

ORDERS ON IA.No.IV

This is an application filed by the defendant under order 37 Rule 3 (5) of C.P.C dated 17.02.2022 seeking leave of the court to defend the suit.

The defendant has sworn to an affidavit annexed to the application and contended that the suit filed by the plaintiff is vexetious and filed with a malfide intention to harass the defendant and to make wrongful gain. The suit is barred by law and not maintainable in view of bar under section 8 of Arbitration and Conciliation Act, 1996 as the agreement contains an arbitration clause. As per clause 12 of the agreement, the dispute arising out of the agreement between the parties to the agreement have to resolve the dispute through arbitration and hence, the suit is not maintainable.

It is the allegation of the defendant that the plaintiff has not performed his part of obligations under the agreement dated 03.08.2018. The plaintiff has not paid sufficient stamp duty on the agreement dated 03.08.2018 and the same has to be impounded as per sec.33 of the Karnataka Stamp Act, 1957. It is also alleged that the plaintiff has suppressed the material facts and has not approached the court with clean hands.

It is further contended that the enforcement of the suit agreement is barred under section 35 of the Indian Contract Act. As per clause 11 of the said agreement, the plaintiff should amend/transfer the lease agreement dated 07.11.2018

executed by him with the land owner in favour of the defendant and the plaintiff has no rights or sub-delegate powers under the agreement and hence, the agreement dated 03.08.2018 has become void under the law. The defendant has a very good case on merits to defend the suit and hence, prayed to grant leave to defend the suit by allowing the application.

The defendant along with the application has filed a memo furnishing his proper address.

The application is resisted by the plaintiff by filing her objections and denied the contents of the affidavit in toto. It is the contention of the plaintiff that the cause of action for the suit arose on 01.10.2018, when the cheque was issued for balance sale consideration in the name of the plaintiff and the same was dishonoured for the reason 'payment stopped by the drawer' on 23.11.2018 and the defendant has failed to make payment towards the said cheque and as such the cause of action has arisen to make payment of legally liable and admitted debt.

It is further contended that section 8 of the Arbitration and Conciliation Act, 1996 does not bar the filing of a summary suit as the defendant has not filed an application under section 8 of the said act along with the present application and hence, the defendant has lost and waived her right to seek reference by invoking arbitration clause. The cheque issued by the defendant is a bill of exchange under

Negotiable Instruments Act and in view of the presumption under section 139 of the said act, the amount mentioned in the cheque is a debt under the agreement of sale and order 37 rule 1 (2) (b) (i) provides for filing of a summary suit for recovery of a debt. The issuance of the cheque by the defendant amounts to admission of a debt independent of the agreement to say and hence, the defendant is liable to pay the same.

It is further contended that as per Sec.30(e) of the Karnataka Stamp Act, the liability of payment of requisite stamp duty is cast upon the purchaser and the defendant being the purchaser of the business undertaking is liable to pay the same. Hence, the payment of stamp duty by the plaintiff does not arise. The suit is maintainable independent of the agreement to sale based on the cheque issued by the defendant and hence, the question of payment of stamp duty on the agreement does not arise. If at all the defendant contends that the agreement to sale dated 03.08.2018 be impounded, then the court has to impound the document and direct the defendant to pay duty and penalty.

It is further contended that the defendant has misconstrued sec.35 of the Contract Act and has made efforts to mislead the court without extracting the full content of clause 11 of the agreement, which amounts to perjury and contempt of court. The plaintiff further contends that in view of the extension of period of limitation from 15.03.2020 till

28.02.2022 by the Hon'ble Supreme Court, the suit is within time.

The defendant has no legally tenable defence and cannot be permitted to defend the suit. Hence, on these grounds the plaintiff has prayed to dismiss the application and prayed to dismiss the suit.

Considering the contentions of the respective parties, the following point arises for my consideration:

Whether the defendant has made out sufficient grounds for grant of leave to defend the suit ?

Having heard the arguments of both the counsels and considering the materials available on record, I answer the above point in the 'Affirmative' for the following:

REASONS

The plaintiff has instituted the summary suit under Order 37 Rule 1 of CPC for judgment and decree directing the defendants to pay a sum of Rs.16,10,500/- together with future interest at the rate of 18% from the date of suit till realization with cost.

