IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 38 OF 2017

1. Shri Ashok Shrirang Salvi
age about 60 years,
Occ. Business, Flat B-2/22,
Nirmal Township Anandnagar,
Off Singhgad Road, Pune,
Maharashtra, Pin 411 051.

2. Shri Amol Ashok Salvi,
age about 38 years,
Occ. Bussiness, Flat B-2/22,
Nirmal Township, Anandnagar,
Off Singhgad Road,
Pune – 411 051.

3. M/s. Ashoka Power lines,
Industries Limited,
Pune, Maharashtra,
Through its Director,
Ashok Shrirang Salvi,
Having office at Pune,
Maharashtra. … Appellants

V e r s u s

1. Union of India,
Represented by Secretary,
Department of Company Law Affairs,
Panaji-Goa.

2. Registrar of Companies having
Jurisdiction at Panaji-Goa.

3. M/s. Aishwarya Resorts Pvt. Ltd.
With change of name Nirmitee

Holidays Pvt. Ltd., registered
Office at S. No.2 off. St. Pedro Panelim,
Ilhas, Old Goa – 403 402.

4. Shri Prakash Sitaram Morey,
aged about 51 years,
Occupation: business,
r/a. Nirmitee House,
Opp. Law College Road,
Pune – 411 -004.

5. Shri Vikas Sitaram Morey,
aged about 43 years,
occupation: business,
r/a. Behind Income Tax Office,
Erandavane, Pune – 411 004. ….. Respondents

Shri S. S. Kantak, Senior Advocate with Ms. A Reis Falcao, Advocate for the Appellants.

Shri Amey Kakodkar, Advocate for the Respondents

CORAM: C. V. BHADANG, J.
RESERVED ON: 13/9/ 2017.
PRONOUNCED ON: 30 /10/2017

JUDGMENT

Admit. The learned counsel for the respondents waives service. Heard finally by consent of parties.

2. By this appeal, the appellants are challenging the dismissal of

their suit under Order 7 Rule 11 (a) of the Code of Civil Procedure 1908 (C.P.C., for short) on the ground that the plaint does not disclose cause of action.

3. The brief facts necessary for the disposal of the appeal may be stated thus;

That the appellants filed Civil suit no.12/2005 against the respondents for declaration and injunction, seeking following substantive reliefs:

> i) The order bearing No.3128/NF/02-3/1 dated 1.4.2003 passed by the defendant no.2 be declared as illegal, null and void.
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> ii) The fresh incorporation certificate issued by the defendant no.2 bearing No.455101GA 1995 PTC1001869 (CIN) dt. 14/8/2003 be quashed and set aside being illegal, null and void.
>
> iii) Pending the hearing and final disposal of the present suit, the defendant nos.3 to 5 be restrained from execution, operation and implementation of the order passed by the defendant no.2 dated 1.4.2003.

4. The defendant no.2 happens to be the Registrar of Companies at Panaji-Goa.

5. The case made out in the plaint is that the appellant nos.1 and 2 were the first signatories to the Memorandum and Articles of Association of the respondent no.3, M/s. Aishwarya Resorts Pvt. Ltd. (said company for short) and were also its Directors. According to the appellant nos.1 and 2 they still continue to be the shareholders of the said company. The appellant no.3 was instrumental in arranging a loan for investment as equity in the said company.

6. On 26/3/2003 an application was submitted by the respondent nos. 4 and 5 with the respondent no.2 for approval of the change of name of the said company to M/s. Nirmitee Holidays Pvt. Ltd. The second respondent has approved the change of name as intimated vide letter dated 1.4.2003. Subsequently a fresh certificate of incorporation came to be issued on 14/8/2003. According to the appellant, the respondent nos.4 and 5 also amended the Memorandum and Articles of Association, by which the authorized capital of the said company was increased from Rs.50 lakhs to Rs. 3 crores. It is the material case that the appellant nos.1 and 2 were kept in dark about all these developments. It was also contended that the respondent no.4 (defendant no.4) has unauthorizedly and fraudulently transferred the equity shares of the appellants no.1 and 2 in favour of the respondent no.3 (defendant no.3), relying on an Indemnity Bond dated 2/11/2000, which

according to the appellants has no evidenciary value. It is in these circumstances that the appellants filed the suit for declaration that the order dated 1.4.2003 passed by the second respondent approving the change of name and the consequent fresh certificate of incorporation issued, is illegal, null and void.

