

MHTH010055312023



**ORDER BELOW EXH.33 IN
COMMERCIAL SUIT NO.13/2023**

The suit is filed essentially for recovery of Rs.19 crore 70 lakh and odd from the defendants. Pending the suit, the defendant nos.3 to 5 caused their appearance and thereafter filed present application (Exh.33) purportedly under Order 7 Rule 11(a) and (d) of Code of Civil Procedure (CPC).

2. The plaintiff, by filing reply (Exh.36), opposed the application.

3. Heard both sides at length. Gone through the record. Following points arose for my determination and the same are answered accordingly for the reasons noted below:-

<u>Sr.No.</u>	<u>Points</u>	<u>Findings</u>
1.	Whether the suit is barred as per Order 7 Rule 11(a) and (d) of CPC ?	Partly Yes.
2.	What order ?	.. As per final order.

: REASONS :

4. The learned Advocate for the defendant nos.3 to 5 (said defendants) prayed for dismissal of the suit as per Order 7, Rule 11(a) and (d) of CPC. It is contended that there is no cause of action as against the said defendants. The plaint does not contain any urgent reliefs so as to entertain the suit without there being

compliance of mandatory provisions contemplated under Section 12A of Commercial Courts Act. It is contended that the Hon'ble Division Bench of Bombay High Court dealt with the issue in the case of ***Sheela Ram*** and laid down the law that the plaint can be rejected against the defendants in a whole. The learned Advocate submitted that in the suit, the relief is sought against the defendant no.1. The said defendants were not party to the agreement between the plaintiff and defendant no.1. The averments in the plaint goes to show that the defendant no.1 was paid the amount by the said defendants and the defendant no.1 in turn failed to pay the bills to the plaintiff. Thus, the plaintiff is claiming the bills from the defendant no.1. The suit, in present form is not maintainable qua the said defendants. The entire plaint has to be rejected in view of non-compliance of Section 12A of the Commercial Courts Act. The said defendants, in support placed reliance on the following authorities :-

- A) RBK Construction Pvt. Ltd V/s. State of Maharashtra and others reported in AIR 2020 Bom 280;
- B) Yamini Manohar V/s. T.K.D. Keerthi, 2023 SCC OnLine SC 1382;
- C) Sheela Ram Vidhani and Another V/s. S.K. Trading Company and others reported in (2021) 4 AIR Bom R 713;
- D) Church of Christ Charitable Trust V/s. Ponnimman Educational Trust reported in(2012) 8 Supreme Court Cases 706 and
- E) Patil Automation Private Limited V/s. Rakheja Engineers Private Limited, 2022 SCC OnLine SC 1028

5. Per contra, the learned Advocate for the plaintiff submitted that the relief is sought against the defendant nos.3 to 5. The defendant no.1 got the contract from said defendants and thereafter, the defendant no.1 executed agreement in favour of the plaintiff in respect of completion of work. The plaintiff, as per the contract, is required to execute the construction work and it is monitored / supervised by the said defendants. The Hon'ble Apex Court as well as Hon'ble Bombay High Court in catena of judgments laid down that the plaint cannot be rejected in part. The plaint has to be rejected as a whole but not in part. The plaintiff pointed out the averments in the plaint showing the cause of action against the said defendants. It is contended that the recovery is sought against the defendant no.1, however, in case of failure, the recovery has to be done through the said defendants. The learned Advocate submitted that as per Section 193 of Contract Act, the principal is responsible for the dues of the sub-agency. In support, the reliance is placed on following authorities:-

- A) Sejal Glass Ltd. V/s. Navilan Merchants Pvt. Ltd. reported in 2018(1) MR 961 (SC);
- B) Madhav Prasad Aggarwal V/s. Axis Bank reported in (2019) 7 SCC 158;
- C) Geetha Krishna V/s. Nanjundaswamy and others, 2023 DGLS (SC) 1104;
- D) Rahul Shah V/s. Jitendra Kumar Gandhi reported in (2021) 6 SCC 418 and
- E) Chemco Plastic Industries Pvt. Ltd. V/s. Chemco Plast, 2024 DGLS (Bom.) 2177.

