illegal and erroneous in the eyes of law since the summons were served by way of affixation,

whereas the report of the Process Server is otherwise, who reported that the person concerned has refused to receive the summons. The learned trial Court on the one hand recorded that the petitioners-defendants had refused to receive the summons and on the other point of the order recorded that the summons were served by way of affixation. Hence, the ex-parte order itself is contradictory and ultimately passed in a wrong and illegal manner. Further, since there was no specific order for the service of the petitioners-defendants, by way of affixation, then how at the first instance the order for affixation has been passed/referred by the learned trial Court, which procedure is an alien procedure and is not provided under the Code, because at the first instance the summons as per the requirement of Order 37 Rule 2 of the CPC is to be issued and thereafter the mode of substituted service can be ordered, but without following the proper procedure, the ex-parte order has been passed, which caused serious prejudice to the petitioners-defendants. The learned trial Court while deciding the application under Order 37 Rule

4 of the CPC has failed to consider the basic aspect of the case, which is the report of the Process Server, wherein he reported that the petitioners-defendants refused to receive the summons and this aspect of the matter has been denied by the petitioners-defendants. Hence, this material aspect can only be proved by way of examining the Process Server concerned, but this has not been done in the present case and as such, the report which has been disputed by the petitioners-defendants, has not been proved in accordance with law. Initially, summons under Order 37 Rule 2 of the CPC had to be issued to the petitioners-defendants, wherein in a wrong and illegal manner they have been proceeded ex-parte and no summons as required under Appendix 4-A were issued to the petitioners-defendants and there is no compliance with the mandatory affidavit and supply of the documents to the petitioners-defendants and hence no procedure as envisaged under the CPC has been adopted, and, therefore, the petitioners-defendants have prayed for setting aside the order, whereby the application for setting

aside ex-parte decree has been dismissed.

12. On the other hand, the learned senior counsel representing the respondents-plaintiffs has supported the order passed by the learned trial Court, whereby the application filed by the petitioners-defendants for setting aside the ex-parte decree has been dismissed and also supported the initial order, whereby the petitioners-defendants were proceeded ex-parte vide order dated 06.01.2016 and decree in favour of the respondents-plaintiffs has been passed.

13. I have heard the learned senior counsel representing the parties and also perused the record carefully.

14. Before adverting to the submissions made at the Bar, it would be relevant to quote the relevant paras of the application for setting aside the ex-parte decree.

> *"2. That the applicants/defendants were never served in this case and if endorsement of process server on summons issued is perused then same endorsement says that father of defendant no.1 refused to the receive the summons and hence report in this regard is made*

whereas impugned order is passed in which it is referred in the order that defendant no.1 has refused to receive the summons and it is also referred that summons were served by way of affixation whereas affixation has also not been made which can be borne out from the report of process server in this regard, hence this is clear that the applicants/defendants were not properly served and alleged refusal by any other person than defendants cannot amount to effecting service on applicants/defendants. Moreover, substituted service of affixation is only to be effected under law if ordinary mode of service is not possible. It is clear from report of process server that neither summons have been refused by the defendants/applicants nor summons are tried to be delivered on defendants/applicants or his agent. Even otherwise from the documents placed on file it is clear that there is no service effected on applicants/defendants and wrong order of ex parte decree dated 6-01-2016 is passed, as such same judgment and decree dated 6-01-2016 which was passed ex parte is to be set aside and defendants/ applicants are greatly prejudiced by ex parte judgment and decree dated 6-01-2016 as applicants/defendants want to contest the present suit by tooth and nail.

