

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CM(M) 362/2023
CM(7936/2023)

Abdul Rashid Naikoo and Ors.

...Petitioner(s)

Through: Mr. M. R. Thakur, Advocate.

Vs.

Mst. Haleema and Ors.

...Respondent(s)

Through:

CORAM:

HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE.

ORDER
20.12.2023

ORAL:

1. This is a petition under Article 227 of the Constitution of India, filed by the petitioners to assail an order dated 19th October, 2023, passed by the Court of learned Sub Judge (CJM), Anantnag [“the Trial Court”], in a civil suit titled “*Mst. Haleema Vs. State of J&K and Others*”, whereby the application filed by the petitioners herein [‘the defendants 8 to 11’ in the suit] for rejection of the plaint under Order 7 Rule 11 CPC, has been rejected.
2. The impugned order passed by the Trial Court is challenged primarily on the ground that the suit for partition in respect of subject property was not maintainable; that the subject property was not a joint property of the parties but was an exclusive property of the defendant No. 8, in terms of a judgment and decree dated 25.08.1993, in a suit filed by the defendant No. 8 against her father Ghulam Qadir Bhat. The petitioners (“defendants”) have yet to file their written statements. In the application

filed under Order 7 Rule 11 CPC it is pleaded that since the subject property is the property belonging to the petitioner No. 1 (“defendant No. 8”) in terms of the aforementioned decree, as such, no suit for partition of such property would lie.

3. The application filed by the petitioners was opposed by the respondent No. 1, who in her objections filed to the application, submitted that the subject property of which she is seeking partition is a property left behind by her father, Ghulam Qadir Bhat, and, therefore, she is entitled to a share in the said property. Regarding the copy of the decree relied upon by the petitioners, it is submitted that on coming to know of the passing of the decree relied upon by the petitioners, the respondent No. 1 filed an application before the concerned court for obtaining the certified copy, but the same was returned with remarks that no such case file was available in the Court. The respondent No. 1 essentially denied the existence of the decree passed in a suit on the basis of which the petitioners are claiming exclusive right over the property.

4. The matter was considered at length by the Trial Court, who vide order impugned in this petition, rejected the application of the petitioners filed under Order 7 Rule 11 CPC, on the ground that the issue raised by the petitioners (defendants) is an issue of fact which needs to be determined during the course of trial. The Trial Court has referred to provisions of Order 7 Rule 11 and has come to the conclusion that from reading of the plaint it cannot be said that the suit is without any cause of action or from the statement in the plaint appears to be barred by any law. Regarding the valuation of the suit, the Court has observed that the suit is undervalued and

has granted time to the respondent No. 1 to make a correct valuation and pay the requisite Court fees. It is this order dated 19th October, 2023, which is called in question by the petitioners in these proceedings.

5. Having heard learned counsel for the petitioners and perused the material on record, I am of the considered opinion that the order passed by the Trial Court does not suffer from any legal infirmity or results in serious miscarriage of justice as would persuade this Court to invoke its supervisory jurisdiction under Article 227 of the Constitution of India. Before proceeding further, it would be appropriate to recollect the parameters of law laid by the Supreme Court in respect of jurisdiction of this Court vested under Article 227 of the Constitution of India:

- (i) The Court or Tribunal has assumed a jurisdiction which it does not have,
- (ii) The Court or Tribunal has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and
- (iii) The jurisdiction though available is being exercised in a manner which is tantamount to overstepping the limits of jurisdiction.

6. Viewed in the backdrop of legal position enunciated by the Hon'ble Supreme Court, it is seen that the respondent No. 1 (the plaintiff) has filed a suit for declaration, partition, possession and injunction etc., in respect to the property which respondent No. 1 claims to be the property left behind by her father late Ghulam Qadir Bhat. The petitioners are sons of another daughter of Ghulam Qadir Bhat namely Saja. The petitioners are yet

to file their written statement and take their stand before the Court. They have, however, filed an application under Order 7 Rule 11 seeking rejection of the plaint on the ground that the suit property is not a joint property of the parties, but is a property exclusively owned by the mother of the petitioners in terms of a decree dated 25.08.1993 filed in a suit titled “*Mst. Saja Vs. Qadir Bhat.*”

7. The respondent No. 1 has filed objections and has taken a clear stand that the decree claimed to have been passed between the mother of the petitioners and late Ghulam Qadir Bhat is nonexistent and, therefore, does not confer any right. It is also pleaded that the decree is between Mst. Saja and Ghulam Qadir Bhat and, therefore, *per-se* not binding upon the respondent No. 1.

8. Be that as it may, the issue which has been raised by the petitioners through the medium of application under Order 7 Rule 11 CPC is a factual issue and cannot be gone into by the Trial Court at the time of determining an application under Order 7 Rule 11 CPC. For facility of reference Rule 11 of Order 7 is set out below:

“ **11. Rejection of plaint:-** The plaint shall be rejected in the following cases:-

- (a) Where it does not disclose cause of action;*
- (b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*
- (c) Where the relief claimed is property valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by*

the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) Where the suit appears from the statement in the plaint to be barred by any law;

(e) Where it is not filed in duplicate.

(f) Where the plaintiff fails to comply with the provisions of Rule 9.

9. From reading of clause (a) of Rule 11, it clearly transpires that a suit can be dismissed if it does not disclose a cause of action. The cause of action has to be seen from the plaint and not from the probable defense that the defendant may take in the suit. From reading of the plaint, it clearly transpires that respondent No. 1 is claiming to be the daughter of late Ghulam Qadir Bhat and is seeking partition of the property left behind by him after his death. She is claiming to be a co-sharer along with mother of the petitioners Mst. Saja. So long as the property remains joint between the parties, a co-sharer has a recurring cause of action to come to the Court and seek partition. Viewed from any angle, it cannot be said that the suit filed by the respondent No. 1 does not disclose any cause of action.

10. So far as the clause (b) and (c) are concerned those deal with the valuation of the relief claimed. As is fairly admitted by the learned counsel appearing for the petitioners, that the Court has found the suit undervalued, but since it is a curable defect, as such, has asked the respondent No. 1 to correct the valuation and pay the requisite Court fee. Now coming to the clause (d) which provides that a plaint can be rejected under Order 7 Rule 11 (d) if from the statement in the plaint it appears that the suit is barred by any law.

11. Learned counsel for the petitioners could not point out from any statement in the plaint reading whereof would indicate that the suit is barred by any law for the time being in force. The only dispute is with respect to the nature of the subject matter of the suit. It is submitted by the learned counsel for the petitioners that the subject matter of the suit is not a joint property and, therefore, a suit for partition would not lie. He submits that his claim is substantiated by a decree passed between the mother of petitioners and late Ghulam Qadir Bhat, which is not challenged by the respondent No. 1 (‘the plaintiff’). The existence of decree is, however, disputed by respondent No. 1. This makes the issue a disputed question of fact to be determined in suit.

12. Viewed in the light of legal position set out above and clear and unequivocal provisions of Order 7 Rule 11, I am of the considered opinion that the order passed by the Court below is perfectly legal and does not call for any interference in the exercise of supervisory jurisdiction vested in this Court by Article 227 of the Constitution of India. The petition is found to be without any merit, and the same is, accordingly, **dismissed**. It is, however, made clear that nothing said hereinabove shall be construed as an opinion of this Court on merits of the controversy and shall prejudice none of the parties.

(SANJEEV KUMAR)
JUDGE

SRINAGAR:
20.12.2023
“Mir Arif”