

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

923 WRIT PETITION NO. 8315 OF 2015

RAMGOPAL AUTOMOBILES THROUGH ITS PROPRIETOR
VERSUS
BHAUSAHEB KASHINATH GHUGE

Shri. R.F. Totla Advocate, for petitioner.

Shri. P.K. Joshi, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

DATE : 15 SEPTEMBER 2016

ORDER:

1) The present proceeding is filed to challenge the orders made on Exhibits 134 and 135 from Summary Suit No.13 of presently pending in the Court of the Civil Judge, Senior Division, Aurangabad, Both the sides are heard.

2) The suit is filed under Order 37 of the Civil Procedure Code as a Summary Suit. In the said suit at Exhibit 134 application dated 21-4-2015 filed by the plaintiff for issuing summons for judgment as provided by Order 37 Rule 3(4) of the Civil Procedure Code. It

appears that on the same day the defendant filed application at Exhibit 135 and he prayed for granting leave to defend the suit.

3) It appears that the trial Court made order on 21-4-2015 on application Exhibit 135 and asked the plaintiff to file say. On the same date as no say was filed, leave was granted to the defendant. On the other hand on 21-4-2015 order was made on Exhibit 134 as follows:

"Keep for order after deciding application Exhibit 135."

4) The provisions of Order 37 Rule 3 (3), (4) and (5) of the Civil Procedure Code run as under :-

"3. Procedure for the appearance of defendant.--

(1)

(2)

(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.4-A 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."

5) The procedure given in the aforesaid provisions shows that first the plaintiff is required to apply to the Court for issuing summons for judgment and only after that provision of Order 37 Rule 3(5) comes into play. Thus the order ought to have been made first on Exhibit 134 but it appears that Exhibit 135 came to be decided first. There are some pre-conditions given in Order 37 Rule

3(5) and those need to be considered before passing any order on such application. Even when that stage was not reached the order was made first on Exhibit 135. In view of these circumstances, this Court holds that the orders made on Exhibits 134 and 135 cannot sustain in law. So the petition needs to be allowed.

6) In the result, the petition is allowed. The orders made on Exhibits 134 and 135 dated 21-4-2015 are hereby quashed and set aside. The application at Exhibit 134 is hereby allowed. In view of this order there will be liberty to the defendant to take steps as provided under Order 37 Rule 3(5) for filing application for grant of leave to defend. The parties to appear before the trial Court on 20th September 2016. Authenticated copy to both the parties.

Sd/-
(T.V. NALAWADE, J.)

rsl