3. That the non-appearance of the applicants/defendants on 6-01-2016 was neither intentional nor deliberate but due to the reasons stated above. That if documents filed with the plaint are perused then same refers to M/s Vardhman Industry and not refers to M/s Om Sai Industries, M/s Sai Industry or M/s Maa Durga Industries and the alleged cheque dated 1-01-2012 bearing cheque no. 112511 amount to Rs. 11,00,000/-, is perused the same amount is written by making forgery on the cheque and writing on the cheque is not writing of applicants/defendants and amount of Rs. 1,00,000/- is forged and tempered to Rs. 11,00,000/-. Moreover the plaintiff firm is a unregistered firm and no record of same firm is placed on record and it is settled law that

unregistered firm cannot sue hence technically suit is to be dismissed on this ground. There is no liability of defendants as false and frivolous documents are prepared. Hence, under these circumstances leave to defend is to accorded to the defendants/applicants and applicants/defendants hereby applies under provision of law seeking leave to defend the suit under the circumstances referred above.

4. That applicants were unnoticed of same suit filed by respondents against the applicants and it is only on 21-01-2016 during winter vacations applicants came to know about the decision of this case from his counsel Sh. Manish Sharma, Advocate who was immediately instructed by applicants to apply copies there and then and copies were applied on 21-01-2016 and thereafter there were winter vacations up to 14-02-2016 and civil courts were closed and after perusing the record present application is moved without any delay immediately after opening the Civil Courts, hence there is no delay in filing the application and if this Hon'ble Court comes to conclusion that there is delay in filing the application then same delay if any days in filing the application may kindly be condoned under section 5 of Limitation Act."

15. A perusal of the application reveals that the petitioners-defendants had stated that they were never served in the case and if the endorsement of the Process Server on summons issued, is perused, it says that the father of petitioner No.1-defendant No.1, refused to receive the summons and hence a report in this regard was made, whereas in the impugned order, it is mentioned that

petitioner No.1-defendant No.1 has refused to receive the summons and summons were served by way of affixation, whereas affixation has also not been made, which can be borne out from the report of the Process Server.

16. At this juncture, it is relevant to mention that initially the summons of the suit in Form No.4 in Appendix B were issued to the petitioners-defendants on 06.11.2015 for 11.12.2015. On the summons so issued, the father of petitioner No.1-defendant No.1 namely, Dharam Pal Saini, who was present in the house along with family, had denied to receive the summons and due to this reason, the trial Court had ordered for issuance of fresh summons in Form No.4 in appendix B on 11.12.2015 to the petitioners-defendants returnable for 06.01.2016. It was also mentioned in the order that if required, affixation be made. The order dated 11.12.2015 is reproduced hereunder:-

> *"Present :- Sh. R.K. Verma, Advocate, for the plaintiff.*
>
> *None for the defendants.*
>
> *Defendants not properly served. Let fresh summons in form No.4 be issued to the defendants returnable for 6-1-2016 if required affixation be made.*

sd/-
Yajuvender Singh
Civil Judge (Senior Division)
Kasauli, Distt. Solan (H.P.)"

17. In sequel to the said order passed by the trial Court, summons were issued to the petitioners-defendants, which were dispatched on 16.12.2015. Petitioner No.1-defendant No.1, Vivek Saini is the sole proprietor. The Process Server for effecting service had visited the premises of the petitioners-defendants on 23.12.2015, on which date, the proprietor of firm Vivek Saini met him. However, he had refused to receive the summons and the Process Server affixed a copy of the summons on the wall of the factory. It was done by the Process Server, since there was a specific order, that if required, service be affected through affixation for 06.01.2016. In the application, the petitioners-defendants had taken a plea that the endorsement of the Process Server on the summons issued, if perused, says that the father of petitioner No.1-defendant No.1 had refused to receive the summons and hence report in this regard is made. It is not on

the basis of the refusal made by the father of the proprietor of the firm, the petitioners-defendants were proceeded ex-parte, but it was on the basis of the report made by the Process Server dated 23.12.2015, when it is stated that the sole proprietor of the firm Vivek Saini had refused to accept the summons and the summons were affixed on the wall of the factory as per the order dated 11.12.2015 passed by the trial Court.

