

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CR No.3445 of 2017(O&M)
Date of Decision: 04.09.2019**

Mandeep Singh

.....Petitioner

Versus

M/s Narain Indane Gas Service and othersRespondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Deepak Gupta, Advocate
for the petitioner.

Mr. Rajan Bansal, Advocate
for respondent No.2.

Mr. M.S. Rana, Advocate for
Mr. Ashish Kapoor, Advocate
for respondent No.4.

RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this revision petition against the order dated 23.01.2017 passed by Civil Judge (Junior Division), Bathinda, vide which application under Order 30 Rule 8 read with Section 151 CPC filed by defendant No.2 Smt. Rupinder Kaur was allowed.

[2]. Plaintiff/petitioner filed a suit for dissolution of firm i.e. defendant No.1 and for rendition of accounts. Permanent

injunction was also sought, restraining defendants No.1 to 3 from disposing of any asset of the partnership firm (defendant No.1). Plaintiff pleaded that defendant No.1 firm was constituted amongst defendants No.2, 3 and the plaintiff vide partnership deed dated 05.02.2011. Rendition of accounts was sought. The recovery of the amount was also sought that may be found due in favour of the plaintiff against the defendants.

[3]. An application under Order 30 Rule 8 read with Section 151 CPC was filed by defendant No.2, claiming that she is sole proprietor of defendant No.1. In memo of parties of the suit, defendant No.1 was impleaded through defendant No.2 as its partner. Defendant No.2 claimed in the application that she is sole proprietor of defendant No.1 and defendant No.3 has got no right in defendant No.1 or with the business of defendant No.1 in any manner. Defendant No.2 contended that she was not served with the summons of the case but the process Server came through one carbon copy of summon along with copy of application under Order 39 Rule 1 and 2 CPC which was not accompanied by a copy of plaint and other documents attached with the plaint. No such summon was personally received by her. She wanted to appear in the suit under protest in terms of Order 30 Rule 8 read with Section 151 CPC.

[4]. Order 30 Rule 8 CPC reads as under:-

*“8. **Appearance under protest.**-(1) Any person served with summons as a partner under Rule 3 may enter an appearance under protest, denying that he was a partner at any material time.*

(2) On such appearance being made, either the plaintiff or the person entering the appearance may, at any time before the date fixed for hearing and final disposal of the suit, apply to the Court for determining whether that person was a partner of the firm and liable as such.

(3) If, on such application, the Court holds that he was a partner at the material time, that shall not preclude the person from filing a defence denying the liability of the firm in respect of the claim against the defendant.

(4) If the Court, however, holds that such person was not a partner of the firm and was not liable as such, that shall not preclude the plaintiff from otherwise serving a summons on the firm and proceeding with the suit; but in that event, the plaintiff shall be precluded from alleging the liability of that person as a partner of the firm in execution of any decree that may be passed against the firm.”

[5]. Perusal of the aforesaid provision would show that any person served with the summons as a partner under Rule 3 may enter an appearance under protest. Rule 3 prescribes that on such application, the Court has to hold that the person applying was a partner at the material time, that itself will not preclude the person from filing a defence, denying the liability of the firm.

[6]. Trial Court framed the following issues in the application under Order 30 Rule 8 CPC:-

*“1. Whether defendant No.1 is a partnership firm and defendants No.2 and 3 are partners of defendant No.1?
OPP
2. Relief.”*

[7]. Issue No.1 is suggestive of the fact that it was the plaintiff who was to discharge the onus of the issue. In case, the plaintiff was successful in proving issue No.1, the plea of defendant No.2 that defendant No.1 is sole proprietorship firm of defendant No.2 would vanish away. In issue No.1 itself, defendant No.2 would counter the evidence of the plaintiff to establish her case on the basis of her plea of being a sole proprietor of defendant No.1.

[8]. Order 30 Rule 8 CPC is for the partner. Any person served with the summons as a partner under Rule 3 can protest on appearance that he was not a partner at any material time. The language of Order 30 Rule 8(1) and (3) CPC would show that on such application, the Court has to hold that he was a partner at material time and that shall not preclude the person from filing a defence. Defence has not been espoused by defendants No.1 and 2 as yet. The maintainability of the suit by impleading defendant No.2 as partner would be tested by the Court.

[9]. Learned counsel for defendant/respondent No.2 placed reliance upon **Union of India Vs. M/s Bora Enterprises and others, 1988 SimLJ 651** and **Gajendra Narain Singh Vs. Johrimal Prahlad Rai, 1964, AIR (SC) 581** to contend that the issue of sole proprietorship has to be decided at the first instance before proceeding with the suit.

[10]. Perusal of **Union Bank of India Vs. M/s Bora Enterprises and others case (supra)** would show that the issue was in respect of plea that the partnership firm was dissolved in August 1978 and thereafter, the applicant was not partner of the partnership firm on three material dates when the balance amount in the account was confirmed. It was in view of those facts, the Court appreciated the cause of action accrued for filing the suit. The Court refrained from commenting upon the fact of the applicant not being partner of the firm on three dates as the same was subject matter of determination of the suit itself. The plea was to be determined by the Court before final decision of the suit. In view of those facts, the Court did not appreciate the challenge made to the order assailed therein and dismissed the revision petition.

[11]. Since the suit itself is at the initial stage and only issue No.1 has been framed, therefore, it would be premature to comment upon anything with regard to accrual of cause of

action. Both the parties would lead their evidence in accordance with law. Even if, the application is not filed by defendant No.3, the same would not advance the case of the petitioner for challenging the impugned order. Defendant No.2 would be well within her right to establish the factum of firm being sole proprietorship under the scope of issue No.1.

[12]. For the reasons recorded hereinabove, I do not find any justification to interfere in the impugned order. This revision petition is accordingly dismissed.

04.09.2019
Prince

(RAJ MOHAN SINGH)
JUDGE

Whether reasoned/speaking

Yes/No

Whether reportable

Yes/No