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MP-6965-2024

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE GAJENDRA SINGH

ON THE 22nd OF APRIL, 2025MISC. PETITION No. 6965 of 2024

*CUREWIN HYLICO PHARMA PVT. LTD. THROUGH ITS DIRECTOR
UTTAM KUMAR RAO*

Versus

CUREWIN PHARMACEUTICALS PVT. LTD AND OTHERS

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Appearance:

Shri Pramod C. Nair - Advocate for the petitioner.

Shri Karpe Prakhar Mohan - Advocate for the respondent.

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ORDER

Per. Justice Vivek Rusia

The petitioner/defendant has filed this present petition being aggrieved by the order dated 07.11.2024 whereby application under Order VIII Rule 10 of the Civil Procedure Code, 1908 filed by the respondent No.1/defendant has been allowed and right of the petitioner to file written statement has been forfeited upon expiry of 120 days from the date of service of summons.

Facts of the case in brief are as under :

2. The respondent No.1/plaintiff has filed a Commercial Suit No. 16/2021 before the Commercial Court, Indore on 04.03.2021 against the present petitioner and respondents No.2 as defendants No.2, respectively under Order VII Rule 1 of the CPC read with Section 55 of the Copyright Act, 1957. The respondent No.1/plaintiff paid court fees of Rs. 2,000/- for the relief of awarding damage with an undertaking to pay such additional court fees, as may be required. The



petitioner being defendant No.1 filed an application under Order VII Rule 1 read with Section 151 of the CPC raising the ground that the plaint is liable to be rejected under Order VII Rule 11 (b)(c)&(d) of the CPC for want of proper valuation and payment of ad-valorem court fees. It was further contended that the plaint is hit by Section 34 of the Specific Relief Act, 1963 as no pleading in respect of agreement has been made. Vide order dated 10.11.2021 the objection was allowed and the plaintiff was directed to deposit ad valorem court fees with liberty to amend the plaint in respect of agreement dated 21.01.2015.

3. Being aggrieved, both plaintiff and respondent No.1 approached this Court by way of Misc. Petitions No. 5001/2022 and 6127/2022. Vide order dated 04.04.2024, both the petitions were disposed of.

4. On 29.05.2024, the respondent no.1/plaintiff appeared before the Commercial Court and informed the Court about payment of court fees on 27.05.2024. The present petitioner/defendant No.1 filed an application for dismissal of the plaint for non-compliance of the order dated 10.11.2021 whereas respondent No.1/plaintiff filed an application under Order VIII Rule 10 of the CPC for striking out the right to defend. The petitioner/defendant No.1 filed reply to the aforesaid application along with written statement to the plaint. Vide impugned order dated 07.11.2024, the learned Commercial Court has allowed the application filed by respondent No.1/plaintiff under Order VIII Rule 10 of the CPC and closed the right of defence of the petitioner on the ground that the written statement was not filed within 120 days from the date of service of summons. Hence, this petition before this Court.

5. Learned counsel for the petitioner submits that though the petitioner/defendant No.1 appeared before the Commercial Court after receipt of the summons but filed an application under Order VII Rule 11 contending that the



plaintiff has not deposited the ad valorem court fees and the plaint is hit by Section 34 of the Specific Relief Act. Both the objections were considered and allowed. Thereafter, plaintiff amended the plaint and paid the ad valorem court fees on 27.05.2024. Therefore, the plaint will be said to have been instituted only upon payment of proper court fees on 27.05.2024 and thereafter the period of limitation to file the written statement will commence. In support of his contention, Shri Nair has placed reliance on the judgment passed by the Coordinate Bench of this Court in *M.A.No. 1269/2021* on *01.07.2021* between the same parties (*Curewin Pharmaceuticals Pvt. Ltd. vs. Curewin Hylico Pharma Pvt. Ltd.*) wherein it has been held that under Section 12-A of the Commercial Courts Act, 2015 a suit shall not be instituted unless the plaintiff exhausts the remedy of pre-institutional mediation in accordance with the Rules made by the Central Government.

6 . *Per contra*, learned counsel appearing for respondent No.1/plaintiff submitted that the learned Commercial Court rightly came to the conclusion that the limitation for filing written statement, in any circumstances, cannot be extended beyond 120 days particularly in a commercial suit. Therefore, no interference is warranted and the petition is liable to be dismissed.

Heard learned counsel for the parties.

7. Admittedly, in the present case the respondent No.1/plaintiff filed a suit without payment of ad valorem court fees. Vide order dated 10.11.2021, the learned Commercial Court directed the plaintiff to properly value the suit and deposit the ad valorem court fees. Consequently, plaintiff deposited the maximum court fees of Rs. 1,50,000/- on 27.05.2024. The contention of learned counsel for the petitioner is that unless proper court fees is paid, the suit cannot be treated as properly instituted before the Commercial Court. After payment of necessary



court fees, the Commercial Court gets jurisdiction to proceed with the suit.