18. The learned trial Court had ordered the service to be effected upon the petitioners-defendants, keeping in view the fact that in earlier summons, there was a specific report made by the Process Server that Sh. Dharam Pal Saini, who is the father of Mr. Vivek Saini, was present in the house along with the family, but he denied to receive the summons at all and thus, no illegality has been committed by the learned trial Court, when it had ordered service upon the petitioners-defendants by way of affixation, if required. The petitioners-defendants have been served by way of affixation only when, the proprietor of the firm, Vivek Saini had refused to receive

the summons, who was present in the factory and the Court had ordered for effecting service by way of affixation, if required.

19. Learned senior counsel representing the petitioners-defendants vehemently argued that since petitioner No.1, who is the sole proprietor of the firm, has not been properly served, the order passed by the learned trial Court to proceed against him ex-parte and thereafter pass an ex-parte decree is bad in law in view of the judgment passed by the Hon'ble Supreme Court in ***State of Jammu & Kashmir and others vs. Haji Wali Mohammed and others***, AIR 1972 Supreme Court 2538. He also placed reliance upon the judgments passed in ***Rajesh Kochhar versus Babu Ram***, 1993 (2) Sim. L.C. 346, ***Shila Nath Mallik and others vs. Balabhadra Sutradhar and others,*** AIR 1992 Gauhati 121 and a judgment passed by the High Court of Rajasthan (Jaipur Bench) in S.B. Civil Misc. Appeal No.1313 of 2010, titled, ***Chuki Devi (Smt.) and others vs. Laxminarayan,*** and contended that since the service on the petitioner was

not properly effected, therefore, the order passed by the learned trial Court, proceeding against the petitioners-defendants ex-parte is bad in law.

20. So far as the first judgment of the Hon'ble Supreme Court in ***Haji Wali Mohammed's*** case (supra) is concerned, in that case, it was not disputed that notices were not served in accordance with the procedure prescribed for service of summons under the CPC and, therefore, the Court had come to the conclusion that there was no proper service. However, in the present case, the proprietor of the firm, when he was petitioner No.1-defendant No.1 had refused to receive the summons who was present in factory on 23.12.2015. He was thereafter served by way of affixation of summons on the wall of the factory by the Process Server as ordered by the trial Court and it was done only when the summons earlier issued, the father of petitioner No.1-defendant No.1 had refused to receive the summons and the trial Court had not proceeded against the petitioners-defendants ex-parte on the basis of the said report, but had ordered to serve them again

as per order dated 11.12.2015 and, if required by way of affixation. As already noticed above, when the Process Server had gone to deliver the summons on 23.12.2015, petitioner No.1-defendant No.1, who was present in the factory had refused to receive the summons and the Process Server on the basis of the order passed by the learned trial Court had served the petitioners-defendants by way of affixation of summons on the wall of the factory. Thus, the judgment referred to above is not attracted to the facts of the present case. Not only this, this is not a decree, which was passed in a regular suit, whereas it is a decree, which was passed under the provision of Order 37 of the CPC.

21. For the purpose of setting aside the ex-parte decree under Order 37 of the CPC, the defendant has to carve out a special circumstance, justifying his not seeking leave of the Court to defend the suit, but in declining to grant relief as per the provisions of Order 37 Rule 4 of the CPC. At this juncture, it would be relevant to quote the provisions of Order 37 Rule 3 and 4 of the CPC, which are required for the

purpose of adjudication of the lis and the same reads as under:-

> *"[**3. Procedure for the appearance of defendant-** (1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexure thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.*
>
> *(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.*
>
> *(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.*
>
> *(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.*
>
> *(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.

(6) At the hearing of such summons for judgment,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.]

***4. Power to set aside decree**.- After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."*

22. A perusal of Order 37 Rule 3 of the CPC contemplates that in a suit to which this order applies, the plaintiff shall, together with the summons under Rule 2, serve on the defendant a copy of the plaint and annexure thereto and the defendant may at any time within 10 days of such service, enters an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him. Sub-rule 2 provides that all the summons, notices and other judicial processes required to be served on the defendants, shall be deemed to have been duly served on him, if they are left at the address given by him for such service. If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summon for judgment in Form No.4-A, in Appendix B or such other form as may be prescribed from time to time.

