

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1122 of 2016**

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Ford India Pvt. Ltd.

.... Defendant-Petitioner

Versus

M/s. Priyadarshi Purnanand Automobiles Pvt. Ltd. & Ors

.... Plaintiffs-Respondents

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Appearance :

For the Petitioners	:	Mr. Chitranjan Sinha, Sr. Advocate Mr. Sandeep Kumar, Advocate Mr. Siddharth Setthy, Advocate with him
For the Respondents	:	Mr. Madhuresh Prasad, Advocate Mr. Abhay Shankar, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. ORDER

5 27-10-2016

I have already heard the learned Senior Counsel

Mr. Chitranjan Sinha for the petitioner and the learned counsel

Mr. Madhuresh Prasad for the respondents.

2. This civil miscellaneous application has been filed by the defendant-petitioner under Article 227 of the Constitution of India for setting aside the order impugned dated 27.08.2016 passed by Subordinate Judge-I at Danapur, Patna in Title Suit No.2658 of 2015 whereby the learned trial court has allowed the application of the plaintiff-respondent no.1 under Order 23 Rule 1(3) C.P.C. and permitted the plaintiff-respondent to withdraw the suit and file a fresh suit.

3. From perusal of the record, it appears that the plaintiff-respondent filed the aforesaid suit praying for the relief

that on adjudication of the facts stated in the plaint it be declared that the plaintiff is an authorized dealer of defendant no.1 (Company) in view of the agreement and further to grant a decree in favour of the plaintiff declaring the notice of termination of dealership and notice dated 30.07.2015 invalid and further prayed that if there is any difficulty in granting relief no.(ii), actual loss may be assessed. The plaintiff also prayed for injunction.

4. The defendant (Company)-petitioner herein appeared and filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 along with the agreement. The court below by terms of order dated 10.09.2015 rejected the application filed by the petitioner under section 8 of the Arbitration and Conciliation Act, 1996 relying on the decision of the Supreme Court in the case of **Radha Krishna Vs. Maestro Engineering and Others, (2010) 1 Supreme Court Cases 72**. Against the said order the petitioner herein filed C.W.J.C. 15462 of 2015. After hearing both the parties this Court by terms of order dated 03.02.2016 held that the decision of the Supreme Court in the case of **Radha Krishna** (supra) has already been held to be *per incurium* in the case of **Swiss Timing Limited Vs. Commonwealth Games, (2014) 6 Supreme Court Cases 677** and remanded the matter after setting aside the order of the trial court with a specific direction that a fresh order be passed



according to law in terms of arbitration clause according to Section 8 of the Arbitration and Conciliation Act, 1996. Against the said order a review application was filed being Civil Review No.80 of 2016. This Court on 12.05.2016 held that since the matter has only been remanded to the court below for fresh order, no case for review is made out. This court while disposing of the review application made clear that the order passed by this Court while remanding the matter shall not prejudice any parties in passing the final order.

5. After this order it appears that an application was filed by the plaintiff-respondent under Order 23 Rule 1(3) C.P.C. praying for permitting the plaintiff to withdraw the suit with liberty to institute fresh suit in respect of the subject matter of the suit. Rejoinder was filed by the defendant-petitioner. The court below by the impugned order dated 27.08.2016 allowed the application and permitted to withdraw and granted permission to the plaintiff to institute a fresh suit and awarded cost of Rs.5,000/- to be paid by the plaintiff to the defendant-petitioner.