8. Section 2(b) of the Commercial Courts Act, 2015 (hereinafter referred to as the 'Act of 2015') defines the meaning of 'Commercial Court' constituted under sub-section (1) of section 3. As per Section 2(1)(a), the Commercial Appellate Court means the Commercial Appellate Courts designated under Section 3A and as per Section 2(1)(aa), the Commercial Appellate Division means the Commercial Appellate Division in High Court constituted under sub-section (1) of Section 5 for adjudicating commercial dispute of specified value and the matter connected or incidental therewith. Specified Value is defined under Section 2(i) in relation to a commercial dispute according to which the value shall not be less than Rs. 3 lakhs or such value as notified by the Central Government. As per Section 6 of the Act of 2015, the Commercial Court shall have jurisdiction to try all suits and applications relating to a commercial dispute of a Specified Value arising out of the entire territory of the State. Section 12 provides the manner for determination of the specified value of the subject matter of the commercial dispute in a suit, appeal or application. Sub-section (2) of Section 12 says that the aggregate value of the claim and counter-claim, if any as set out in the statement of claim and the counter-claim shall be the basis for determining whether such arbitration is subject to the jurisdiction of a Commercial Division, Commercial Appellate Division or Commercial Court, as the case may be.

9. It is clear from the aforesaid provisions that it is mandatory for the Commercial Court to determine the specific value of the suit and the counter claim for proceeding further by appropriate Commercial Division, Commercial Appellate Division or Commercial Courts, as the case may be. Hence, the suit is to be properly valued and once the court fees is paid only then the Commercial



Court can proceed with the suit. Apart from the above, as held by the Coordinate Bench of this Court in case of *Curewin Pharmaceuticals (supra)*, a suit which does not contemplate any urgent interim relief under this Act shall not be instituted unless the plaintiff exhausts the remedy of pre-institutional mediation. Therefore, even if the suit has been filed, it cannot be treated to be 'instituted' without exhausting the remedy of pre-institutional mediation and settlement.

10. In case of *Red Bull AG vs. Pepsico India Holdings Pvt. Ltd, & Ors.*, reported in *2019 SCC OnLine Del 9901* decided on 28.08.2019 which has been followed in case of *Machine Tools Aids India vs. M/s GNC Infra Llp & Anr.*, reported in *2023 0 Supreme (Del) 2313*, it has been held that when a suit is duly instituted, summon may be issued to the defendant to appear and answer the claim. Hence, the court has to ensure that the suit has been duly instituted and thereafter the court may issue summons on the defendant. If the suit is not duly instituted, the court has a jurisdiction to return the plaint under Order VII Rule 11 of the CPC. Relevant paragraph of the judgment in case of *Red Bull AG (supra)* is reproduced hereunder :

"14. A perusal of the aforementioned statutory provisions would show that when a suit is duly instituted summons may be issued to the defendant to appear and answer the claim. Hence, the court has to ensure that the suit has been duly instituted and thereafter the court may issue summons on the defendant.

15. Mulla on CPC, 18th Edn. while interpreting Order 5 Rule 1 CPC states as follows:-

"Under this rule, it is obligatory to issue summons to defendant unless the case falls within the proviso. When a party is sought to be impleaded in a legal proceedings, service of notice on such party cannot be a mere formality but should in fact be a reality."

16. In this background the Division Bench of this court in the case of Bright Enterprises Pvt. Ltd. & Anr. Vs. MJ Bizcraft LLP & Anr.(supra) held as follows:-

"17. From the above and particularly upon examining the provisions of Section 27 and Order V Rule 1(1) CPC, it is evident that when a suit is regarded as having been _duly instituted', a summons may be issued to



the defendant. The use of the expression 'duly instituted' has to be seen in the context of the provisions of Orders VI and VII of the CPC. In the present matter, it is nobody's case that the suit had not been duly instituted in the sense that it did not comply with the requirements of Order VI and VII CPC. It is neither a case of return of a plaint under Order VII Rule 10 nor a case of rejection of a plaint under Order VII Rule 11 CPC. The present case is one of dismissal of the suit itself on merits. Therefore, the only thing that needs to be examined is whether the Court had a discretion to issue or not to issue summons given that the suit had been duly instituted. In our view, the use of the word 'may' does not give discretion to the Court and does not make it optional for it to issue summons or not. This is further fortified by the fact that the first proviso to Order V Rule 1(1) itself gives a situation where summons must not be issued and that happens when a defendant appears at the presentation of the plaint and admits the plaintiff's claim. Therefore, in such a situation, there is no requirement for issuance of summons and that is why the word 'may' has been used in Order V Rule 1(1). In all other cases, when a suit has been duly instituted' and is not hit by either Order VII Rule 10 or Order VII Rule 11 CPC, summons has to be issued to the defendant. (emphasis added)