23. In the present case, since the petitioners-defendants did not enter appearance despite service and did not apply for leave to defend, the trial Court had firstly preceded them ex-parte on the same date and thereafter

passed the ex-parte decree against them as per clause(a), sub-rule (6), Rule 3 of Order 37 of the CPC.

24. Learned senior counsel for the petitioners-defendants vehemently argued that the trial Court had not adopted the procedure, as contemplated under sub-rule 4, Rule 3 of Order 37 of the CPC, whereby the summons for judgment in Form 4-A in Appendix B or such other form were to be served upon the petitioners-defendants, but the Court has straightway passed the decree. This procedure was to be adopted by the Court, if they had entered appearance and applied for leave to defend. As already held above, the petitioners-defendants when did not appear, the Court had to believe the allegations levelled in the plaint and the respondents-plaintiffs were held entitled to a decree for the sum mentioned in the summons together with interest. The petitioners-defendants were issued the summons in Form No.4 in Appendix B, which is required under law and the proprietor of the firm namely Vivek Saini was served by way of affixation when he refused to receive the summons and

thus, the learned trial Court had rightly passed the decree.

25. The petitioners-defendants, who did not enter appearance were rightly proceeded against ex-parte, which order was not challenged by them and they had only prayed for setting aside the ex-parte judgment and decree. The petitioners-defendants had filed an application under Order 37 Rule 4 of the CPC for setting aside the ex-parte judgment and decree. The Court after passing the decree only under special circumstances may, set aside the decree and if necessary, stay or set aside execution and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court to do so, and on such terms as the Court thinks fit.

26. In the present case, the petitioners-defendants in the application have not given any special circumstances for their non-appearance and the Court while adjudicating the application has to see whether the circumstances pleaded are so unusual or extraordinary, to justify putting the clock back by setting aside the decree to grant further relief in regard to

post decree matters, namely staying or setting aside the execution and also in regard to pre-decree matters. The words “special circumstances” occurring in Rule 4 of Order 37 of the CPC and the “sufficient ground” appearing in Rule 13 of Order 9 of the CPC are not synonymous and as such cannot be equated. To spell out “special circumstances”, the defendant has to firstly satisfy the Court that there was no due service of writ of summons or that he was prevented by sufficient cause from getting the leave of the Court to defend and secondly to show that he has good or meritorious defence in the suit.

27. Learned senior counsel has also relied upon the judgment passed by this Court in ***Rajesh Kochhar’s*** case (supra), wherein this Court had been pleased to set aside the ex-parte decree on the ground that the report made by the serving officer did not mention the whereabouts of the person and further there was nothing shown in the report that there was no likelihood of the respondent being found at his residence within a reasonable time. However, in the case

at hand, the proprietor of the petitioner's firm had refused to receive the summons and thus, as per the order passed by the learned trial Court to serve the petitioners/defendants by way of affixation, the petitioners-defendants were served and thus, no illegality has been committed by the Process Server and thereafter on the basis of the report made by the Process Server, the trial Court had rightly proceeded against the petitioners and passed the ex-parte decree.

28. The judgment of the Gauhati High Court in ***Shila Nath Mallik's*** case (supra), is also not attracted to the facts of the present case for the reason that in that case too, the application for setting aside the ex-parte decree was filed under Order 9 Rule 6 of the CPC and not under Order 37 Rule 4 of the CPC, as in the present case.

29. The Hon'ble Supreme Court in ***Rajni Kumar vs. Suresh Kumar Malhotra and others***, AIR 2003 SC 1322, had the occasion to deal with the similar proposition of law and held that while considering the application to set aside the ex-parte order, it is necessary to bear in mind the distinction

between suits instituted in the ordinary manner and suits filed under Order 37 of the CPC. Rule 4 of Order 37 of the CPC provides special circumstance for setting aside the decree and, therefore, the provisions of Rule 13 of Order 9 of the CPC will not apply to a suit filed under Order 37 of the CPC. Order 37 of the CPC prescribes the procedure for appearance of defendant and is governed by the provisions of Rule 3 thereof and the defendant is not entitled to defend the suit, unless he enters appearance within 10 days of service of summons either in person or by a pleader and files in Court an address for service of notice on him. In default of his entering an appearance, the plaintiff becomes entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rates specified. The relevant paras of the judgment read as under:-