7. The cause of action as mentioned in para 26 of the plaint reads thus:

> (a) The cause of action for the present suit firstly occurred on 14.11.2003 when the defendants nos.3 to 5 filed pursis in special civil suit bearing no.41/2003/A and 42/2003/A pending in the court of Hon'ble Civil Judge (Sr. Dn) Panaji, Goa wherein the defendants informed the Hon'ble Court that fresh Certificate of Incorporation consequent on change of Name is issued by the Defendant No.2. The cause of action for the present suit also arose on or about 04-02-2004 when the defendant no.3 filed an application in Regular Civil Suit bearing no.1891/2003 pending in the Court of Hon'ble Civil Judge (Jr. Dn), Pune. The cause of action also arose on 29/3/2004 when the plaintiffs filed Writ Petition bearing no.170/2004 in the Court of Hon'ble High Court of Judicature, Mumbai, Bench, Panaji, Goa against defendants. The cause of action also arose on 24/6/2004 when Their Lordships of Hon'ble High Court, Mumbai Bench, Panaji Goa passed the order thereby allowing the plaintiffs to withdraw the writ petition and

allowing the liberty to file Civil Suit in the Court of Civil Judge Sr. Dn., Panaji, Goa on the same cause of action. The cause of action also arose on 01.04.2003, when the defendant no.2 passed the impugned order bearing No.3128/NF/02-03/1 dt. 01.04.2003 thereby violating the provisions of Company Law and settled principles of law. The cause of action also arise on 12.10.2004 when the plaintiffs issued legal notice u/s 80 of the Civil Procedure Code 1908 to Union of India, through its Ministry of Company Law Affair, Secretary, New Delhi and Register of Companies of Goa, Daman and Diu, Panaji, Goa, thereby complying with the provision of section 80 of the Code of Civil Procedure 1908. The cause of action also arose on 29/10/2004 when the plaintiffs posted the said notices. The cause of action further arose on 1.11.2004, when the defendant no.1 and received the said notices. The cause of action has been arising on everyday on the date of happening of events within the jurisdiction of this Hon'ble Court."

8. The appellants led evidence in the suit and closed their side. It is at this stage that the respondents no. 3 to 5 filed an application for rejection of the plaint under Order 7 Rule 11 (a) r/w section 151 of C.P.C. on the ground that the plaint does not disclose cause of action.

9. The appellants filed their reply and resisted the application.

10. The learned trial court by the impugned order dated 22/4/2016 has held that the plaint does not disclose cause of action, as the names of the appellants do not appear on the Register of members. In the face of the finding as above, the application (Exhibit 148) has been allowed and the plaint is rejected. Feeling aggrieved the appellants are before this Court.

11. I have heard Shri Kantak, the learned Senior Counsel for the appellants and Shri Kakodkar, the learned counsel for the respondents. With the assistance of the learned counsel for the parties I have gone through the plaint and the documents produced and the impugned order passed.

12. It is submitted by Shri Kantak, the learned Senior Counsel for the appellants that the power conferred under Order 7 Rule 11 of C.P.C is of a drastic nature and can be exercised only where a clear case for rejection of the plaint is made out and not otherwise. It is submitted that while considering a question of rejection of plaint under Order 7 Rule 11 of C.P.C., the Court has to confine to the averments made in the plaint and the documents, if any, produced by the plaintiff. It is submitted that the Court cannot look into the defence and also cannot touch on the merits of the dispute involved, which has necessarily to be gone into at the trial of the suit.

It is submitted that the learned trial court has touched upon the merits of the controversy while directing rejection of the plaint, which is not permissible. It is submitted that the learned trial court has decided upon the merits of the suit, at a premature stage. It is contended that the question of the plaintiffs being shareholders of the said company was an issue which could be established and proved by leading evidence. It is contended that the appellants have averred the material particulars such as fraud leading to the accrual of cause of action. It is submitted that the entire basis of the impugned order, namely, the appellants/plaintiffs not being the shareholders of the said company on the date of the filing of the suit, is misconceived and incorrect. It is submitted that the learned trial court has failed to appreciate that the appellants have challenged the very action of the respondent nos.4 and 5 in changing the name of the company and obtaining a fresh certificate of incorporation, fraudulently and without compliance with the statutory procedure. It is submitted that the reliance placed on the decision of the Supreme Court in the case of **Church of Christ Charitable Trust and Educational Charitable Society Vs. Ponniamman Educational Trust (2012) 8 SCC 706** is misplaced, as the said case arose in the context of facts which are clearly distinguishable. It is submitted that the learned trial court has not properly considered the cases cited on behalf of the appellants and has erroneously held that the appellants were required to produce a copy of the Register of members and in the absence thereof, the suit was liable to be rejected. It is submitted that the learned trial court had no reason to rely on section 41 (2) r/w section 21 and section 189 of the Companies Act 1956 to hold that the appellants do not have cause of action to question the change in the name of the company. On behalf of the appellants reliance is placed on the following decisions :

