



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Writ Petition No. 8359 of 2023

Asati Electrical Services through its Proprietor Ravindra S/o Panchamlal Asati ..vs.. Jarnali Singh Saluja]

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. A. R. Saxena, Advocate for the petitioner

CORAM : ANIL L. PANSARE J.

DATED : 03-10-2024

The petitioner – plaintiff is aggrieved by order dated 8-3-2023 passed by 2nd Joint Civil Judge Senior Division, Bhandara below Exhibit 29 and 31 in Summary Civil Suit No. 8/2021, thereby granting unconditional leave to defend the suit filed by the petitioner.

2. Heard Mr. A. R. Saxena, learned counsel for the petitioner. None appeared for the respondent – original defendant though served.

3. The petitioner has filed suit under Order 37 of the Code of Civil Procedure, 1908 (for short 'the Code') contesting his claim on the negotiable instrument i.e. the cheque issued by the respondent in favour of the petitioner. The respondent filed application (Exhibit 29) under Order 37 Rule 3(5) of the Code seeking leave to defend the suit. Learned counsel for the petitioner submits that the petitioner filed reply to the said application. Thereupon, respondent filed yet another application (Exhibit 31) seeking permission to file additional grounds to grant leave to defend the suit. This is how the application/s have been filed by the respondent to defend

the suit. In other words, the respondent was required to add to his original stand certain more grounds to seek leave to defend the suit.

4. The trial Court noted that since the suit is registered as summary civil suit, it is necessary to give opportunity to defend the suit. The trial Court has further noted that the additional grounds sought to be raised by the respondent are very crucial and is a pure question of law and if the respondent is permitted to raise additional grounds to grant leave to defend the suit, no prejudice will be caused to the plaintiff.

5. These reasons, to my mind, are lacking the necessary consideration while allowing the application seeking leave to defend the suit.

6. The so called legal ground is that suit has been filed by M/s. Asati Electricals, a proprietary concern, which is not a juristic person or legal entity and, therefore, cannot be represented by proprietor to sue in its name. On this ground, the respondent claimed that the suit itself is not maintainable.

7. Learned counsel for the petitioner submits that it is well settled that proprietary concern is nothing but individual's entity and thus proprietor is entitled to sue or defend the suit.

8. There appears substance in the aforesaid submission. It is well settled that proprietary concern and proprietor are one and same entity/concern. Further, the respondent in its application seeking leave to defend the

suit has not referred to any provision and/or precedent in support of his contentions.

9. On this point, learned counsel for the petitioner has invited my attention to the judgment passed by the Hon'ble Supreme Court in the case of ***Ashok Transport Agency Vs. Awadhesh Kumar and another [(1998) 5 SCC 567]*** wherein the Court has held as under :

“6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX which make applicable the provisions of Order XXX to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "insofar as the nature of such case permits". This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so

made applicable keeping in view the nature of the case.”

10. Thus, the Supreme Court has in clear terms held that the proprietary concern is only the business name in which the proprietor of the business carries on the business and the suit by or against a proprietary concern is by or against the proprietor of the business.

11. Thus, there is no merit in the stand taken by the respondent that the suit is not maintainable having been filed by the proprietary concern through its proprietor.

12. Coming to the defence, the respondent has taken a stand that the petitioner has paid Rs. 3,00,000/- through RTGS and Rs. 1,00,000/- by cash towards oral agreement to sale to purchase apartment/flat. This averment is made to counter the petitioner's pleading that the respondent has taken hand loan. The respondent has thereafter averred that the alleged transaction/agreement could not be culminated into sale deed and was cancelled. Accordingly, he issued cheque under question to return the earnest amount.

13. Learned counsel for the petitioner has correctly argued that though the theory of sale transaction is incorrect, even if, same is admitted, the respondent himself has admitted that cheque was issued by him. In the circumstances, the trial Court ought to have examined whether the case is made out by the respondent to obtain leave to defend the suit.

14. As regards test to be applied while granting leave, learned counsel for the petitioner has relied upon

the judgment passed by the Division Bench of this Court in the case of ***Rajesh Laxmichand Udeshi @ Bhatia Vs. Pravin Hiralal Shah [2012 SCC OnLine Bom 2181]*** wherein the Court held thus :

“10. There can be no two views about the tests laid down as to in which cases leave to defend is to be granted and in which cases it is to be refused. Weightage to be given to a defence that is raised will depend on the facts of each case. Once the plaintiff has placed the documentary material on record showing that the plaintiff has a case in law, merely because the defendant indicates that he has certain defence, leave is not to be granted automatically, but the Court is required to find out whether such defence even at its face value has some credibility. The defendant must produce on record some material in furtherance of his defence, so as to enable the Court to judge the credibility of the defence, albeit, prima facie.”

Thus, the Court has held that the leave to defend the suit cannot be granted automatically, but the Court is required to examine whether the defence put forth even at its face value has some credibility. The Court further held that the defendant must produced on record some material in furtherance of his defence, so as to enable the Court to judge the credibility of the defence, *albeit, prima facie*.

15. In the present case, respondent has come up with a case of oral agreement to sell. He has referred to two witnesses in support. Even if, it is to be admitted that the parties entered into agreement to sell, the fact remains, that too upon own showing of the respondent, that said agreement was cancelled and respondent has

issued the cheque to return the amount of earnest money. Having admitted same, the respondent ought to have made necessary arrangement to honour the commitment i.e. negotiable instrument. Having not done so, there appears no reason why should leave to defend the suit be granted to the respondent.

16. The trial Court has not examined the issue in the light of settled principles of law. It has, without assigning any reason, jumped to the conclusion that the grounds raised by the respondents are crucial. As regards pure question of law, the trial Court appears to be not apprised of the judgment referred to herein above. The order, therefore, does not stand scrutiny of law.

17. The petition is accordingly allowed. The order impugned is quashed and set aside. The applications, Exhibit Nos. 29 and 31 seeking leave to defend the suit stands rejected.

18. Writ petition is disposed of in above terms.

(Anil L. Pansare, J.)