> *"9. The expression 'special circumstances' is not defined in the C.P.C. nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extra-ordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable*

nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly by a special circumstances. In an application under Order 37, Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extra ordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters namely, staying or setting aside the execution and also in regard to pre decree matters viz., to give leave to the defendant to appear to the summons and to defend the suit.

10. In considering an application to set aside ex parte decree, it is necessary to bear in mind the distinction between suits instituted in the ordinary manner and suits filed under Order 37 C.P.C. Rule 7 of Order 37 says that except as provided thereunder the procedure in suits under Order 37 shall be the same as the procedure in suits instituted in the ordinary manner. Rule 4 of Order 37 specifically provides for setting aside decree, therefore, provisions of Rule 13 of Order 9 will not apply to a suit filed under Order 37. In a suit filed in the ordinary manner a defendant has the right to contest the suit as a matter of course. Nonetheless, he may be declared ex parte if he does not appear in response to summons, or after entering appearance before framing issues; or during or after trial. Though addressing arguments is part of trial, one can loosely say that a defendant who remains absent at the stage of argument, is declared ex parte after the trial. In an application under Order 9 Rule 11, if a defendant is set ex parte and that order is set aside, he would be entitled to participate in the proceedings from the stage he was set ex parte. But an application under Order 9 Rule 13 could be filed on any of the grounds mentioned thereunder only after a decree is passed ex parte against defendant. If the court is satisfied that (1)

summons was not duly served, or (2) he was prevented by sufficient cause from appearing when the suit was called for hearing, it has to make an order setting aside the decree against him on such terms as to cost or payment into court or otherwise as it thinks fit and thereafter on the day fixed for hearing by court, the suit would proceed as if no ex parte decree had been passed. But in a suit under, Order 37 the procedure for appearance of defendant is governed by provisions of Rule 3 thereof. A defendant is not entitled to defend the suit unless he enter appearance within ten days of service of summons either in person or by a pleader and files in court an address for service of notices on him. In default of his entering an appearance, the plaintiff becomes entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, upto the date of the decree together with costs. The plaintiff will also be entitled to judgment in terms of Sub-rule (6) of Rule 3. If the defendant enters an appearance, the plaintiff is required to serve on the defendant a summons for judgment in the prescribed form. Within ten days from the service of such summons for judgment, the defendant may seek leave of the court to defend the suit, which will be granted on disclosing such facts as may be deemed sufficient to entitle him to defend and such leave may be granted to him either unconditionally or on such terms as the court may deem fit. Normally the court will not refuse leave unless the court is satisfied that facts disclosed by the defendant do not indicate substantial defence or that defence intended to be put up is frivolous or vexatious. Where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, no leave to defend the suit can be granted unless the admitted amount is deposited by him in Court.

Inasmuch as Order 37 does not speak of the procedure when leave to defend the suit is granted, the procedure applicable to suits instituted in the ordinary manner, will apply.

11. It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the court to grant leave to the defendant to appear to summons and defend the suit if the Court considers it reasonable so to do, on. such terms as court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under 'Rule 4 of Order 37 is filed to set limitation expired, or having appeared, did not apply for leave to defend the suit in the decree either because the defendant did prescribed period, the court is empowered to grant leave to defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37. is different from Rule 13 of Order 9.

