

Mr. Sagar Ghogre i/b. Mr. Sandip Ghogre for Petitioner.
Mr. Pradeep J. Thorat for Respondents.

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 16, 2016

Heard Mr. Ghogre, learned Counsel for petitioner and Mr. Thorat, learned Counsel for respondents at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'plaintiff', has challenged the order dated 21.11.2016 passed by the learned trial Judge. By that order, the learned trial dismissed the draft Notice of Motion taken out by plaintiff for framing / re-casting issues set out in prayer (b) of the draft motion.

3. In support of this Petition, Mr. Ghogre submitted that plaintiff has instituted Suit for recovery of Rs.64,84,340/- from the defendants together with interest @24% per annum from 21.09.2011 till realization as per the particulars of the plaint set out in exhibit E-1. He submitted that defendants have alleged that plaintiff has suppressed the cost of material supplied by the defendants to the plaintiff while the plaintiff carried out the sub-contracts given by the defendants. Defendants further alleged that in a joint meeting held between the plaintiff and defendants on 22.08.2011, entire claim of the plaintiff was settled at Rs.5,00,000/- He submitted that in fact defendants have accepted the

claim of the plaintiff in the sense that defendants have accepted invoices at exhibits A-3 to A-34 of the plaint forwarded by the plaintiff to defendants. He further submitted that the learned trial Judge rejected the Motion on the ground that plaintiff availed 10 days for leading evidence and despite availing opportunity, did not file affidavit of evidence. He submitted that plaintiff's affidavit of evidence is ready and it can be filed on the next date of hearing. He, therefore, submitted that the learned trial Judge was not justified in dismissing the Motion and that too by observing that the primary burden is on the plaintiff to establish its case.

4. On the other hand, Mr. Thorat supported the impugned order. He invited my attention to paragraph 11 of the plaint wherein plaintiff has averred that for the electrical works carried by it for the defendants in the financial year 2008-2009, defendants are liable to pay Rs.4,16,37,486/- to the plaintiff. He has also invited my attention to prayers (b) and (c) of the plaint to contend that it is for the plaintiff to establish that they are entitled to recovery of Rs.64,84,340/- together with interest. He also invited my attention to the issues framed by the learned trial Judge on 02.09.2015.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff has instituted Suit initially for recovery of Rs.64,84,340/-. Defendants have denied the said claim and in addition have contended that in a joint meeting held between the parties on 22.08.2011, the full and final settlement was arrived at Rs.5,00,000/-. Thus, basically, plaintiff will have to establish its claim as also defendants will have to establish their defence. The learned trial Judge was, therefore, justified in observing that the primary burden is on the plaintiff to establish its claim. Hence, no case is made out for

interfering with the impugned order. Petition fails and the same is dismissed. However, it is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the proposed proceedings as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)

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