As to Point Nos.1 and 2 :

6. The said defendants by filing present application prayed for rejection of the plaint to their extent in view of Order 7 Rule 11(a) and (d) of CPC. It is contended that there is a contract *inter se* between the plaintiff and defendant no.1. The said defendants have no concern whatsoever with the said contract and thus, for want of privity of contract, the said defendants cannot be sued. The another contention raised is regarding breach of the mandatory provision contemplated under Section 12A of Commercial Courts Act. The condition is postulated upon the plaintiff not to file suit unless the plaintiff exhausts the remedy of pre-institution mediation. The liberty to file suit without exhausting pre-institution mediation is only granted when any urgent relief under this Act is sought by the plaintiff. It is contended that the plaintiff has not sought any such urgent relief and therefore, the suit in present form is not maintainable.

7. The learned Advocate for the said defendants to make the submission good, placed reliance on the authorities. In the case of ***Church of Christ*** (supra), the Hon'ble Apex Court laid down that in absence of any cause of action shown against the defendant, the suit cannot be proceeded either for specific performance or for the recovery of money. In the case of ***Patil Automation*** (supra), the Hon'ble Apex Court held, "*We declare that Section 12A of the Act is mandatory and holds that any suit instituted violating the mandate of Section 12A must be visited with rejection of the plaint under Order 7 Rule 11. This power can be exercised even suo moto by the court as explained earlier in the judgment. We, however, make this*

declaration effective from 20.08.2022 so that concerned stakeholders become sufficiently informed." In the case of **R.B.K. Construction** (supra), the Hon'ble Bombay High Court laid down the law regarding privity of contract. It is laid down that, "There being no contractual relationship between the petitioner and the authority or any of its instrumentalities, the petitioner has no right of action to enforce the contract" meaning thereby for want of privity of contract, no party can be sued. In the case of **Yamini Manohar** (supra), the Hon'ble Apex Court discussed the mandate of Section 12A of Commercial Courts Act.

8. As against the same, the plaintiff placed reliance on the law laid down by the Hon'ble Apex Court in the case of **Sejal Glass** (supra). The Hon'ble Apex Court by relying upon the ratio laid down in **Sejal Glass**, held that the plaint cannot be rejected in part in the judgment of **Madhav Prasad Agrawal** (supra). The Hon'ble Apex Court in the case of **Geetha** (supra) again relied upon the ratio laid down on these two authorities, reaffirmed the ratio of part rejection of the plaint. In the case of **Chemco Plastic** (supra), the Hon'ble Bombay High Court laid down that while exercising powers under Order 7 Rule 11 of CPC, the court is required to peruse only the plaint and documents filed therewith.

9. The limited issue raised is of prosecution of said defendants in present suit which is essentially filed for recovery against the defendant no.1. The averments in the plaint goes to show that there is a privity of contract between the plaintiff and defendant no.1. The plaintiff came with the claim that the defendant nos.3 to 5 assigned construction work to the defendant no.1. The defendant

no.1, in turn assigned those development / construction rights to the plaintiff under the agreement. Accordingly, the plaintiff started construction work as per the suit work order. The defendant no.1 was supposed to pay advances, however, the defendant no.1 failed. The plaintiff learnt that the said defendants have paid certain amount to the defendant no.1, however, the defendant no.1 failed and neglected to pay plaintiff and therefore, present suit.

10. In the plaint, from paragraph no.55 onwards, the plaintiff pleaded about the local and pecuniary jurisdiction, giving notice to the Government and the cause of action. The tenor of the pleadings goes to show that the plaintiff claims the dues from the defendant no.1. Accordingly, the prayer clause A is specific under which, the plaintiff claims recovery from the defendant no.1. In the alternative, the plaintiff prayed for jointly and severally recovery from the defendant nos.2 to 5. In the prayer column, Clause (g) is specifically against the defendant nos.2 to 5 thereby seeking directions against said defendants to produce original deeds, documents, agreements, work order, etc. Thus, from the plaint in the suit, it is rather evident that the suit is essentially for recovery that too against the defendant no.1. The plaintiff sought alternative prayer thereby seeking recovery from the defendant nos.2 to 5 in case of failure on the part of defendant no.1. The another contention raised is regarding Section 193 of Contract Act. With due and great respect, the said contention is also not acceptable. The said provision is reproduced in verbatim as under;

"Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands

towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal".

Thus, on plain reading of the provision, it does not apply to present set of facts and at the same time, there is no pleading in the plaint to that effect. Thus, the contention is not acceptable.