12. Now adverting to the facts of this case, though appellant has shown sufficient cause for his absence on

> *the date of passing ex parte decree, he failed to disclose facts which would entitle him to defend the case. The respondent was right in his submission that in the application under Rule 4 of Order 37, the appellant did not say a word about any amount being in deposit with the respondent or that the suit was not maintainable under Order 37. From a perusal of the order under challenge, it appears to us that the High Court, was right in accepting existing of special circumstances justifying his not seeking leave of the court to defend, but in declining to grant relief since he had mentioned no circumstances justifying any defence.*
>
> *13. In this view of the matter, we do not find any illegality much less jurisdictional error in the order under challenge to warrant interference of this Court. Inasmuch as having regard to the provisions of Section 34 of the C.P.C. and the facts of the case that the liability does not arise out of a commercial transaction, we are of the view that the grievance of the appellant with regard to rate of interest is justified. We, therefore, reduce the rate of interest from 18 per cent to 6 per cent per annum."*

30. In the present case too, the Process Server had made a report on 23.12.2015, when the proprietor of the petitioner's firm had refused to receive the summons and as per the provisions of Order 37 Rule 3 of the CPC, the petitioners were entitled to defend the suit, in case, they had entered appearance within 10 days of service of summons either in person or by a pleader. However, in the present case,

when the proprietor of the petitioner's firm had refused to accept the summons, the Process Server, as per the directions given by the Court, had affixed the copy of the summons on the wall of the factory and the petitioners did not come before the Court to seek leave to defend and the application for setting aside the ex-parte decree dated 06.01.2016 came to be filed only on 19.02.2016 i.e. admittedly after the expiry of 10 days from the date of making the report by the Process Server.

31. The petitioners-defendants in the application filed under Order 37 Rule 4 of the CPC had taken the plea that if the endorsement of the Process Server is seen on the summons it says that the father of defendant No.1 refused to receive the summon, whereas if the impugned order passed is perused, it has been mentioned that petitioner No.1-defendant No.1 had refused to receive the summons and it referred that the summons were served by way of affixation, whereas affixation has also not been made which can be borne out from the report of the Process Server. It is apt to

mention here that the petitioners-defendants were not proceeded against ex-parte on the report of the Process Server when the father of Vivek Saini-defendant No.1 had refused to receive the summons. Fresh summons were issued to the petitioners-defendants on 11.12.2015 and Vivek Saini-defendant No.1 had refused to receive the summons on 23.12.2015 and hence, the petitioners-defendants were served by way of affixation as clear from the report of the Process Server dated 23.12.2015. The petitioners-defendants did not approach the Court with clean hands and wrongly averred that there is no report that the petitioners-defendants were served by way of affixation. The another plea taken in the application that the petitioners-defendants were not properly served and refusal of service by another person than defendants cannot amount to effecting service on the petitioners-defendants is concerned, is not sustainable in law for the reason that Vivek Saini, who is the proprietor of the firm had refused to receive the summons and, therefore, the petitioners-defendants were served by way of affixation

of summons and they were not served through other persons. Since the pleas taken by the petitioners-defendants were unfounded, the learned trial Court had rightly rejected their application and this Court does not find any illegality or irregularity in the order. Further, it is settled law that the litigant who does not come to the Court with clean hands is not entitled to any discretionary relief.

32. Learned counsel for the respondents/plaintiffs placed reliance upon the judgment passed by this Court in ***Tirlok Singh Thakur vs. Madan Singh Nirala***, AIR 2000 HP 95 and contended that the petitioners, who had filed the application for setting aside the ex-parte decree had to file an application to seek leave to defend the suit and the ex-parte decree can be set aside only under special circumstances and since in the present case, no reason has been set out to seek the leave to defend, the learned trial Court had rightly rejected the application. He further argued that as per the provisions contained in Rule 4 Order 37 of the CPC, the defendant is to satisfy the twin condition, namely that he was

prevented by sufficient cause from putting in appearance and obtaining leave to defend the Court and that he has a good, substantial or meritorious defence in the suit, before a decree passed under Order 37 Rule 3 of the CPC can be set aside and leave is granted to him. In the case at hand, the petitioners have not met with the twin conditions i.e. they were prevented by sufficient cause from putting in appearance and obtaining leave of the Court and that they have good, substantial or meritorious defence in the suit. What has been pleaded in the application for setting aside the ex-parte decree is only that the alleged cheque dated 01.01.2012, bearing No.112511, amounting to Rs.11,00,000/- was written by making forgery on the cheque and that the writing on the cheque is not the writing of the petitioner, whereas, if the cheque, photocopy of which has been placed on record with the Civil Suit, is perused, the proprietor of the petitioner's firm had written in words "ELEVEN LAC ONLY " and thus the defence taken in the application is not plausible. Further the plea taken in the application that the plaintiff's firm is an

