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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM(M) 1031/2023 & CM APPL. 33631/2023**

RAJIV SHARMA Petitioner
Through: Mr. Keshav Sehgal and Mr.
Mayank Maini, Advocates
versus
M/S BALAJI ENTERPRISES & ANR. Respondents
Through: Mr. Faiyaz Hassan, Advocate
(through VC) for R-1

% Date of Decision: 06th July, 2023
CORAM:
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

CM APPL. 33632/2023 (for exemption)

Allowed, subject to all just exceptions.

Accordingly, the present application stands disposed of.

CM(M) 1031/2023

1. This petition filed under Article 227 of the Constitution of India impugns the order dated 24.05.2023 passed by District Judge, Commercial Court-03, South East District, Saket Court, Delhi ('Trial Court') in CS (COMM.) No. 205/2022, titled as *M/s Balaji Enterprises v. Bhushan Sharma & Anr.*, dismissing the application filed by the Petitioner herein i.e., defendant No. 2 under Order 1 Rule 10 C.P.C. seeking deletion from the array of parties.



2. For the sake of convenience, the parties herein shall be referred to in terms of their rank and status before the Trial Court, i.e., Petitioner as Defendant No.2, Respondent No.1 as Plaintiff and Respondent No.2 as Defendant No.1.

3. The plaintiff instituted a commercial suit against defendant No.1 and 2 herein for recovery of Rs. 66,95,658/-. The claim in the suit arises on account of the commercial transactions with respect to sale and purchase of plastic granules. defendant no. 1 admittedly carries on business of a sole proprietorship firm under the name and style of 'M/s Raghav Industries'. The Petitioner herein has been arrayed as a defendant No.2 in the civil suit on the plea that he as well is directly involved in the day-to-day business and affairs of 'M/s Raghav Industries'.

4. The defendant no.2 filed an application under Order 1 Rule 10 C.P.C. seeking his deletion from the array of parties on the ground that he has no role or concern in the functioning of the proprietorship firm of 'M/s Raghav Industries'. It was stated that defendant No.1 is the sole proprietor of 'M/s Raghav Industries'.

5. The Trial Court while dismissing the above-said application filed by the defendant no.2 herein, observed at paragraph 5 of the impugned order, that in view of the averments made in the plaint 'at this stage' it cannot be inferred that defendant no. 2 is not involved in the day-to-day affairs of the proprietorship firm 'M/s Raghav Industries'. On this basis, the Trial Court dismissed the application filed by the defendant no. 2 under Order 1 Rule 10 C.P.C.



Arguments of the Petitioner/Defendant no. 2

6. The learned counsel for the defendant no. 2 states that the plaintiff instituted the commercial suit, against the defendant nos. 1 and 2 seeking recovery of Rs. 66,95,658/- along with pendente lite and future interest at 24 %.

6.1 He states that it is admitted on record that the commercial transactions which are the subject matter of the claim in the civil suit were only allegedly executed between plaintiff and defendant no.1. All documents relied upon by the plaintiff have also been exchanged between plaintiff and defendant no.1.

6.2 He states that the defendant no. 2 herein has no liability under the commercial transaction allegedly entered into between the said parties.

6.3 He states that M/s Raghav Industries is a proprietorship firm of defendant no.1 i.e., Mr. Bhushan Sharma, who is the sole proprietor of the said firm. He states that all the documents placed on record by plaintiff with the plaint, evidence, only evidence alleged transaction between plaintiff and defendant no.1.

6.4 He states on instructions that defendant no. 2 does not operate the bank accounts of the proprietorship firm, M/s. Raghav Industries. He states that defendant no.1 alone is liable for the transactions carried out in the name of M/s Raghav Industries. He states that the PAN number of the firm M/s. Raghav Industries is of defendant No.1, as he is the sole proprietor. Therefore, the impleadment of defendant no.2 is without any cause.



6.5 He states therefore, in law defendant no. 2 cannot be arrayed as a defendant in this commercial suit since he admittedly has no privity of contract with the plaintiff.

6.6 He also relies upon the proceedings, which were initiated by the plaintiff with respect to the mandatory pre-litigation mediation as per the mandate of Section 12 A of Commercial Courts Act. 2015. He states that no mediation notice was issued to the defendant no. 2 herein and mediation notice was only served on defendant no.1 i.e., Mr. Bhushan Sharma, the sole proprietor of M/s Raghav Industries. He states that the said fact sufficiently evidences that the impleadment of defendant no.2 is mischievous and without any cause.

