

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 2833 OF 2018

Nanji Sunderji Sejpal ... Petitioner
Versus
Vithuram Shivlal Lahoti Denagi Trust & others... Respondents

.....
Mr. Girish G. Togani for the Petitioner.

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CORAM : M. S. SONAK, J.

DATE : 12th OCTOBER, 2018.

ORAL JUDGMENT :

1. Heard Mr. Girish Togani, learned Counsel for the Petitioner.
2. The challenge in this petition is to the order dated 11th April, 2017 made by the learned trial Judge dismissing the petitioner's application under Order VII Rule 11(a) of the Code of Civil Procedure (CPC).
3. Mr. Togani, the learned Counsel for the Petitioner submits that this is a case where the plaint discloses no cause of action. By way of elaboration, Mr. Togani submits that the suit seeking the petitioner's eviction from the suit premises is not maintainable

because the petitioner is admittedly lessee in respect of the suit premises. He submits that there is a clause in the lease-deed for renewal the lease term. In pursuance of such clause, the petitioner has in fact exercised the option for renewal. He relies on ***State of U.P. and others Vs. Lalji Tandon (Dead) – (2004) 1 SCC 1*** to contend that where a covenant for renewal exists, its exercise is an unilateral act of the lessee, and the consent of the lessor is unnecessary. Mr. Togani submits that these factors warrant the rejection of the plaint on the ground that it fails to disclose any cause of action.

4. Mr. Togani further submits that there is no proper termination of the lease in the present case. He submits that so called notice of termination is not in consonance with the provisions of Section 106 of the Transfer of Property Act. He submits that this is yet another ground for rejection of the plaint for failure to disclose cause of action.

5. Mr. Togani submits that the lease-deed in the present case was executed by an individual ***Vithuram Shivlal Lahoti*** (lessor). However the suit has been instituted by a trust. There is no cause

of action for the trust to institute a suit of the present nature and therefore the plaint warrants rejection by resort to the provisions of the Order VII Rule 11(a) of the CPC.

6. Finally, Mr. Togani criticised the impugned order by submitting that the learned trial Judge has unnecessarily gone into the issues of prior approval from the Charity Commissioner or the failure of all the trustees to institute the suit, when these were not the grounds on which the petitioner had sought for the rejection of the plaint. He submits that the learned trial Judge has failed to appreciate the case of the petitioner in proper perspective and consequently there is jurisdictional error in not rejecting the plaint under Order VII Rule 11(a) of the CPC.

7. The impugned order has been made by the learned trial Judge below Exhibit-51, in which, the petitioner (original Defendant No.1) had applied for the following reliefs :-

“10) It is therefore prayed that-

(a) Hon'ble court may be pleased to frame preliminary issue, as to whether the suit is maintainable at law and is barred by law:

(b) Hon'ble court may be pleased to dismiss the suit or return the plaint, as the Hon'ble court deems fit and proper, in the interest of justice and oblige.

(c) Any other relief as the Hon'ble court deems fit and proper may be granted.”

8. The learned trial Judge, at paragraph 4 of the impugned order has recorded that the Advocate for the petitioner (Defendant No.1) had invoked the provisions of Order VII Rule 11 of the CPC in order to contend that the plaint discloses no cause of action. The contentions raised by the Advocate for the petitioner have been noted in paragraph 4 of the impugned order. However, most of such contentions are now disowned by the learned counsel for the petitioner before this Court.

9. Insofar as the contentions which are now raised by the learned counsel for the petitioner are concerned, none of them support the petitioner's contention that the plaint in the present case fails to disclose any cause of action. Most of the contentions seem to suggest the plaintiff in the suit has no cause of action to institute the suit. Now, this is quite different and distinct from the contention that the plaint fails to disclose any cause of action. Unless the petitioner makes out the case that the plaint in the

present case fails to disclose cause of action, there is no question of rejection of the plaint in the exercise of powers conferred by Order VII Rule 11(a) of the CPC.

10. From the perusal of the plaint, it is quite clear that cause of action has been disclosed. Whether the averments made in the plaint in support of such cause of action are true or not is a matter which will have to be decided after the conclusion of the trial. Such matters cannot be gone into at the stage of deciding any application under Order VII Rule 11 of the CPC. Most of the contentions raised by the learned counsel for the petitioner constitute the defense of the petitioner to the suit as instituted. At the stage of deciding application under Order VII Rule 11 of the CPC, the defense raised by the defendant cannot be looked into. The petitioner has already filed written statement in the matter in which the defenses now urged by the learned counsel for the petitioner, have been substantially urged.

11. The contentions raised by and on behalf of the petitioner seem to suggest that there is no cause of action for instituting the suit. As noted earlier, this is quite different and distinct from

alleging and establishing that there is a failure to disclose cause of action in the plaint.

12. In *State of Orissa Vs. Klockner and Company and others* – *A.I.R. 1996 SC 2140*, the Apex Court approved the view taken by the learned Single Judge of the Orissa High Court interfering with the order made by the learned trial Judge rejecting a plaint under Order VII Rule 11(a) of the CPC. The learned Single Judge noted that the learned trial Judge had failed to maintain the distinction between the plea that there was no cause of action for the suit and the plea that the plaint does not disclose a cause of action.

13. In *Santi Ranjan Das Gupta Vs. Dasuram Mirzamal Firm* – *AIR 1957 ASSAM 49* the Division Bench of the Assam High Court has drawn distinction between '*no cause of action for the suit*' and '*failure to disclose cause of action*'. The Division Bench has observed that the plaint may disclose cause of action which may not be sufficient to sustain the suit. The suit in such case would be liable to dismissal. However, the plaint in such a case cannot be rejected by resort to Order VII Rule 11(a) of the CPC.

14. In ***British Airways Vs. Art Works Export Ltd. and another -AIR 1986 CALCUTTA 120*** the Division Bench of the Calcutta High Court declined to reject the plaint based on the plea that there was no cause of action for the plaintiff to institute the suit. In this case also the Division Bench made a distinction between the '*absence of cause of action*' and the '*failure to disclose cause of action*'. In the former case the suit may be dismissed upon conclusion of the trial. However, it is only in the later case that a plaint can be rejected.

15. In ***Industrial Development Bank of India Vs. Mrs. G.C. Kamala and others – 2009 AIHC 1611*** the learned Single Judge of the Madras High Court has held that as long as the plaint discloses a cause of action, the same cannot be rejected by resort to Order VII Rule 11(a) of the CPC. The correctness or falsity of the cause of action projected in the suit cannot be gone into while dealing with an application for rejection of plaint.

16. Most of the contentions raised by the learned Counsel for the petitioner seem to suggest that the rejection of the plaint was sought for on the ground that the plaintiff has no cause of action

to institute the suit. As noted earlier this is not a good ground for rejection of the plaint by resort to Order VII Rule 11 of the CPC. Besides as noted earlier, there is no question to adverting to the defense of the petitioner in the suit at the stage of dealing with an application Order VII Rule 11(a) of the CPC.

17. For all the aforesaid reasons it cannot be said that there is any failure on the part of the learned trial Judge to exercise jurisdiction. Accordingly, this petition is liable to be dismissed and he hereby dismissed. There shall be no order as to costs.

18. It is however clarified that observations in the impugned order for that matter the present order are only in the context of considering petitioner's application under Order VII Rule 11 of the CPC. Therefore, none of these observations shall in any manner prejudice the petitioner's defense in the suit on merits. Accordingly, all contentions of all parties on the merits of the suit are left open for determination by the learned trial Judge at the appropriate stage.

(M. S. SONAK, J.)

Shridhar
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