It is the case of the plaintiff that the plaintiff along with his partner had established a unisex saloon in the name and style of Purle Tree ('Saloon/beauty parlor') and the defendant who joined the said beauty parlor as an employee evinced her interest in taking over and owing the beauty parlor, which was accepted by the plaintiff. The defendant had agreed to pay the sale consideration amount of Rs.68,00,000/- for the saloon

and accordingly, a sale receipt dated 24.02.2018 came to be executed between the husband of defendant Mr.Chethan Kumar M.U, the plaintiff and his partner. Subsequently the parties have agreed to reduce the sale consideration amount to Rs.56,00,000/- and an 'agreement for sale of stock in trade, furniture and effects' came to be executed on 03.08.2018. The defendant has paid a sum of Rs.27,00,000/- of the sale consideration amount to the plaintiff and his partner and the defendant is liable to pay the balance sale consideration amount of Rs.29,00,000/- for which he had issued three cheques, which came to be dishonoured with an endorsement 'payment stopped by drawer'. This is the amount now the plaintiff is claiming in the suit.

On the other hand the defendant is seeking leave of the court to defend the suit on various grounds.

Hence the requirements of order 37 of cpc must be taken note of and whether the defendant has satisfied the said requirements or not has to be seen. As per order 37 rule 3 (5) of C.P.C.

The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the court or judge to be just:

provided that leave to defend shall not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.

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is instituted for recovery of loan amount with interest. It is the case of the plaintiff that the defendant had obtained a loan of Rs.14,39,000/- for the purpose of purchasing the vehicle by executing the loan agreement, hypothecation deed and other necessary documents in favour of the plaintiff bank. It is a fact that the plaintiff has resisted the suit by filing his written statement and raised the contention that he has repaid the entire loan amount by obtaining NOC from the bank. It is a fact that after framing issues, the plaintiff has led its

evidence and the defendant has also led his examination-in-chief and when the matter was posted for cross examination, the present application came to be filed.

7. Now the amendment sought by the plaintiff in para No.5(b) and 8 of the plaint is with respect to the date of commencement of date of installment and the name of the supplier of the vehicle as it is due to typographical error.

8. At this stage it is necessary to go through the provisions of order 6 Rule 17 of CPC and as per the said provision the court is empowered to allow the amendments which are necessary for the purpose of determining the real questions in controversy between the parties. A restriction has been imposed by the proviso to the said section that no application shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

9. Though the defendant has raised a contention that the application has been filed under Order 11 Rule 17, but on going through the very application the provision has been corrected as Order 6 Rule 17. The counsel for the plaintiff might have supplied the uncorrected copy to the counsel for the defendant. Hence, the application should be treated as filed under Order 6 Rule 17 of C.P.C.

The pleadings should be in consonance with the documents relied upon by the plaintiff. It is the contention of

the plaintiff that the typographical error crept in the plaint came to the knowledge of the counsel while preparing for cross-examination. The date of commencement of the installments as per the loan agreement and other documents of the plaintiff goes to show that it is 11.06.2014 and not 15.03.2014. Likewise the name of the supplier of the vehicle is 'Shireesh Auto Private Limited' and not 'Pratham Motors'. Anyhow the proof of the said facts will be considered at the time of judgment. The proposed amendment neither changes the nature of the suit nor arise out of a new cause of action. The plaintiff has satisfied that in spite of due diligence, he could not have raised the matter before the commencement of the trial. On going through the proposed amendment the applicant has made out sufficient grounds to allow the amendment. Hence, I answer the above point in the 'Affirmative' and proceed to pass the following:

ORDER

I.A.No.X filed by the plaintiff under order 6 rule 17 R/w Sec.151 of C.P.C dated 10.01.2022 is hereby allowed and the plaintiff is permitted to carryout the necessary amendment in the office.

(SUNIL.A.SHETTAR)
LXXXVI Addl. City Civil Judge
Bangalore.

The advocate for the petitioner has filed I.A.No.8 under order 9 (ii) (c) of Arbitration and Conciliation Act, 1996 for extension of order of statuquo.

Respondents and their counsels are absent.

Order of statuquo is hereby extended till next date

Await notice of respondent No.2.

Call on 21.01.2022.

(SUNIL.A.SHETTAR)
LXXXVI Addl. City Civil Judge
Bangalore.