unregistered firm is also not fortified from the document placed on record, which shows that the petitioner's firm was registered and thus the plea taken by the petitioners/defendants cannot be said to be in merit defence. Relevant para of the judgment reads as under:-

> *"7. Issue No. 1 Rule 4 of Order 37, Code of Civil Procedure, provides :--*
>
> > *"After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendants to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."*
>
> *8. No doubt, Rule 7 of Order 37 prescribes that the procedure in suits triable under this Order shall be the same as the procedure in suits instituted in the ordinary manner, however, this is subject to the rules of special procedure as provided under this Order. Order 37, which is otherwise a self-contained Order deals not only with the right of the defendant to appear in a summary suit in which a decree has to be passed if leave to defend is not given to him, it also deals with the procedure to be followed if the defendant wishes to have a decree passed in such a summary suit, set aside.*
>
> *9. Order 37, Rule 2 lays down that where the defendant to whom the summons has been issued to appear and seek leave to defend the suit, does not appear or if he appears and does not seek leave to defend the suit, the allegations in the plaint shall be deemed to have been admitted by him and the plaintiff shall be entitled to a decree.*
>
> *10. The language used in Rule 2 of Order 37 does not*

postulate the passing of an ex-parte decree as is provided under Order 9, Rule 6, Code of Civil Procedure. It is only when the defendant afterwards appears and establishes special circumstances that the Court may set aside the decree and grant leave to him to appear and defend the suit. The procedure set out in Rule 4 of Order 37 leaves no doubt that the provisions contained in Order 9, Rule 13, Code of Civil Procedure, can have no application to a decree passed in absentia of the defendant under Rule 3 of Order 37.

11. The words "special circumstances" occurring in Rule 4 of Order 37 and the words "sufficient ground" appearing in Order 9, Rule 13 are not synonymous and as such cannot be equated. The legislature in its wisdom has used the words "special circumstances" in Rule 4, of Order 37. Therefore, the gravity of reasons is higher in the case of "special circumstances". Under Rule 4, the defendant is obliged to explain the special circumstances which prevented him from appearing in Court and seek leave to defend the suit within time. In addition he has further to show that he has good, substantial and/or meritorious defence in the suit.

12. The High Court of Bombay in Harshad Shah v. Bhor Industries Ltd., (1998) 4 Man 334, has held:--

> *"Order 9, Rule 13, CPC has no application for setting aside ex parte decree in summary suit. Specific provision is made under Order 37, Rule 4, CPC, whereunder the defendant has to show the special circumstances for setting aside ex parte decree passed in summary suit under Order 37, CPC. To spell out "special circumstances" the defendant has to first satisfy the Court that there was no due service of writ of summons or summons for Judgment or that he was prevented by sufficient cause from getting leave to defend and then secondly to show that he has good, substantial and/or meritorious defence in the suit. In the absence of satisfaction of first condition, it*

may not be necessary to go into second condition at all. Having not applied for leave to defend service of summons for judgment, it is not open to the defendant to now urge that he has substantial, meritorious and good defence in contesting the suit because in the very nature of claim made by the plaintiff under Order 37 or for that matter summary procedure 'prescribed under Order 37 could not be invoked. If a defendant deliberately or negligently sits over the matter after the service of summons for Judgment and does not apply for leave to defend and lets the Court pass decree ex parte, he cannot be permitted to derive premium for his deliberate omission or negligence and urge later in his application for setting aside such decree that he has good, meritorious and substantial defence in the suit. The power to set aside ex parte decree in summary suit cannot be exercised on the sole ground that the defendant has been able to demonstrate that there was sufficient cause of his failure to obtain leave to defend or when having obtained leave, he failed to appear, but defendant has to further show the merit of his defence. The two circumstances combined together may take out special circumstances as contemplated under Rule 4 of Order 37, CPC."

