

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11929 OF 2018

M/s. National Textile Corp. Ltd.
(Western Region), Mumbai

...Petitioner

vs.

Bhaskar Namdeo Khandke
(Since deceased through LRs)

...Respondent

Ms. Heena Doshi, for the Petitioner

Mr. Mayur Khandeparkar I/b. Ms. Snehal Modi, for the
Respondent.

CORAM : M. S. SONAK, J.

DATE : DECEMBER 17, 2018

P.C.:

. Heard Ms. Doshi, learned counsel for the Petitioner.

2. The challenge in this Petition is to the orders dated 2nd February, 2018 and 10th August, 2018 made by the trial Court and the Appeal Court rejecting the Petitioner's application under Order VII Rule 11 of the Code of Civil Procedure (CPC) in which they had contended that the proceeding under Order XX Rule 12 for determination of the means profit are not maintainable on the ground that they do not disclose the cause of action and in any case they are barred under the Textiles Undertakings (Nationalization) Laws (Amendment and Validation) Act, 2014.

3. Ms. Doshi, learned counsel for the Petitioner placed reliance on the decision of the Hon'ble Apex Court in the case of ***Union of India vs. Nareshkumar Badrikumar Jagad and Ors., Review Petition © Diary No. 40966 of 2013 in Civil Appeal No.7448 of 2011*** in support of her contention that the proceeding for recovery of means profit are not maintainable in view of the Nationalization Act, 2014.

4. In the present case, the proceeding under Order XX Rule 12 of the CPC for determination of means profit are in pursuance of decrees for eviction and mesne profits which have already attained finality right upto the Hon'ble Apex Court. The two Courts have considered the impact of Nationalization Act, no doubt for the limited purpose of examining whether the proceeding under Order XX Rule 12 require to be terminated at the threshold by invoking Order VII Rule 11 of CPC. The two Courts have concluded that this is not the case of failure to disclose cause of action or case where the proceedings are required to be terminated the threshold by invoking Order VII Rule 11 of CPC.

5. In this case, we are dealing with the proceeding under

Order XX Rule 12 for determination of mesne profits in terms of decree which has already attained finality. The issue as to whether the provision of Order VII Rule 11 of CPC can be invoked to object such proceedings is itself a doubtful issue. The Order VII Rule 11 of CPC applies where to rejection of a Plaint and not even dismissal of a suit on merits. That apart, at least *prima facie* it is apparent that the decision in case of ***Union of India*** (supra) was not at all in the contest of application under Order VII Rule 11 of CPC for termination of proceedings at the threshold.

6. Mr. Khandeparkar, learned counsel for the Respondent also attempted to point out the distinguishing features of the present matter. At this stage, it is not necessary to advert such distinguishing features, simply because there does not appear to be any jurisdictional error in the view taken by the two Courts that this was not a fit case for invocation of by Order VII Rule 11 of CPC.

7. The view taken in two impugned orders however does not and cannot bar the Petitioner from nevertheless participating in the proceeding under Order XX Rule 12 of CPC in placing of

materials *inter alia* on the issue of the defence which they now propose to raise by virtue of Nationalization Act. Such defence will have to be considered by the executing Court on its own merits along with other issues which arise in the proceeding. This means that the Petitioner are not shut out from raising the issue under Nationalization Act merely because their application under Order VII Rule 11 of CPOC came to be rejected.

8. This clarification now issued, will protect the interest of the Petitioner and at the same time, will not protract the proceeding under Order XX Rule 12 of CPC in pursuance of the decree which has already attained finality. Ultimately, if the Petitioner fails on merits, it is always open to the Petitioner to raise these issues in Appeals/ Revision as may be maintainable at that stage.

9. For all the aforesaid reasons, this Petition is not entertained and is dismissed.

10. However, it is clarified that the proceeding under Order XX Rule 12 of CPC be disposed of by the executing Court on their own merits and in accordance with law without being influenced by the

observations made in the impugned orders or the present order, since, the observations are made in the context of deciding Order VII Rule 11 of CPC and the scope of such proceeding is quite restricted.

11. With the clarification as aforesaid, this Petition is dismissed.

12. There shall be no order as to costs.

(M. S. SONAK, J.)