

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 11th OF JULY, 2023

MISC. PETITION No. 1971 of 2021

BETWEEN:-

**PRAMODH S/O DARSHANLAL AGRAWAL,
AGED ABOUT 64 YEARS, OCCUPATION:
BUSINESS 11/1, DR. R.S. BHANDARI MARG
(MADHYA PRADESH)**

.....PETITIONER

(BY SHRI ABHIJEET SINGH CHOUHAN, ADVOCATE)

AND

- 1. SHIVKANT S/O MURLILAL CHOWKSE,
AGED ABOUT 48 YEARS, OCCUPATION:
BUSINESS 704, SECTOR R MAHALAKSHMI
NAGAR (MADHYA PRADESH)**
- 2. SUNITA W/O SHIVKANT CHOWKSE
OCCUPATION: HOSUE WIFE 704, SECTOR-
R MAHALAKSHMI NAGAR. INDORE
(MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI SAMEER ANANT ATHAWALE, ADVOCATE)

.....
*This petition coming on for admission this day, the court
passed the following:*

ORDER

Heard finally, with the consent of the parties.

2] This petition has been filed by the petitioner/plaintiff under Article 227 of the Constitution of India against the order dated

16.03.2021, passed in Civil Suit No.385-B/2019 by XI Civil Judge, Class II, Indore (M.P.), whereby, in summary suit, the application filed by the respondents/defendants under Order XXXVII Rule 3 sub Rule (5) of CPC for leave to defend has been allowed.

3] In brief, the facts of the case are that the plaintiff has filed a suit for recovery of Rs.4,15,760/- against the defendants under the provision of Order XXXVII Rule 2 of CPC. The suit was filed in the year 2019 and the defendants were served on 24.10.2019. Thereafter, on 14.11.2019, the petitioner/plaintiff filed the judgement in the Form No.4-A as provided under sub-rule (5) of Rule 3 of Order XXXVII, a copy of which was also furnished to the counsel appearing for the defendants. On 02.01.2020, an application for leave to defend was filed by the defendants under **Order XXXVII Rule 10 of CPC**. The aforesaid application was dismissed by the learned Judge of the Trial Court vide order dated 15.02.2020 holding that there is no Rule 10 as provided under Order XXXVII of CPC which has only 7 rules and it was also observed that the application has also not been filed within the prescribed period of limitation. Subsequently, another application was filed by the defendants under Order VII Rule 11 of CPC on 24.02.2021, which was dismissed by the Trial Court on 05.03.2021, and thereafter, another application was again filed by the defendants under Order XXXVII Rule 3(5) of CPC seeking leave to defend the suit, and this time, the Trial Court allowed the application vide impugned order dated 16.03.2021, which is under challenge in this petition.

4] Counsel for the petitioner has submitted that after rejecting the defendants' earlier application under Order XXXVII on the

ground that it has been filed under wrong provision, and the subsequent application under Order VII Rule 11 for rejection of plaint on the same grounds which were taken in the earlier application for leave to defend, was also rejected. There was no reason for the learned Judge of the Trial Court to allow the third application under Order XXXVII Rule 3(5) of CPC without even recalling or reviewing its earlier order dated 15.02.2021.

5] Counsel has also submitted that the defendants, despite rejection of their earlier application on 15.02.2021, have not challenged the same, and thus, the order has become binding on the defendants and in such circumstances, the impugned order cannot be sustained in the eyes of law, which literally amounts to bypassing of Court's own order. Thus, it is submitted that the order passed by the Trial Court on earlier occasions cannot be bypassed by filing a separate application under the correct provision.

6] In support of his submissions, counsel for the petitioner has also relied upon a decision rendered by the Supreme Court in the case of **State Bank of Hyderabad Vs. Rabo Bank**, reported as **AIR 2015 SC 3820**, para 15.

7] The petition is opposed by the counsel for the respondents/defendants and it is submitted by shri Sameer Athawale that no illegality has been committed by the learned Judge of the Trial Court for the reason that the earlier application for leave to defend was rejected by the learned Judge only on the ground that it was filed under a wrong provision of law and the subsequent application which was filed under the correct provision, has been allowed taking note of the fact that the earlier application was

rejected on technical ground of mentioning of wrong provision by the counsel for the defendants. It is also submitted that the scheme of Order XXXVII clearly provides that sufficient opportunity has to be given to the defendant(s) to defend his case as it is provided under sub-Rule (7) of Rule 3 that, “*The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of defendant in entering an appearance or in applying for leave to defend the suit.*” Thus, it is submitted that the provisions of Order XXXVII have to be interpreted liberally and thus, it is submitted that no interference is called for and the petition be dismissed.

8] Heard counsel for the parties and perused the record.

9] From the record, it is apparent that the respondents/defendants’ earlier application filed for leave to defend has already been rejected vide order dated 15.02.2021, on the ground that it was filed under the wrong provision of law. This order has not been challenged by the defendants and has become final. There is also no review petition filed against the said order, and instead, a fresh application was filed by the defendants under Or.37 Rule 3(5) of CPC which has been allowed noting that earlier application under Or.37 Rule 3 was rejected on the ground that it has been filed under the wrong provision i.e., under Or.37 rule 10 of CPC. In the considered opinion of this court, such course of undoing an order does not exist in CPC because once an order is passed, whether rightly or wrongly, it cannot be overridden by passing a separate order, as it can only be recalled in a review petition by the same court or can also be set aside by a higher court if challenged in accordance with law.

10] In the case at hand, the defendants, instead of filing a review or challenging the order dated 15.02.2021 they were aggrieved of, in High court, have filed a fresh application under Or.37 rule 3(5), and the learned judge of the trial court has simply bypassed the earlier order passed by the same court stating that it was passed by holding that the application for leave to defend was filed under the wrong provision of law i.e. under Or.37 rule 10 and also on the ground of delay, and has allowed the subsequent application. Thus, once the application for leave to defend has also been dismissed on the ground of delay, how it can be condoned by the same court subsequently? it is simply beyond the pale and is liable to be interfered with.

11] Resultantly, the petition stands **allowed**, the **impugned order dated 16.03.2021 is set aside** and the leaned judge of the trial court is directed to proceed with the case in accordance with law.

(SUBODH ABHYANKAR)
JUDGE

Bahar