18. In the present case, the learned Single Judge has neither returned the plaint under Order VII Rule 10 nor rejected the plaint under Order VII Rule 11 CPC. Therefore, it was incumbent upon the learned Single Judge to have issued summons to the respondents /defendants, particularly because the respondents/defendants had not appeared at the time of presentation of the plaint and did not admit the claim of the appellants / plaintiffs. The Rule of audi alteram partem is embedded in Order V Rule 1 sub-rule (1) read with Section 27 CPC."

17. Hence, it is quite clear that once a suit is stated to have been duly instituted and the suit is not hit by Order 7 Rule 10 or Order 7 Rule 11 CPC, the suit fulfils the stated requirement. Summons have to then be issued to the defendant thereafter."

11. Apart from the above, the Coordinate Bench of this Court vide order dated 04.04.2024 partially allowed Misc. Petition 6127/2022 between the same parties and set aside the directions issued to the plaintiff to include the pleadings in respect of agreement dated 22.01.2015 in the plaint.

"17. A perusal of plaint as a whole and the reliefs claimed as mentioned in para 2 of the order, it is not a case that the relief sought is incapable of valuation as the plaintiff has mentioned in paragraph 42.1 of the plaint and the trial Court has exercised his jurisdiction properly for looking at the substance of the relief asked for and the agreement dated 22.01.2015 mentions the value of trademark "ENERZY" as Rs.77,00,000/- and total relief is based on the ground that the sold product did not cover the Artistic work of ENERZY powder. The agreement dated 22.01.2015 cannot be separated from the relief claimed accordingly. The trial Court did not commit any



error in exercising the power under Order 7 Rule 11 (b) & (c) of the CPC to direct the plaintiff to correct the valuation of the relief and to supply the requisite stamp-paper. It is not required to issue writ and direction to the respondents no.1 and 2 to render the complete account of profits earned by them on account of the sales made by them by selling said products under the Artistic work "ENERZY" Powder to enable the petitioner to make payment of the requisite Court Fee on the Plaint and it is not necessary that the issue ought to have been deferred to be decided only after framing of a issue.

18. In view of the above, we do not find any substance in the M.P.No.5001/2022, Accordingly, M.P.No.5001/2022 is dismissed.

19. As far as M.P.No.6127/2022 is concerned, at the time of disposal of application under Order 7 Rule 11 of the CPC the trial Court was not within the jurisdiction to direct the plaintiff that implead the necessary pleadings of agreement dated 22.01.2015 in the plaint for the reasons that the trial Court is not expected to issue such type of directions and secondly sufficient facts regarding agreement dated 22.01.2015 are mentioned in the plaint.

20. The relief claimed by the plaintiff is not hit by the provisions of Section 34 of the Specific Relief Act, 1963. So, in absence of the directions to impleadment of pleadings in the plaint regarding agreement dated 22.01.2015, the plaint does not lacks the cause of action and on the meaningful reading of the plaint it is not a case which falls under Order 7 Rule 11 (a) of the CPC. Hence, M.P.No.6127/2022 is allowed partially and order of the trial Court is modified in deleting the following directions which are reproduced below :-

“अतः इस संबंध में भी वादी को यह निर्देश दिया जाना उचित है कि वह वाद के उचित निराकरण हेतु अनुबंधपत्र दिनांक 22.01.2015 सम्बंधी आवश्यक अभिवचन वादपत्र में सम्मिलित करे । अनुबंधपत्र सम्बंधी आवश्यक अभिवचन वादपत्र में सम्मिलित करने हेतु कार्यवाही १५ दिन के भीतर करे ।”

21. Accordingly, M.P.No.5001/2022 and M.P.No.6127/2022 stands disposed of. "

12. After the aforesaid order, the necessary court fees was paid and the plaint was properly amended and only then the written statement could be filed by the present petitioner/defendant No.1 on 13.08.2024 i.e. within 120 days. Hence, in such peculiar circumstances, the learned trial Court has wrongly counted the period of 120 days from the date of service of summons to the petitioner/defendant No.1.



13. In view of the foregoing discussion and provisions of law, the petition is **allowed**. The impugned order dated 07.11.2024 passed by the Commercial Court, District Indore in Comms 16/2021 is hereby set aside. The written statement filed by petitioner/defendant is directed to be taken on record and the right to defend the suit is restored.

With the aforesaid directions, the petition stands allowed and disposed of.

(VIVEK RUSIA)
JUDGE

(GAJENDRA SINGH)
JUDGE

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