

In the High Court of Punjab and Haryana at Chandigarh

C.R.No. 8248 of 2017

Date of Decision:28.11.2017

Mubin and another

---Petitioners

vs.

Aamin and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Akshay Kumar Jindal, Advocate
for the petitioners

Rekha Mittal, J.

The present petition directs challenge against order dated 31.8.2017 (Annexure P-4) passed by the Civil Judge (Senior Division), Ferozepur Jhirka whereby application filed by the petitioners under Order 7 Rule 11 of the Code of Civil Procedure (in short "CPC") for rejection of plaint, has been dismissed.

Counsel for the petitioners has submitted that respondent/plaintiff filed suit for declaration with consequential relief of permanent injunction against the petitioners and their co-defendants in respect of land measuring 38 kanals 10 marlas, situated within the revenue estate of village Rawli, Tehsil Ferozepur Jhirka, District Mewat claiming that previously Rehman Bux @ Rehman Khan late father of the plaintiff and father of Rustam, Rojdar, Yusuf and Khalil was in cultivating possession of the suit land on payment of 1/3rd *batai*. On death of Rehman Bux @ Rehman Khan, his tenancy rights were inherited by his son i.e. plaintiff and Rustam etc. jointly. In the said suit, there is reference to sale deeds dated

9.7.2009, 13.2.2012, 7.7.2010, 10.10.2012 and 19.9.2012 stated to be executed by different co-owners of the land. The respondent/plaintiff has claimed his tenancy right over the entire suit land by alleging that Rustam etc. by colluding with Luxmi Devi etc. left their possession and tenancy right over the suit land vide Report Roznamcha No. 442 dated 17.6.2011 and revenue entries in the name of defendant Nos. 1 and 2 on the basis of said Report Roznamcha are wrong, illegal, null and void and liable to be corrected.

Later, the respondent/plaintiff filed another suit (Annexure P-1) claiming possession by way of pre-emption in respect of the same very land wherein challenge has also been laid to Report Roznamcha No. 442 dated 17.6.2011. It is further argued that as cause of action to file suit for possession by way of pre-emption was available to the respondent/plaintiff at the time of institution of previous suit for declaration and permanent injunction rather relief of possession by way of pre-emption flows from the same very cause of action, pleaded in the suit for declaration and permanent injunction, suit filed by the respondent/plaintiff for possession by way of pre-emption is liable to be dismissed being barred under Order 2 Rule 2 of the CPC. It is further argued that trial court has committed a serious error rather illegality by holding that cause of action for claiming possession by way of pre-emption is based upon separate and distinct cause of action viz-a-viz the cause of action pleaded in the suit for declaration and injunction.

Counsel has further argued that issue with regard to suit being barred under Order 2 Rule 2 of the CPC can be raised by filing an application under Order 7 Rule 11 of the CPC, therefore, correctness or

otherwise of the order impugned needs to be examined by this Court. For this purpose, he has relied upon judgment of Hon'ble the Supreme Court of India ***State Bank of India vs. Gracure Pharmaceuticals Limited, 2014(1) RCR (Civil) 889.***

I have heard counsel for the petitioners and perused the paper book particularly the order impugned.

Before advertng to the submissions made by counsel for the petitioners, it is pertinent to note that in order that a plea of bar under Order 2 Rule 2(3) of the CPC should succeed, the defendant who raises the plea must make out; (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (ii) that in respect of that cause of action the plaintiff was entitled to more than one relief; (iii) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. In this context, reference can be made to judgment of Hon'ble the Supreme Court ***Gurbux Singh vs. Bhooralal, AIR 1964 SC 1810.***

Counsel for the petitioners is not in a position to dispute that application under Order 7 Rule 11 of the CPC is decided on the basis of averments made in the plaint and documents relied upon by the plaintiff. For this purpose, plea by way of defence raised by the defendant or document(s) relied upon by the defendant is not relevant. In this context, reference can be made to judgment of Hon'ble the Supreme Court of India ***Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman vs. M/s Poonniamman Educational Trust***

represented by its Chairperson/Managing Trustee 2012(3) RCR (Civil)

811.

The first question for consideration is whether issue with regard to the suit being barred under Order 2 Rule 2 of the CPC can be decided while dealing with an application under Order 7 Rule 11 of the CPC. Counsel for the petitioners is not in a position to say that plaint of the suit previously instituted is either a part of the plaint of the suit for possession by way of pre-emption or the said plaint has been relied upon by the respondent/plaintiff in the subsequent suit. If plaint of the previously instituted suit is not a part of pleadings of the respondent/plaintiff, how can the averments raised in the said suit or cause of action pleaded therein can be examined in the suit instituted subsequently for deciding the question if the subsequent suit is barred under Order 2 Rule 2 (3) of the CPC. In ***State Bank of India's case (supra)***, though the question of suit being barred by the provision of Order 2 Rule 2 of the CPC seems to have been raised by the bank and its officers by filing an application under Order 7 Rule 11 of the CPC but the Court has not adverted to the question as to whether any such plea is to be decided solely on the basis of averments made in the plaint or plea raised by the applicant based upon additional fact(s) can be the subject matter of consideration and decided at that stage. With due respect, in my considered opinion, question of suit being barred under Order 2 Rule 2 of the CPC on the basis of averments made in the application under Order 7 Rule 11 of the CPC by relying upon documents which are not a part of plaint or relied upon by the respondent/plaintiff is not amenable to adjudication while deciding application under Order 7 Rule 11 of the CPC.

In this view of the matter, the trial court has committed a serious error by proceeding to decide the plea of bar under Order 2 Rule 2(3) of the CPC on the basis of application filed by the petitioners under Order 7 Rule 11 of the CPC.

Another question that falls for consideration is whether disputed questions of fact and law which were required to be decided by the trial court at an appropriate stage of the proceedings on the basis of pleadings and evidence should be examined by this Court in exercise of its power of superintendence. Allowing the parties to adopt such a recourse would amount to deviating from the established and statutory remedy(ies) provided under law. Had the trial court refused to decide this question at this juncture and left it to be decided by framing an issue and permitting the parties to adduce evidence, any party to the lis having grievance to express against finding recorded by the trial court would have availed of statutory remedy of first and second appeal. Under the circumstances, this Court would not examine correctness or otherwise of the order impugned. However, in order to safeguard interests of the petitioners, the matter qua bar under Order 2 Rule 2 CPC is left open to be decided by the trial court at an appropriate stage of the suit, if so raised, without being influenced by any observations made in the order impugned.

For the foregoing reasons, the petition stands disposed of in the aforesaid terms.

Before parting with the order, it is clarified that the petition has been disposed of without notice to the respondent/plaintiff in order to avoid inconvenience and incurring expenditure by him. However, if the

respondent/plaintiff has any grievance to express, he shall be at liberty to
file appropriate application before this Court.

(Rekha Mittal)
Judge

28.11.2017
paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No