

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No.87 of 2016

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1. Pradip Kumar Khemka, son of late Kesardeo Khemka.
 2. Niraj Kumar Khemka, son of late Pradip Kumar Khema, both residents of Mohalla-Marwari Bazar, Basant Market, ward No. 16, P.S. and District-Samastipur.

.... Petitioner/s

Versus

Kailash Kumar Jhunjhunwala son of late Parmeshwar Lal Jhunjhunwala, Proprietor of Sri Ganesh Pharma, Marwari Bazar, Ward No. 16, P.S. and District-Samastipur.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. J.S. Arora, Sr. Adv.
 Mr. Manoj Kumar, Adv.
For the Respondent/s : Mr. J.K. Verma, Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 11-08-2017

Heard learned counsel for the parties.

The present revision application has been filed against the order dated 21.08.2014 passed in T.S. No. 15 of 2013 whereby the learned court below has held that the petition filed by the defendants under Order VII Rule 11 C.P.C. is not maintainable.

The plaintiff-opposite party filed the suit praying for the relief to restrain the defendants from taking possession of the shop detailed in schedule-I of the plaint till 30.04.2027, and till the payment of amount given by way of security plus interest as per agreement dated 10.05.1996 and 16.02.2004.

From the submissions on behalf of the parties and from



the materials on record, it is clear that there is relationship of landlord and tenant in between the plaintiff-opposite party and the defendant-petitioners. It is also admitted fact that the eviction suit no. 03 of 2007 was filed by one of the petitioners in this revision application seeking eviction of the plaintiff-opposite party from the suit premises on the ground of personal necessity and default in payment of rent. The plaintiff-opposite party contested the said suit which was decreed by judgment and decree dated 26.09.2012 (Annexure-1) granting the decree of eviction, as prayed. The plaintiff-opposite party has preferred an appeal against the said judgment and decree which is admittedly pending. The plaintiff-opposite party, however, has filed another suit for the relief as abovementioned.

The defendant-petitioners filed the petition (Annexure-3) under Order VII Rule 11 C.P.C. praying for rejection of the plaint, inter alia, raising the objection that in view of the judgment and decree in earlier suit, the subsequent suit is legally barred and cannot proceed between the same parties with regard to the same property. It has also been averred in the petition that the cause of action for the suit was not specific and not true according to law.

The learned court below, however, has come to the conclusion that the matter of res judicata is a mixed question of law and fact and has to be decided after the evidence is adduced. It has



further been observed that the present suit is a title suit whereas the earlier suit is the eviction suit and the nature of both the suits is different. Accordingly, the learned court below has come to the conclusion that the petition filed by the defendants is not maintainable.

Mr. Arora, learned senior counsel appearing on behalf of the petitioners has strongly submitted that the learned court below has passed the order mechanically without considering the objections raised by the petitioners in their petition (Annexure-3) and thereby has committed jurisdictional error. It has been contended that the reasonings assigned by the learned court below in the impugned order is fanciful and not sustainable. Elaborating the facts and circumstances of the case including the averments made in the plaint (Annexure-1), it has primarily been contended that no cause of action has been disclosed by the plaintiff and whatever has been stated in the name of cause of action is only illusory. It has also been submitted that in the earlier suit, the same pleas as raised in the plaint of the present suit had been raised by way of defence. It has also been argued that the main plank of the case set up by the plaintiff in the present suit is the lease but the same is admittedly not a registered agreement. Lastly, it has been submitted that the present suit has been filed with oblique purpose to avoid the decree of eviction already



passed against the plaintiff. Strong reliance has been placed upon the decision in the case of **I.T.C. Limited Vs. Debts Recovery Appellate Tribunal, 1998 (2) SCC 70.**

Mr. Verma, learned counsel for the plaintiff-opposite party, however, has strongly contended that the merit of the suit cannot be adjudged at the stage of considering the prayer for rejection of the plaint and even the submission that the plaintiff has no ultimate chance of success in the suit has no bearing at this stage. Referring to the dictum of the Apex Court in the case of **P.V. Guru Raj Reddy Vs. P. Neeradha Reddy, 2015 (8) SCC 331**, it has been contended that the drastic power under Order VII Rule 11 C.P.C. for rejection of the plaint has to be exercised within the parameters of the said provision itself and other considerations as raised by the petitioners touching upon the merits of the suit is alien to the settled principles governing exercise of power to reject the plaint. It has also been submitted that though the submissions have been made on behalf of the petitioners in the present revision application on the issue of absence or non-disclosure or illusory cause of action in the suit but from the impugned order, it does not appear that the said point was ever pressed before the learned court below and therefore in view of the law laid down by the Apex Court in the case of **Shankar K. Mandal Vs. State of Bihar, A.I.R. 2003 S.C. 4043**, it would be



deemed that the said objection would be taken to have been given up. It has also been contended that the defendant-petitioners might have remedy under Section 10 C.P.C. in the facts and circumstances of the case but they have failed to make out the case for rejection of the plaint for which only the averments made in the plaint are to be considered as laid down by the Apex Court in the case of **Kuldeep Singh Pathania Vs. Bikram Singh Jaryal, 2017 (1) P.L.J.R. S.C. 484.**

After careful consideration of the submissions and the materials on record including the impugned order, it is transparent that the learned court below has proceeded to hold the petition filed by the defendant under Order VII Rule 11 C.P.C. as not maintainable keeping in view only the factors that the nature of the two suits are different and res judicata is a mixed question of law and fact which can be decided only on the basis of the evidence led by the parties. The principles governing the exercise of jurisdiction under Order VII Rule 11 C.P.C. is by now well settled by several authoritative pronouncements and the prayer for rejection of the plaint under Order VII Rule 11 C.P.C. should have been considered according to those well settled principles after taking into notice the pleas and submissions on behalf of the parties. In the opinion of this Court, the impugned order is therefore erroneous and deserves to be overturned.



However, in the facts and circumstances of the case, this Court refrains from expressing any opinion on the merits of the submissions made on behalf of the parties as noticed above and thinks it proper to remand the matter back to the learned court below for fresh consideration of the petition (Annexure-3) filed by the defendants under Order VII Rule 11 C.P.C. after hearing the parties.

The revision application is, accordingly, allowed and the impugned order is set aside. The matter is remitted back to the learned court below for fresh consideration of the petition (Annexure-3) filed by the defendants under Order VII Rule 11 C.P.C. after hearing the parties in accordance with law.

(V. Nath, J)

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