

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9470 OF 2018

Brian Rudolph Donato Tavares

.. Petitioner

Versus

Nirmala Tavares

.. Respondent

Mr. Ranvir Shekhawat and Mr. Jagdish Choudhary I/b Raj Legal for the Petitioner.

Mr. A.D. Sarwate, for the Respondent.

CORAM : M.S. SONAK, J.

DATE : 19 NOVEMBER 2018.

ORAL JUDGMENT :-

1. Heard learned Counsel for the parties.
2. Rule. With the consent of and at the request of learned Counsel for the parties, Rule is made returnable forthwith.
3. The challenge in this Petition is to the common order dated 19.07.2018 passed below Exhibit-16 in P.A. No.1217 of 2017 and Exhibit-14 in P.B. No. 18 of 2017 by which, the Petitioner (Original Respondents in both the Petitions) had applied for rejection of the plaints by resort to the provisions at Order VII Rule 11 of Civil Procedure Code.
4. Mr. Shekhawat, the learned Counsel for the Petitioner has pointed out that the Petitioner had applied for rejection of the Plaint primarily on the following two grounds :-

a) That the Petitioner as well as the Respondents were citizens of United States of America. Besides, the parties as well as their children were ordinary residents of USA at the time when the Plaints were instituted in the Courts at Pune. On these grounds, it was urged that the Courts in Pune had no jurisdiction to entertain the suits and consequently the Plaints were required to be rejected by resort to Order VII Rule 11 of the CPC.

b) That the marriage between the Petitioner and Respondent was governed by the Portuguese Civil Code and therefore, in terms of the law as applicable and as interpreted by the learned Single Judge of the Karnataka High Court in *Sai Subhash Hegde Vs. Darshan Sai Hegde ILR 2008 KAR 3881*, only the Courts in the State of Goa would have jurisdiction to entertain suit of the nature instituted by the Respondent. On this ground, it was urged that the Courts in Pune would lack jurisdiction to entertain the suit and consequently, the two Plaints required rejection by resort to Order VII Rule 11 of the CPC.

5. Mr. Shekhawat pointed out that the learned trial Judge in making the impugned order as only dealt with the first ground urged by and on behalf of the Petitioner. However, there is not even any reference to the second ground urged by and on behalf of the Petitioner. Mr. Shekhawat pointed out that non consideration of the second ground amounts to non exercise of jurisdiction when it comes to dealing with application under Order VII Rule 11 of the CPC.

6. He points out that even the reasoning insofar as the first ground is concerned is vulnerable and warrants interference.

7. Mr. Sarwate, the learned Counsel for the Respondent submits that the very application made by the Petitioner was misconceived since, Plaints can be rejected under Order VII Rule 11 of the CPC on extremely limited grounds. He points out that none of such grounds were even made out in the application seeking rejection of the Plaint. Mr Sarwate refers to the averments in the application seeking rejection of Plaint and submits that it is not even the case of the Petitioner that the Plaints fail to disclose any cause of action. He submits that in such matters the Court is required to only go by the averments in the Plaint and the defence, if any, of the Petitioner is quite irrelevant at this stage. He refers to Article 5 of the Portuguese Civil Code and submits that the suit for divorce can be instituted either in a Court of Domicile or in the Court of having jurisdiction over the place where the Plaintiff has residence. He submits that in terms of this Article the suits before the Courts at Pune were competent.

8. In any case, and by way of an demurer Mr. Sarwate contends that even if it is assumed that the suits were instituted in a Court lacking jurisdiction, the Plaints cannot be rejected under Order VII Rule 11 of the CPC, but, at the highest, application could have been made for return of the Plaints in terms of Order VII Rule 10 of the CPC. Mr. Sarwate clarifies that in the present case, the suits have been instituted in the Court of competent jurisdiction and therefore, there is no case made out to interfere with the impugned order.

9. Rival contentions now fall for determination.

10. From the perusal of the application made by the Petitioner seeking rejection of the Plea, it does appear that the Petitioner had raised two grounds referred to in paragraph 4 of this order. However, on the perusal of the impugned order, it is apparent that the second ground raised by and on behalf of the Petitioner has not at all been considered by the learned trial Judge in making the impugned order.

11. Ordinarily, when two distinct grounds are raised by the parties, it was the duty of the learned trial Judge to have at least considered both the grounds. On this ground alone, it is necessary to remand the matter to the learned trial Judge for decision on the second ground raised by and on behalf of the Petitioner. At this stage, there is no necessity to express any opinion on the rival contentions. Rather, it would be appropriate to clarify the rival contentions left open for the determination of the learned trial Judge.

12. Insofar as the rejection on first ground is concerned, on the perusal of the reasoning in the impugned order, really no case is made out to disturb such reasoning. At the stage of deciding an application under Order VII Rule 11 of the CPC, a Court is to concern itself only with the averments in the Plea. At this stage, there is no question of any reference to the defence. At this stage, the Court is also not required to go into the issue as to whether the averments in the Plea are true or false.

13. Besides, on perusal of the application under Order VII Rule 11 of the CPC, it appears that the case of the Petitioner was that there was no cause of action which arose within the jurisdiction of the Pune Court. There is a difference between failure to disclose cause of action and the absence of cause of action. Considered from his perspective, there is no necessity to interfere with the impugned order, insofar as it rejects the first ground raised by and on behalf of the Petitioner.

14. However, since, the second ground urged by and on behalf of the Petitioner has not at all been considered by the learned trial Court, it is only appropriate when the matter is remanded to the learned trial Court for decision on this second ground. Learned trial Judge is requested to dispose of the applications under Order VII Rule 11 of the CPC restricted no doubt to the second ground urged in support of the same as expeditiously as possible and in any case within a period of six weeks from today. As indicated earlier, all rival contentions are kept open for determination by the learned trial Judge insofar as this ground is concerned.

15. The rule is made partly absolute to the aforesaid extent. There shall be no order as to costs.

16. All concerned to act on the basis of authenticated copy of this order.

(M.S. SONAK, J.)