(i) **P.V. Guru Raj Reddy rep. by GPA Laxmi Narayan Reddy and anr. Vs. P. Neeradha Reddy and others. (2015) 8 SCC 331.**

(ii) Hilton Builders & Textiles Pvt. Ltd. Vs. Special Paints Limited and Anr. 2014 (7) ALL MR 188.

(iii) M/s. Dom Francisco Flat Owners Co-operative Housing Society Ltd. Vs. M/s. Alfran Constructions Pvt. Ltd. & Ors. 2014 (5) ALL MR 813.

(iv) Kamala and others Vs. K. T. Eshwara Sa and others (2008) 12 SCC 661.

(v) Dr. Suresh Bhalchandra Shetye Vs. Shri Anil Vasant Pednekar & Ors. 2011 (7) ALL MR 619.

13. On the contrary it is submitted by Shri Kakodkar, the learned counsel for the respondents that the learned trial court has rightly come to the conclusion that the plaint does not disclose cause of action and is thus liable

to be rejected under Order 7 Rule 11 (a) of C.P.C. It is submitted that under the Companies Act it is only a person on the Register of the members of the company who is treated as a shareholder. It is submitted that the court cannot entertain a claim by anyone, whose name is not borne on the Register of members of a company. For this reliance is placed on the decision of this Court in the case of **BBN (UK) Ltd. and others Vs. Janardan Mohandas Rajan Pillai and others 1993 (3) Bom. C.R.228** and in particular para 12 thereof. It is submitted that the plaintiff/s is/are not only under the obligation to plead the necessary facts, constituting the cause of action but should also produce the necessary documents supporting the same as required by Order 7 Rule 11 (1) and (2) of C.P.C. It is submitted that the appellants have not produced the copies of the relevant record showing that they are the members/shareholders of the said company, as on the date of the filing of the suit. Reliance in this regard is placed on the decision of the Supreme Court in the case of **Church of Christ Charitable Trust and Educational Charitable Society (supra)**. It is submitted that the trial court has not touched upon the merits and has confined itself to the averments made in the plaint and the documents produced. It is submitted that the plaint has to be read meaningfully in order to eliminate the possibility of an illusion of a cause of action being created by clever drafting, as has been held by the Supreme Court. It is submitted that the appellants have intentionally chosen not to stake any challenge to the indemnity bond or to the transfer of shares. On behalf of the respondents, reliance is placed on the decisions of the Supreme Court in the case of :

(i) **Ram Sukh Vs. Dinesh Aggarwal (2009) 10 SCC 541** and

(ii) **Azhar Hussain Vs. Rajiv Gandhi 1986 (Supp.) SCC 315.**

14. I have carefully considered the rival circumstances and the submissions made. The law relating to rejection of plaint as envisaged under Order 7 Rule 11 of C.P.C. is too well settled to be restated. Order 7 Rule 11 of C.P.C contemplates rejection of plaint for various reasons as set out in Rule 11(a) to 11(f). Presently we are concerned with a claim for rejection of the plaint under Order 7 Rule 11 (a) on the ground that it does not disclose cause of action. A three Judge Bench of the Supreme Court in the case of **Bloom Dekor Limited vs Subhash Himatlal Desai (1994) 6 SCC 322** has held that by cause of action it is meant that every fact which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, cause of action is a bundle of facts which it is necessary for the plaintiff to prove in order to succeed in the suit.