13. The above ratio was reiterated in Unilab Chemicals and Pharmaceuticals v. Smith Stanistreet Pharmaceuticals Ltd. (1999) 3 CompLJ 389: 1999 AIHC 2657.

14. I am in agreement with the above decision of the High Court of Bombay. Under the provisions contained in Rule 4 of Order 37, the defendant is obliged to satisfy the twin conditions, namely, he was prevented by sufficient cause from putting in appearance and obtain leave to defend the suit, and, he has a good, substantial and/or meritorious defence in the suit, before a decree passed under Order 37, Rule 3, can be set aside and leave

> *granted to him to defend the suit. Absence of any one of the two conditions would be sufficient to decline the prayer of the defendant under Order 37, Rule 4."*

33. Learned senior counsel representing the respondents-plaintiffs further argued that since the petitioners-defendants have not approached the Court with clean hands inasmuch as they have based their entire case on the basis of the summons, which were got served upon the father of the proprietor of the petitioner's firm, whereas the proprietor of the petitioner's firm was proceeded against on the basis of the report given by the Process Server on 23.12.2015 after the notices had been issued by the trial Court on 11.12.2015, no case was made out for setting aside the ex-parte decree and a litigant who does not approach the Court with clean hands, does not deserve any discretionary relief.

34. Learned senior counsel representing the petitioners-defendants had vehemently argued that since the petitioners-defendants have now protected the interest of the respondents, by depositing an amount of Rs.17,00,000/- in

the shape of FDRs to furnish the bank guarantee, no prejudice will be caused in case the ex-parte decree is set aside and one opportunity is granted to the petitioners-defendants to defend their case. However, the said submission cannot be accepted in view of the fact that the petitioners-defendants had not approached the Court with clean hands inasmuch as the entire basis for setting aside the decree was that the petitioners-defendants were never served in the case and if the endorsement of Process Server on summons issued is perused then the same says that father of petitioner No.1-defendant No.1 had refused to receive the summons and hence report in that regard was made, whereas the impugned order was passed in which it was referred that petitioner No.1-defendant No.1 had refused to receive the summons and it is also referred that summons were served by way of affixation.

35. As already discussed above in detail, once the service effected on the father of the proprietor of the petitioner's firm was not seen to be a proper service, the

Court had ordered the issuance of fresh summons on 11.12.2015 to effect service on the petitioners-defendants and when the Process Server had visited the factory on 23.12.2015, the proprietor of the petitioner's firm namely Sh. Vivek Saini had refused to receive the summons and the Process Server, as per the order passed by the trial Court, had affixed a hard copy of the summons on the wall of the factory, in which the date fixed was 06.01.2016. However, the petitioners-defendants despite having knowledge of the said summons did not choose to come present on the said date i.e. on 06.01.2016 before the trial Court and the trial Court was right in proceeding them against ex-parte and passed the ex-parte decree, which does not require any interference.

36. Learned senior counsel for the petitioners-defendants vehemently argued that the respondents-plaintiffs did not serve upon the petitioners-defendants a summons for judgment in Form No.4-A in Appendix B as contemplated under Sub Rule 4, Rule 3 of Order 37 of the CPC and thus the ex-parte decree on this ground deserves to be

set-aside. Firstly, the petitioners-defendants did not take this plea while filing the application for setting aside the ex-parte and secondly, this procedure was to be adopted when the petitioners-defendants had entered the appearance before the trial Court. Since the petitioners-defendants did not enter appearance despite service, the trial Court has rightly passed the ex-parte decree.

37. Consequently, I do not find any merit in the present petition and the same is accordingly dismissed. No order as to costs. Pending application(s) if any also stands disposed of.

29th September, 2026

(ankit)

(Jiya Lal Bhardwaj)
Judge