

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

WRIT PETITION NO. 3870 OF 2021

Nitin Solvents and Adhesives Private Ltd.,
Vs.
Shri Sunil Prabhakar Bhalerao

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. Abhijeet Khare, Advocate for petitioner.

CORAM : MANISH PITALE J.

DATE : 04.04.2022.

Heard Mr. Khare, learned counsel
appearing for the petitioner (original plaintiff).

2. By this writ petition, the petitioner has challenged an order dated 04.01.2020, passed by the Court of Joint Civil Judge Junior Division, Nagpur, whereby an application at Exh. 12 filed by the respondent (original defendant) seeking leave to defend has been allowed subject to the condition that the respondent shall pay cost of ₹500/- to the petitioner.

3. In the present case, the petitioner filed a suit for recovery of an amount ₹2,40,000/- for goods

supplied to the respondent. The petitioner has claimed the decree for recovery of the aforesaid amount along with interest @ 24% from 20.01.2016.

4. In this suit, the respondent filed the aforesaid application for grant of leave to defend, which was opposed by the petitioner, *inter alia*, on the ground that it was filed beyond the period of 10 days specified in Order 37 Rule 3(5) of the Civil Procedure Code (CPC). It is further submitted that in the application no justifiable ground was made out for grant of leave to defend.

5. As noted above, by the impugned order dated 04.01.2020, the Court below allowed the application subject to the aforesaid condition.

6. In this petition, notice was issued on 04.10.2021. The sole respondent has been served, but he has chosen not to appear before this Court.

7. Mr. Khare, learned counsel appearing for the petitioner, submitted that the impugned order deserves to be set aside, not only on the ground that the application seeking leave to defend was filed beyond the mandatory period of 10 days, but because

no justifiable ground was stated in the application while seeking leave to defend. The Court below also failed to appreciate the requirements for grant of such leave to defend. Factually incorrect observations were made in the impugned order and only on the condition of payment of cost of ₹500/- to the petitioner, the application stood erroneously allowed.

8. The learned counsel for the petitioner handed over a copy of the Roznama pertaining to the aforesaid case, downloaded from the site pertaining to the Court below, wherein it is recorded that after the impugned order dated 04.01.2020 was passed, till date, the respondent No.4 has failed to comply even with the direction of payment of cost of ₹500/- to the petitioner.

9. The aforesaid downloaded copy of the Roznama is taken on record and marked as “X” for identification.

10. As noted above, the respondent has chosen not to appear before this Court. Therefore, this Court has heard the learned counsel for the petitioner and perused the impugned order as well as the material placed on record.

11. A perusal of the material on record would show that Vakalatnama on behalf of the respondent was filed before the Court below as far back as on 02.04.2018. Thereafter, judgment summons had been issued on 19.07.2018 and as per the Roznama placed on record, on 12.10.2018, the same was served upon the respondent. Even otherwise, an acknowledgment dated 27.01.2019 placed on record shows that the counsel representing the petitioner supplied copy of the affidavit of judgment summons to the counsel representing the respondent, who had filed Vakalatnama on behalf of the respondent.

12. A perusal of the application for grant of leave to defend filed on behalf of the respondent shows that the same was filed on 15.02.2019. Therefore, even if the date 27.01.2019 is to be taken as the date to reckon the period of 10 days as specified in Order 37 Rule 3(5) of the Civil Procedure Code, the application for grant of leave to defend was filed much beyond the period of 10 days. There is nothing on record to show that the respondent even prayed for condonation of delay in moving the said application for grant of leave to defend beyond period of 10 days. This aspect was only cursorily referred in the impugned order, by stating that delay

cannot prejudice respondent from defending the suit. In the absence of any prayer in the context of delay, the Court below could not have proceeded in the aforesaid manner.

13. Even otherwise, a perusal of the application for grant of leave to defend would show that the respondent claimed that a cheque was given to the petitioner by way of security and since the respondent had rejected the goods supplied by the petitioner on the ground of not being of proper quality, instead of returning the cheque the petitioner had misused the same. The aforesaid stand taken by respondent was not supported by reference to any details as regards the date of rejection of such supply of goods, much less any reference to the communication or letter from the respondent to the petitioner regarding rejection of goods on the ground of inferior quality. The defence sought to be taken in the application for grant of leave to defend was not only general and vague, but also not supported by any material.

14. A perusal of the impugned order shows that the aforesaid vague and general form of defence was not even referred to and the Court below proceeded on the basis that the respondent was

adverting to a loan which he had repaid. The aforesaid recording of facts by the Court below is completely foreign to the contents of the application for grant of leave to defend filed by the respondent. This further demonstrates complete non-application of mind on the part of the Court below in passing the impugned order.

15. It is further evident that despite such vague and general contents of the application for grant of leave to defend, the Court below passed an order allowing the application by imposing condition of payment of cost only of ₹500/- to the petitioner. The Court below failed to apply the settled position of law that for such an application to be granted, the respondent had to make out at least a semblance of defence, with reasonable and supportable pleadings in such an application. In the absence of such material, the Court below could not have allowed the application filed by the respondent.

16. Even as per the Roznama of the Court below, brought to the notice of this Court by the learned counsel appearing for the petitioner, it is evident that till date the respondent has not complied with even the aforesaid condition imposed by the Court below while passing the impugned order. This

further demonstrates the approach of the respondent who chose not to appear before this Court, despite service of notice.

17. In view of the above, this Court is of the opinion that the impugned order cannot be sustained and it deserves to be set aside.

18. Accordingly, the writ petition is allowed and impugned order is quashed and set aside and the application for grant of leave to defend at Exhibit 12 filed by the respondent is dismissed.

JUDGE

Prity

PRITY S
GABHANE

Digitally signed
by PRITY S
GABHANE
Date:
2022.04.07
15:23:14 +0530