6. The learned Senior Counsel Mr. Chitranjan Sinha submitted that the court below has got no jurisdiction to try the suit in view of the admitted arbitration agreement between the parties. If there is agreement wherein a clause of arbitration is there, it is



mandatory for the Civil Court to refer the dispute to an arbitrator. In the present case, existence of arbitration clause is admitted. The application has been filed by the petitioner for making reference to the arbitrator according to Section 8 of the Arbitration and Conciliation Act, 1996. Since the provision as contained in Section 8 of the Arbitration and Conciliation Act, 1996 is mandatory, the Court is required to refer the matter to the arbitrator. In other words the suit cannot be tried by the Civil Court and if the Civil Court cannot try the suit, there is no question of permitting the suit to be withdrawn and granting permission to file a fresh suit because the fresh suit also will not be maintainable as there is arbitration agreement, which is admitted fact. If the impugned order is allowed to stand then again in the second suit that may be filed, the same question regarding arbitration clause and section 8 of the Arbitration and Conciliation Act, 1996 will arise. In support of his contention the learned senior counsel relied upon the decision of the Supreme Court in the case of **Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, (2003) 6 Supreme Court Cases 503.**

7. The next submission of the learned Senior Counsel Mr. Sinha is that Order 23 Rule 1(3) C.P.C. contemplates that where the court is satisfied that a suit must fail by reason of some

formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit or part of a claim, it may on such term as it thinks fit grant the plaintiff permission to withdraw with liberty to institute a fresh suit. In the present case, at out hand, only the provision has been mentioned in the application filed by the plaintiff-respondent. No formal defect has been pointed out. In the application nothing has been stated that because of the said formal defect the suit must fail and no sufficient ground has been shown by the plaintiff for permission to file a fresh suit. The court below also in the impugned order has nowhere mentioned regarding the formal defect and has not recorded any finding that on the particular formal defect the suit must fail and there is sufficient ground for allowing the plaintiff to file a fresh suit. If the court has not recorded any such finding, he has got no jurisdiction to allow the application. The court below allowed the application only on the ground that the suit is at the very initial stage. In support of his contention the learned Senior Counsel relied upon the decision of the Supreme Court in **Civil Appeal No.5178 of 1995 decided on 28.08.1996 (Bakhtawar Singh Vs. Sada Kaur** (web copy of manupatra) = **(1996) 2 Supreme Court Cases 167 and Full Bench decision of the Bombay High Court**. Photocopy of the Full Bench decision obtained from SCC online web edition

passed in **Ramrao Bhagwantrao Vs. Babu Appanna** decided on 11.10.1939 and **A.I.R. 2009 Andhra Pradesh 12 (Somalraju Vs. Samanthu Sivaji Ganesh)**.

8. On the other hand, the learned counsel for the respondents submitted that none of the decision relied upon by the petitioner are applicable in the present case. In all the decisions relied upon by the petitioner the cases were at the advanced stage whereas the present case is at the very initial stage. The learned counsel relied upon the decision of Supreme Court in the case of **Baniram & others Vs. Gaiind and others, A.I.R. 1982 Supreme Court 789**.

9. The learned counsel further submitted that when the court below has exercised the jurisdiction under Order 23 Rule 1(3) C.P.C. according to law the order impugned cannot be interfered with in exercise of supervisory jurisdiction under Article 227 of the Constitution of India. According to the provision of C.P.C. under Order 23 Rule 1(3) the Court is required to be satisfied that there are formal defects and because of that the suit must fail and there are sufficient ground for permitting to institute fresh suit and the court below considering these aspects has allowed the application. There is no jurisdictional error in the order. In support of his contention the learned counsel relied upon decision of the Supreme

Court in the case of **Surya Dev Rai Vs. Ram Chander Rai, (2003) 6 Supreme Court Cases 675.**

10. Perused the impugned order passed by the court below. From perusal of the impugned order, it appears that the court below has allowed the application of the plaintiff-respondent only on the ground that till that date no issues were settled. It further appears that the court below nowhere considered the provision under Order 23 Rule 1(3) C.P.C.