15. The question whether a plaint discloses cause of action or not

would obviously be peculiar to the facts and circumstances of each case. It is also well settled that while deciding the question about rejection of plaint, the Court has to confine to the averments made in the plaint as a whole and the documents filed along with the plaint and the court cannot refer to the defence either actual or probable in deciding the said question. At the same time it has to be borne in mind that the plaint has to be read as a whole in a meaningful manner in order to ensure that it discloses a clear right to sue and not a mere illusion, as has been held by the Supreme Court in the case of **T. Arivandandam V. T.V. Satyapal (1977) SCC 467**. The following observations in para 5 of the judgment are apposite :

> "5. The learned Munsif must remember that if on a meaningful – not formal-reading of the plaint it is manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled, and it clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10 CPC. An activist Judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Chapter XI) and must be triggered against them."

16. The object of Order 7 Rule 11 of CPC as held by the Supreme Court in the case of **Ram Sukh (supra)** is to ensure that meaningless litigation, which is otherwise bound to prove abortive should not be permitted to occupy the judicial time of the court. With these principles in mind let us now turn to the facts in the present case.

17. The learned trial court has come to the conclusion that the plaint does not disclose cause of action, for the following reasons:

> *"(i) That from the pleadings in the plaint and the documents produced by the plaintiffs themselves, the appellants have transferred their entire shareholding in the company to the respondent nos.4 and 5 and on the date of the application for change of name of the company the appellants were not the shareholders of the company.*
>
> *(ii) Therefore by necessary implication, in terms of section 41 (2) r/w section 21 and 189 of the Companies Act the plaintiffs cannot be said to have any cause of action to question the change in the name of the company.*
>
> *(iii) The plaintiffs in the present suit have "mischievously avoided " seeking a declaratory relief that the transfer of shares is illegal.*
>
> *(iv) This according to the learned trial court is because the suit seeking any such declaration would*

be barred by law of limitation, since the shares were transferred in the year 2000 and the suit is filed in the year 2005, i.e. beyond the period of limitation of 3 years.

(v) That it was necessary for the plaintiffs to have pleaded that they are the members of the company. However, this material fact has not been pleaded in the plaint nor any document in support thereof is produced" as mandated by Order 7 Rule 14 of CPC".

18. It can thus be seen that the plaint has been rejected only on the ground that the appellants have failed to plead and to produce any document in support, to show that they are the members/shareholders of the said company, as on the date of filing of the application for change of name or the date of filing of the suit. This finding of the trial court is countered on the ground that the appellants have averred in para 7 of the plaint that the respondent no.4 (defendant no.4) has unauthorizedly and fraudulently transferred the equity share capital to the credit of respondent no.3 solely relying on the indemnity bond which according to the appellants has no evidenciary value. In para 8 of the plaint the appellants have even claimed that they are entitled to get a declaration that the alleged transfer of shareholding of the appellants herein is illegal. It however, would be significant to note that the appellants have not sought any declaration in the

suit about the said transfer of shares being fraudulent or about the indemnity bond having lost its evidenciary value. It is clear that the Court is required to read the plaint in a meaningful manner so as to avoid, falling in the trap of an illusion of cause of action being created. All that the learned trial court has held is that for seeking a declaration that the change of name of the company and the consequent issue of a fresh certificate of incorporation is null and void, the appellants have to aver and show that the they are the members/shareholders of the said company, as on the date of the filing of the suit. In my considered view, no exception can be taken to the said finding as recorded. It cannot be accepted that while recording the said finding the learned trial court has traveled beyond the averments made in the plaint or has referred to the defence. The learned trial court has also rightly found that the appellants have avoided to seek a declaration that the transfer of shares was fraudulent and the indemnity bond has lost its evidenciary value. In fact, the reliefs presently sought for in the plaint would be consequential to the declaration that the transfer of shares was fraudulent. If without seeking that declaration the appellants have filed the suit seeking declaration confined to the resolution about the change of the name and the fresh certificate of incorporation, I find that there is clear attempt to create an illusion of cause of action, which cannot be permitted.

19. It is true that the case of **Ram Sukh (supra)** as well as **Azhar Hussain (supra)** arose out of an order of dismissal of election petition on the basis of a preliminary objection under Order 7 Rule 11 of CPC. However, that alone cannot make these cases distinguishable on facts. The principles laid down in the aforesaid decisions are applicable to ordinary civil litigation and have been held to apply with greater vigour in election matters (see para 18 of the judgment in the case of **Ram Sukh**).