11. The agreement regarding construction is undisputedly *inter se* between the plaintiff and defendant no.1. It is also undisputed that the construction work was undertaken by the defendant no.2. The contract was obtained by defendant no.4. Thereafter, the defendant no.4 entrusted the said contract to defendant no.3. Thereafter, the defendant no.3 allotted the said work to the defendant no.5. Finally, the defendant no.5 allotted certain part of construction work to the defendant no.1. Later on, the defendant no.1 entrusted the said work to plaintiff. Thus, the assignment of work is clear and the same demonstrates that the plaintiff got the work from defendant no.1. Thus, it is rather clear that there is no privity of contract concerning the subject work between the plaintiff and the defendant nos.2 to 5. Thus, there is no privity of contract between the plaintiff and said defendants. Even considering the reliefs sought in the suit, it is rather clear that the substantive prayer is only against the defendant no.1.

12. The said defendants therefore, filed present application for rejection of the plaint to their extent. In this context, the settled

law needs to be considered. The authorities relied by the plaintiff are on the point that the plaint cannot be rejected in part. The Hon'ble Apex Court held that the plaint has to be rejected in whole and there can't be bifurcation. While settling the law, it appears that the Hon'ble Apex Court have not considered the ratio laid down by the Hon'ble Apex Court in the case of ***Church of Christ*** (supra). The Hon'ble Division Bench of Bombay High Court in the case of ***Sheela Ram*** (supra) dealt with the ratio laid down by the Hon'ble Apex Court in the cited case-laws. The Hon'ble Division Bench in para 12 held that, "*In view of foregoing settled position, we are of the view that the earlier decision rendered by the Supreme Court in the case of Church of Christ needs to be followed which has laid down that the plaint as a whole can be rejected against some of the defendants.*" The Hon'ble Division Bench taking into considering the ratio laid down by the Hon'ble Apex Court in the cases of ***Sejal Glass, Madhav Prasad*** and other authorities, laid down the above preposition by relying upon the earlier ratio laid down by Hon'ble Apex Court in the case of Church of Christ. The learned Advocate for the said defendants submitted across the bar that the view of Hon'ble Division Bench was carried before the Hon'ble Apex Court by way of SLP which got dismissed. Thus, the view taken by the Hon'ble Division Bench of Bombay High Court in the case of Church of Christ is now well settled law. Thus, now it can be said that the plaint can be rejected in whole as against some of the defendants.

13. Since, the law is now clear which authorized rejection of plaint in whole as against some of the defendants, the said principle needs to apply to present proceeding. As noted above, there is no

privity of contract between the plaintiff and said defendants, consequently, there should not be any cause of action against the said defendants. The plaintiff sought no substantive relief against the said defendants. The relief sought is in the nature of mandatory injunction i.e. to direct the said defendants to produce work order, agreements, etc. Thus, the relief is ancillary and / or supplementary in nature. Having considered the reliefs, at the most, the said defendants can be witnesses in order to support the claim of the plaintiff, however, certainly they are not either formal or necessary party to the suit.

14. The cause of action is not against the said defendants. Thus, the suit in present form cannot be proceeded as against the said defendants. The plaint, qua the said defendants has to be rejected in whole and therefore, the relief sought by the said defendants needs to be granted. The next contention raised by the said defendants is regarding rejection of the plaint for want of compliance of Section 12A of Commercial Courts Act. The plaintiff in para 52 of the plaint made averments that the plaintiff is seeking urgent interlocutory relief as per Order 38 of CPC and therefore, the plaintiff has not complied with Section 12A of Commercial Courts Act. The suit is filed for recovery against the defendant no.1. The plaintiff pleaded and prayed urgent relief and thus, as per the language of Section 12A, the pre-institution mediation can be dispensed with. The contract is between the plaintiff and defendant no.1. The said defendants were arrayed as the contract flowed from them. Therefore, the said defendants can be deleted from the array of defendants and the suit can proceed against the defendant nos.1 and 2 as there is an agreement between the plaintiff with defendant no.1 in respect of work of defendant no.2. Thus, the defendant no.2 can

be termed as a formal and may be a necessary party and for which, the suit can be continued. However, for want of cause of action, the suit as against the said defendants needs to be rejected in whole. Hence, I answer the points accordingly and pass following order :-

ORDER

1. The application is partly allowed with no order as to costs.
2. The plaint in Commercial Suit No.13/2023 stands rejected as against the defendant nos.3 to 5.
3. The parties to proceed with the suit in accordance with law.

Thane.
Date :09.07.2024

(Amit M. Shete)
District Judge-2, Thane.