11. Order 23 Rule 1(3) C.P.C. reads as follows:-

(3) Where the Court is satisfied-

- (a) that a suit must fail by reason of some formal defect, or*
- (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of claim, it may, on such terms, as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.*

12. The Full Bench of Bombay High Court relied upon by the petitioner has held that the language of the rule is quite plain and the Court must be satisfied either that the suit must fail by reason of some formal defect and that there are sufficient ground for allowing the application of the plaintiff to institute fresh suit. The ground in clause (a) requires that the suit must fail by reason of



some formal defect whereas the grounds contemplated in clause (b) need not necessarily be fatal to the suit but must be analogous to a formal defect. The formal defect has been mentioned as mis-joinder of parties, rejection of a material document for improper stamp and the erroneous valuation of the subject matter etc. and it is held that “the formal defect” must be given a wide and liberal meaning, and must be deemed to connote every kind of defect which does not affect the merit of the case, whether that defect be fatal to the suit or not.

13. In the present case, at our hand, the court below has not at all applied his judicial mind as to whether there is any formal defect and because of that the suit must fail and what is that formal defect.

14. The judgment in the case of **Somalraju** (supra) it has been held that merely repetition of the expression “formal defect” is not sufficient to grant the permission as contemplated under sub-rule (3) of Rule 1 of Order 23. What is the formal defect according to the plaintiff, must be specified and if the Court is satisfied that the suit must fail by reason of such formal defect, the leave can be granted pointing out such formal defect.

15. In the present case, admittedly the plaintiff had not pointed out nor has specified the so-called formal defect and the

court below also has not recorded its satisfaction that the suit would fail by reason of the formal defect.

16. The Hon'ble Supreme Court in the case of **Bakhtawar Singh** (supra) has held that the plaintiff must show that the permission to withdraw the suit was given on the ground that the suit was bound to fail by reason of some formal defect or there were sufficient grounds for allowing the plaintiff to institute a fresh suit. It appears that in that case the earlier suit was withdrawn by the plaintiff with liberty to file fresh suit and application was filed under Section 14 of the Limitation Act for exclusion of time spent in prosecuting the suit which was withdrawn. Upto the High Court, the application was rejected. The Supreme Court held as above and dismissed the civil appeal. In view of the decision of the Supreme Court also the plaintiff is required to point out what are those formal defects and the court below is required to record its satisfaction that because of the formal defect the suit must fail and there is sufficient reason for permitting the plaintiff to withdraw the suit with liberty to file a fresh suit. In my opinion, therefore, unless the Court records a finding according to the provision contained in Order 23 Rule 1(3) the Court has no jurisdiction to permit the plaintiff to withdraw the suit granting liberty to file a fresh suit on the same subject matter. The court below only allowed the

application on the ground that the suit is at very initial stage. There is no provision under Order 23 Rule 1(3) C.P.C. that if the suit is at the very initial stage, the Court without recording any finding on clause (a) or clause (b) of sub-rule (3) of Rule 1 of Order 23 can permit the plaintiff to withdraw the suit.

17. The most important fact which is to be considered in the present case is that the petitioner has filed an application under Section 8 of the Arbitration and Conciliation Act, 1996. Earlier application was rejected relying on the decision of the Supreme Court in the case of **Radha Krishna** (supra) which was subsequently held to be *per incurium* in the case of **Swiss Timing Limited** (supra), therefore, this Court set aside the order of the trial court and has directed the court below by order dated 03.02.2016 in C.W.J.C. No.15462 of 2015 to decide the application under Section 8 of the Arbitration and Conciliation Act, 1996. This question is yet to be decided by the trial court. In other words, the maintainability and/or the jurisdiction of the civil court is yet to be decided. If it is found that the civil court cannot entertain the suit and has the duty to refer the matter to the arbitrator then how the court will get jurisdiction to permit the plaintiff to withdraw the suit and file a fresh suit. If this order is allowed to stand then naturally after filing the second suit again this question will arise. Therefore, the

application appears to have been filed by the respondents in the court below to bypass the order passed by this court in the aforesaid writ application. This Court in the order dated 03.02.2016 held at paragraph 6 as follows:-