20. There cannot be any dispute with the proposition that the power conferred on the Court under Order 7 Rule 11 of CPC is of a drastic nature as it has the effect of terminating a civil action at the threshold. The Supreme Court in the case of **P.V. Guru Raj Reddy (supra)** has held that the condition precedent to the exercise of such a power, therefore are stringent and have consistently been held to be so by the court and it is only if the averments in the plaint, expressly do not disclose a cause of action, that the plaint can be rejected.

21. In the case of **Hilton Builders (supra)** this Court held that what the Court needs to consider is whether on facts pleaded by the plaintiff "treating them to be true" a cause of action is disclosed or not.

22. The contention on behalf of the appellants is that once the appellants have averred that the transfer of the shares was fraudulent and the indemnity bond had lost its evidenciary value, the Court ought to have proceeded on the basis that these averments are correct, for the limited purpose of finding out whether the plaint discloses a cause of action. The submission although attractive at the first blush cannot stand a deeper scrutiny. This is because the appellants are not seeking a declaration that the transfer of shares is fraudulent or a declaration that the indemnity bond has lost its evidenciary value. The cause of action is intricately connected with the relief sought. In other words, the cause of action has necessarily to be considered in relation to and in the context of the relief claimed. The question always is whether the plaint discloses a cause of action for getting the relief claimed in the plaint and not otherwise. In that view of the matter the question whether the plaint discloses a cause of action cannot be considered in isolation to that of the relief claimed therein. For this reason in my considered view the contention on behalf of the appellants cannot be accepted.

23. In the case of **Hilton Builders (supra)**, the suit was for specific performance of an oral agreement which was said to be evidenced in the form of a draft Memorandum of Understanding (MOU) exchanged between the

plaintiffs and the defendant no.1. The defendant no.1 sought rejection of the plaint on the ground that the plaint does not disclose cause of action. It would be significant to note that the plaintiffs therein had not only sought specific performance of the said concluded contract by executing the deed of conveyance in terms of a draft MOU but had also sought a declaration that there was a valid, concluded and binding contract between the plaintiffs and the defendant no.1 in assignment/transfer of the property evidenced by the draft MOU. It appears that alternatively the defendant no.1 had sought relief of lis pendens in terms of prayer clause (d) of the notice of motion. The facts in my considered view are clearly distinguishable.

24. In the case of **M/s. Dom Franscisco Flat Owners Co-op Housing Society Ltd. (supra)** the defendant no.1 had claimed that the plaintiff has no cause of action to file suit and it was not specifically pleaded that the plaint does not show any cause of action. Thus, relying on the decision of the Supreme Court in the case of **State of Orissa Vs. Klockner and Company and others AIR 1996 SC 2140** this Court held that the case was covered by law as laid down by the Supreme Court in the case of **Klockner and company (supra).**

25. The case of **Kamala and others (supra)** was one relating to

rejection of plaint under Order 7 Rule 11 (d) of CPC. The Hon'ble Supreme Court held that under Order 7 Rule 11 of C.P.C has limited application and the principles of res judicata cannot be attracted at that stage. It has been held that the matters involving a mixed question of law and facts requiring evidence to be led, can either be taken up as a preliminary issue or at the final hearing of the suit but the said question cannot be determined at the stage of the proceeding under Order 7 Rule 11 (d) of C.P.C.

It can thus be seen that the matter arose in the context of rejection of the plaint under Order 7 Rule 11 (d) i.e the plaint being barred by any law and not on the ground that the plaint does not disclose any cause of action. The question whether the plaint could be rejected under Order VII, Rule 11 of CPC or it requires disputed questions, which can be resolved only on leading evidence would be peculiar to facts and circumstances of each case.

26. In the case of **Dr. Suresh Shetty (supra),** the suit was filed for declaration that the sale deeds were executed out of collusion to the prejudice of the rights of the plaintiffs. This Court held that whether or not the rights of the plaintiffs are extinguished can be decided after the matter is taken up on merits and therefore, the trial court had rightly refused to reject the plaint

under Order 7 Rule 11 (a) of CPC.

It can thus be seen that even in the said case, there was a specific declaration sought which required evidence to be led. The case, in my considered view, is distinguishable.

27. For the reasons aforesaid, I do not find that any case for interference is made out. The appeal is without any merit and is accordingly dismissed with no order as to costs.

A decree be drawn accordingly.

C. V. BHADANG, J.

Ap/