Arguments of the Respondent No.1/Plaintiff

7. The learned counsel for the plaintiff has entered appearance on advance service.

7.1 He states that there is no infirmity in the order passed by the Trial Court. He relies upon the averments made in the plaint and more specifically the averments made at paragraph 10 of the plaint, which reads as under:

“10. That after continuous efforts made by the plaintiff to get in touch with the defendants, the defendant no. 2 i.e., Rajiv Sharma replied via whatsapp, asking the plaintiff to visit them again and collect their cheques for the due amount, on 21st September 2021. However, when the Authorized Representative of the plaintiff firm reached there, they were again not allowed inside the factory and they were communicated on phone that the defendants have gone to Jammu and asked the Authorized Representative to wait for one more day. Accordingly, the Authorized Representatives had to stay in UNA overnight and on the next day again they were asked to wait. However, on 23rd September 2021, one of their employee/relative namely Ankur Sharma met them



and promised to send cheques against the pending dues within 2 days but they have not done the same.”

(Emphasis Supplied)

7.2 He states that in the plaint it has been specifically averred that defendant No. 2 used to communicate with the plaintiff with respect to the commercial transaction undertaken with M/s Raghav Industries.

7.3 He states that it was defendant No. 2, who was regularly in contact with the plaintiff for the execution of the transaction between the plaintiff and M/s. Raghav Industries.

7.4 He fairly admits that there is no document filed before the Trial Court in support of the role played by defendant No. 2 in the performance of the transaction. He states that the WhatsApp messages referred to in paragraph 10 of the plaint have not been placed on record and no other documents evidencing the role of defendant no. 2 is on record. He states that there were e-mails exchanged between the plaintiff and defendant no.2; however, the same have not been placed on record before the Trial Court

Analysis and Conclusion

8. This Court has considered the submissions of the parties.

9. The Trial Court has dismissed the application filed by Defendant No.2 seeking his deletion relying on the averments made in the plaint and given its reasons at paragraph 5 of the impugned order dated 24.05.2023 which reads as under:

“5. As per plaint, the defendant no. 2 is associated with defendant no.1 since the beginning of the transaction and also communicating on whatsapp. At this stage, it cannot be inferred that he is not involved in day to day affairs of the firm or that he is not actively involved in the transaction. Accordingly, no ground is made out to entertain the present



application. Hence, the present application stands dismissed and disposed off accordingly.”

(Emphasis Supplied)

There is no other reasoning given by the Trial Court while dismissing the application.

10. The Trial Court has however not returned any finding on the aspect whether Defendant No.2 is a proper or necessary party to the proceedings in the commercial suit.

11. Order I Rule 10 (2) of the Code of Civil Procedure, 1908 ('CPC'), which arises for consideration in these proceedings reads as under:

*“(2) **Court may strike out or add parties.** - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”*

(Emphasis Supplied)

12. As per Order I Rule 10 (2) of the CPC, the Court may at any stage of the proceedings, either upon or without the application of the party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out.

13. The discretion on whether to add or remove, delete parties from a pending litigation, therefore, vests with the Court which is *in seisin* of the litigation.

14. In order to decide the controversy at hand, it may be apposite to refer to the principles to be applied while deciding a cause of action involving Order I Rule 10 of the CPC:



(i) In *Vindur Impex and Traders Pvt. Ltd. & Ors. v. Tosh Apartments Pvt. Ltd. & Ors*, (2012) 8 SCC 384, the Supreme Court has succinctly laid down the principles to be followed while deciding an application filed under Order I Rule 10 (2). Paragraph 36 in this regard reads as under:

“36. Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:

1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as Plaintiff or Defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the suit.

2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the Court.

3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

4. If a person is not found to be a proper or necessary party the Court does not have the jurisdiction to order his impleadment against the wishes of the Plaintiff.”

(Emphasis Supplied)

(ii) In *Mumbai International Airport (P) Ltd. v. Regency Convention Centre & Hotels (P) Ltd. & Ors.*, (2010) 7 SCC 417, the Supreme Court stated that the general rule in regard to impleadment of parties is that the plaintiff in a suit, being *dominus litis*, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. The impleadment of a party can be on the basis that it is a necessary or a proper party to the proceedings. A necessary party is one against whom the plaintiff seeks relief or in whose absence an effective decree cannot be passed.



A proper party is one against whom relief may not be sought but whose presence is essential for the determination of the questions involved in the suit.