“6. The Hon’ble Supreme Court in many cases such as (i) (2003) 6 SCC 503 Hindustan Petroleum Corporation Vs. Pink City Midway Petroleum (ii) (2000) 4 SCC 539 Anand Gajpati Raju Vs. P.J.V. Raju (iii) (2015) SCC Online SCC 147 M/s Sundaram Finance Ltd. Vs. T. Thamkam held that Section 8 of Arbitration and Conciliation Act is mandatory provision and once the application under Section 8 is filed by the defendant, the Court is required to see as to whether the jurisdiction of the Court is ousted by the Arbitration clause and the Court is not required to see whether Court has the jurisdiction to decide the dispute which can be resolved by the arbitrator. Once it is brought to the notice of the Court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the Civil Court should first see whether there is ouster of jurisdiction. Once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party violating terms of the agreement, approaches the Civil Court, the other party can apply to Court in terms of Section 8, which is obligatory for the Court, to refer the dispute to arbitration in terms of the agreement. The provision as contained in Section 8 is peremptory in nature. In the present case admitted fact is that the dispute between the parties arises out of the contract between the parties and that can be decided by the arbitrator.”

18. It will not be out of place to mention here that the Court is not trying the suit. There is no question of framing issue at

this stage arises. Once an application under Section 8 of the Arbitration and Conciliation Act, 1996 is filed by the defendant, it is for the Court to decide the same. If the Court decides that the suit cannot be referred to arbitrator as there is no arbitration agreement then only the Court will get jurisdiction to try the suit. This question has not been decided by the court below.

19. So far the decision relied upon by the learned counsel for the respondents i.e. **Baniram** (supra) is concerned, it appears that the Hon'ble Supreme Court found that none pleading may prove a technical impediment and may result in the dismissal of the appeal which may impede a fresh adjudication if a point is to be made though belated and therefore, permitted the plaintiff to withdraw the suit. Therefore, in that case the Supreme Court recorded the finding required under Order 23 Rule 1(3) C.P.C. In the present case, there is no such finding recorded by the trial court. Moreover, here there is no question of recording such finding arises because the Court cannot form an opinion that the suit must fail as the Court is required to first record a finding as to whether the dispute that is raised in the suit be referred to arbitration according to arbitration agreement clause. Further it can be said that while considering an application under Section 8 of the Arbitration and Conciliation Act, 1996, the Court is not required to form any

opinion as provided under Order 23 Rule 1(3) C.P.C. prior to passing any order under Section 8 of the Arbitration and Conciliation Act, 1996. The Court could have recorded any finding according to Order 23 Rule 1(3) C.P.C. only if the suit could be tried by the civil court.

20. So far the exercise of jurisdiction under Article 227 of the Constitution of India is concerned, it may be mentioned here that in the case of **Surya Deo Rai** (supra) itself the Supreme Court has held that power under Article 227 of the Constitution of India can be exercised by the High Court if the order passed by the court below is without jurisdiction or it has been passed in the manner not permitted by law or the court below assumed a jurisdiction which it has not. This case has been overruled in the case of **Radhey Shyam & Anr. Vs. Chhabi Nath & Ors. (2015) 5 Supreme Court Cases 423**. However, the principle under Article 227 has been upheld.

21. In view of my above discussion I find that the court below has no jurisdiction to permit the plaintiff-respondent to withdraw the suit with liberty to file a fresh suit without recording any finding as required under the provision of Order 23 Rule 1(3) C.P.C. In the present case, prior to passing the order under Section 8 of the Arbitration and Conciliation Act, 1996 no order under Order 23 Rule 1 (3) can be passed by the civil court because unless

the Court finds that the Court has the jurisdiction to entertain the suit, no such opinion can be formed and permission can be granted. Therefore, the order passed by the court below is without jurisdiction, as such, it is hereby set aside.

22. In the result, this civil miscellaneous application is allowed. The impugned order is set aside. The court below is directed to decide the application under Section 8 of the Arbitration and Conciliation Act, 1996 filed by the petitioner as directed by this Court earlier in the writ application as aforesaid.

(Mungeshwar Sahoo, J)

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