

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 3354 OF 2011
IN
SUMMARY SUIT NO. 1131 OF 2010**

Biotor Industries Ltd. & Anr.

.. Plaintiffs

Vs.

Mrs.Coomi Kanga & Ors.

.. Defendants

And

Noreen Fallows

.. Respondent
(Proposed Defendant)

Mr.Gouresh Mogre a/w. Ms.Nidhi Singh i/b Jaykar and Partners for plaintiffs.

Mr.R.C.Sequiera i/b Ms. Sarojini Upadhyay for proposed defendant nos.1(a) to 1(c).

Ms.Geeta Menon i/b Mr.Atul Pande for defendant no.2.

**CORAM : K.R.SHRIRAM, J.
RESERVED ON : 16TH JULY, 2015
PRONOUNCED ON : 20TH JULY, 2015**

P.C.

1 The counsel for defendant nos.1(a) to 1(c), and this notice of motion no.3354 of 2011 has been taken out on behalf of defendant no.1(b), praying for rejection of the plaint under Order 7, Rule 11 of the Code of Civil Procedure, 1908 (Code), requests that the said notice of motion be heard first and correctly so, before hearing the other applications including the

summons for judgment. The counsel submitted that if this notice of motion is allowed then the need to hear other applications would not arise. The counsel for the applicant submitted that he is pressing the notice of motion under Order 7, Rule 11 (a) and (d) of the Code though the counsel argued only on the basis that the plaint does not disclose any cause of action, i.e., Order 7 Rule 11(a) of the Code.

2 While considering the plea under Order 7 Rule 11 of the Code, it is settled law that the Court has to consider only the plaint and the averments in the plaint are required to be treated as true. The Court cannot look into the defence of the defendants. The Apex Court in the matter of **Sopan Sukhdeo Sable & Ors. Vs. Assistant Charity Commissioner & Ors** ¹ has held that for the purpose of contesting an application under clauses (a) and (d) of Order 7 Rule 11 of the Code, the averments in the plaint are germane and the pleas taken by the defendants in the written statement would be wholly irrelevant at that stage. The counsel for the plaintiff relied on a judgment of this Court in the matter of **Ultratech Cement Ltd & Anr. Vs. Dalmia Cement Bharat Ltd.** ². The counsel for the applicant did not dispute this proposition but relied on a judgment of the Apex Court in the matter of **T. Arvindandam Vs.**

1 2004(3) SCC 137

2 [2015(2) Mh.L.J. 354

T.V. Satyapal & Anr.³ to submit that the Courts should not get carried away by clever drafting and if on a meaningful-not formal-reading of the plaint, it is manifest that the same is vexatious and meritless, in the sense of not disclosing a clear right to sue, the Court should exercise its power under Order 7 Rule 11 of the Code. The counsel submitted that if clever drafting has created the illusion of a cause of action, it should be nipped in the bud at the first hearing by examining the party searchingly under Chapter 10 of the Code.

3 Today, the status of the matter is the plaintiff has taken out summons for judgment which is yet to be heard. The original defendant has filed reply. The counsel that the applicant submitted that in the plaint, at paragraphs 3(l) and (m), the plaintiff has stated that the original defendant had failed to give accounts to the plaintiff of the amounts withdrawn by him and the defendant has himself signed the IOU and admittedly withdrawn the amount. The counsel further submitted that in the further affidavit filed by the plaintiff of one Rajesh Kapadia, Director of the plaintiff affirmed on 7.07.2015, it is stated that the amounts were withdrawn by one Neville Battiwala who handed over the amounts to the original defendant and there is no evidence whatever that the amount was handed over to original

3 A.I.R. 1977 SC 2421

defendants. The counsel for the applicant submitted that as there is this major contradiction, the entire case as filed against the original defendant is cooked up, vexatious and merit-less and the Court should reject the plaint.

4 The Apex Court has said “framing of issues is the first stage of hearing” (*Vidyabai & Ors. Vs. Padmalatha & Anr.*⁴). Therefore, even if we have to follow the judgment of the Apex Court in the matter of *T. Arvindandam*, we have to wait for the first hearing of the suit because at that stage, the written statement of the defendants will also be available.

5 Though there is substance in what Shri Sequiera states again it has to be emphasized while considering an application under Order 7 Rule 11 (a) and (d) of the Code for rejection of the plaint, we have to only consider the averments in the plaint. In paragraphs 3(f), (h), (i), (j), (k), (l) and (m) of the plaint, the plaintiff has disclosed the cause of action against the original defendant. Whether the averments contained therein are true or not cannot be gone into at this stage because as held by the Apex Court, we have to read the plaint as if the contents thereof are true. Even the High Court of Rajasthan in the matter of *Bhagwan Das Vs. Goswami Brijesh Kumarji & Ors.*⁵ relied on by the counsel for the plaintiff has in paragraphs 5 and 7

4 A.I.R.2009 SC 1433

5 A.I.R.1983 Rajasthan 3

stated as under :

5. *It may be observed that the plea that there is no cause of action for filing the suit is very different from the plea that the plaint does not disclose a cause of action. What the learned counsel urges is that there was no cause of action for filing the suit, as the permission given by the Assistant Commissioner, which is a condition precedent to the filing of an application under Section 38 before the learned District Judge, was invalid or void. But what Order 7, Rule 11, C. P. C. postulates is that at the preliminary stage the Court is only to see from the averments made in the plaint as to whether, on the face of such averments, a cause of action is disclosed or not. As the question which has been raised by the learned counsel relates to the invalidity of the permission granted by the Assistant Commissioner it may raise a question of law or a mixed question of law and fact for determination. It may be open to the petitioner to show that a notice or an opportunity of hearing was given to the opposite party by the Assistant Commissioner. Alternatively, it could be urged that once a person was granted permission by the Assistant Commissioner to seek directions from the Court, then it was not necessary to give fresh opportunity of hearing to the working trustee while granting permission to another person in respect of the same cause of action. In any view of the matter, the question which is to be determined at the present stage of the case is as to whether the plaint discloses a cause of action or not and at such a preliminary stage it cannot be decided as to whether the permission given by the Assistant Commissioner to Bhagwandas under Section 38 of the Act is valid in law or not.*

6.

7. *Learned counsel for the opposite party may be right in urging that if the plaint is based on a document, then*

such a document may be considered as forming part of the plaint itself and the document can also be looked into, while considering the averments of the plaint, for the purpose of deciding the question that the plaint discloses a cause of action or not. But it has to be remembered that the averments made in the plaint as well as the contents of the document which may constitute part of the plaint, can be looked into on the face value thereof and the question relating to the validity or invalidity of the document cannot be considered at the stage of deciding an application under Order 7 Rule 11, C. P. C.

5 In the circumstances, the notice of motion is dismissed with no order as to costs.

6 The suit to be listed on 3.08.2015 for hearing of the other interim applications and the summons for judgment.

(K.R. SHRIRAM, J.)