(iii) This Court in *Mohinder Jeet Singh v. BMW India Pvt. Ltd. & Ors*, 2019 SCC OnLine Del 9892, while relying on *Mumbai International (Supra)* has held as under:

“13. The deletion of a party as a defendant in a suit is therefore possible only upon arriving at a determination that the party is neither a necessary nor a proper party to the suit.

14. The allegations contained in the plaint in the present case must be analysed in the context of these principles. The relief sought in the plaint is for a decree against “the defendants, jointly and severally” To this extent, it is clear that the plaintiff has sought relief against the defendants no. 4 and 5 as well. The question then is whether he has disclosed a cause of action against the said defendants, entitling him to proceed against them.”

(Emphasis Supplied)

15. The plaintiff has relied upon the averments made at paragraph 10 of the plaint to justify the conclusion of the Trial Court. No documents have been filed in support of the said averments. It is the same paragraph which has been relied upon by the Trial Court in the impugned order.

15.1 Considering the facts of this case in the light of the above dicta of Supreme Court and this Court, even if it is assumed that the facts stated by the plaintiff in the plaint at paragraph 10 are considered to be correct, this Court fails to understand how could the role played by the defendant No. 2 make him legally liable to the plaintiff for recovery of the said amount arising out of the commercial transactions undertaken with defendant no.1.

15.2 The financial responsibility of performing the transactions in law is on defendant no.1 i.e., defendant No. 1, who is a sole proprietor of



the firm. The legal responsibility, if any, therefore will only be on defendant no.1. In this regard, it would be appropriate to refer to the dicta of the Supreme Court in ***Yogesh Aggarwal vs. Aneja Consultancy (A part of Aneja group) & Ors. 2021 SCC OnLine SC 1312*** which reads as under:

“5. Since the opposite party is a sole proprietorship consultancy of Mr. I.J. Aneja therefore, the liability of payment of investments would be that of Mr. I.J. Aneja and not of the employees who are engaged by Mr. Aneja at different places such as Nehru Place, Noida and Ghaziabad.

6. Since the complaint itself was not maintainable and the appellant is an employee engaged by the sole proprietorship consultancy there cannot be any personal liability which can be inflicted upon the appellant by virtue of only being an employee of the sole proprietorship.”

(Emphasis supplied)

15.3 In this regard, it would also be relevant to refer to the judgment of learned single judge of this Court in ***M/s TBS Engineers Pvt. Ltd. vs. Mr. J.P. Mishra and Ors. 2011 SCC OnLine Del 5403*** which reads as under:

“6. I may at this stage note that the suit has been filed besides against Respondent No.1 and 3 (who are the sole proprietor and sole proprietorship concern) also against Respondent No.2 and who was only dealing with the appellant/plaintiff on behalf of Respondent/Defendant no. 1 and 3. Obviously, such dealing cannot fasten any liability upon respondent no. 2/defendant no.2 and the liability can only be of the sole proprietor and the sole proprietorship concern i.e., the respondent nos. 1 and 3. The Suit was therefore, not maintainable against the Respondent no.2 and defendant no. 2.”

(Emphasis supplied)

15.4 In view of the aforesaid, it is evident that the suit itself was not maintainable against defendant no.2 and therefore, even if the averments made at paragraph 10 were assumed to be correct, the Trial



Court fell in error in not granting the relief of deletion prayed for by the defendant no.2.

16. The learned counsel for the plaintiff stated that though he has not placed on record emails issued by the defendant no. 2 to the plaintiff; he states that he can place the same on record. He states that the emails would show that defendant no. 2 was corresponding with the plaintiff with respect to the commercial transactions.

16.1 In the opinion of this Court assuming that defendant No.2 had written the email, however, the said emails would not also not make defendant No. 2 liable in law for the financial liabilities of the defendant No.1, or his sole proprietorship firm. Defendant No.1 is an individual entity and for the financial liabilities of defendant No.1, defendant No.2 cannot be *vicariously* made liable.

16.2 Assuming defendant no. 2 was assisting defendant No. 1, whether in his role as a son or an employee, in either role he cannot be made liable for the commercial transaction, which is the subject matter of the suit and therefore he cannot be considered as a necessary or a proper party to the suit.

17. In this view of the matter the impugned order dated 24.05.2023 is set aside as being erroneous in law. The application filed by the Petitioner i.e., defendant No.2 seeking his deletion from the array of parties is allowed and the Petitioner i.e., defendant No. 2 is deleted from the array of the parties. Pending application stands disposed of.

18. No order as to costs.



JULY 6, 2023/rk **MANMEET PRITAM SINGH ARORA, J**

