

\$~J-

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Date of Judgment: 06.07.2018

+ C.R.P. 22/2017

SURESH NANDA

..... Petitioner

Through Mr.Pinaki Misra, Sr.Adv. with
Mr.Sandeep Kapur, Mr. Arun Monga and
Mr.Vivek Suri, Advs.

versus

DEVIKA MEHTA & ANR

..... Respondents

Through Mr.Atul T.N., Mr.Akshay Ringe and
Mr.Harsh Raghuvanshi, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This revision petition is filed under section 115 CPC seeking to impugn the order dated 21.4.2016 whereby the application filed by the petitioner/defendant No.1 under Order 7 Rule 11 CPC was dismissed.
2. The plaintiff/respondent No.1 has filed the present suit for declaration, permanent and mandatory injunction. She has sought a decree of declaration declaring that she/plaintiff is the biological and natural born daughter of defendant No.1 and 2, namely, the petitioner and respondent No.2. Other connected reliefs are also sought. The case of the plaintiff is that defendant No.1 is a former naval officer who is an established successful business man. He in 1991 was staying in UK for the purpose of developing business contacts and to gain NRI status. Defendant No.2 was married to Mr.Anil

Mehta on 2.2.1977 and had a daughter Ms.Gaurika Mehta out of their wedlock. It is stated that their relationship was strained due to various reasons and the two were staying on different floors since 1986-87. It is also stated that the defendants met at various gatherings and developed intimate relationship. The plaintiff was born on 29.4.1993 in London. She was named Devika Mehta using the surname of Mr.Anil Mehta the husband of defendant No.2. It is pleaded by the plaintiff that defendant No.2 sometimes in June 2011 informed her about her parentage, namely, that her biological father was defendant No.1 and not Mr.Anil Mehta. It is pleaded that initially when confronted defendant No.1 accepted the said position. The plaintiff thereafter sought to have her official records corrected. She was advised from a solicitor firm in UK that the process would require a DNA test report of defendant No.1 for change of name of a parent in the General Register of England. The plaintiff was unable to contact defendant No.1. Hence a communication from her Solicitor dated 23.7.2012 was sent to defendant No.1 seeking the blood sample for the DNA test. Defendant No.1 vide his reply dated 29.7.2012 denied the fact that he was the father of the plaintiff. Thereafter the plaintiff in 2013 filed an Indigent Person Application being IPA 48/2013 before this court. The said IPA No.48/2013 was withdrawn with liberty to take appropriate legal remedy by order dated 24.4.2015. It is pleaded that exercising the said liberty granted by this Hon'ble court the present suit has been filed.

3. Defendant No.1/petitioner filed the present application under Order 7 Rule 11 CPC read with Order 1 Rule 9, Order 23 Rule 1 CPC, Order 2 Rule 2 and Section 151 CPC seeking rejection of the plaint. It was pleaded in the

application that the plaintiff invoked the jurisdiction of the courts of UK and has thereafter filed a petition before this court. That petition was withdrawn. Now again, a fresh suit has been filed. It is pleaded that the plaintiff is guilty of forum shopping.

It is also pleaded that this court does not have the territorial jurisdiction to adjudicate the present suit. Reliance is placed on the notice sent by the Solicitor of the plaintiff on 23.7.2012 which was addressed to defendant No.1 at Dubai. Hence, it is pleaded that defendant No.1 is even as per the plaintiff a resident of Dubai, UAE and hence this court would not have the territorial jurisdiction to adjudicate the present suit.

It is also further submitted that the suit is barred by limitation having been filed beyond the period of three years.

4. A perusal of the impugned order would show that the trial court has rejected the contentions and pleas raised by defendant No.1. On the issue of limitation the trial court noted that limitation is to be reckoned from the date of defendant No.1's refusal which is the email denying the case of the plaintiff issued on 29.07.2012. As the present suit was filed on 29.7.2015 the court came to the conclusion that the suit is filed within the limitation period. On the plea of the defendant No.1 regarding territorial jurisdiction of this court the trial court held that under Section 20 CPC a suit can be filed where a defendant either wholly or partially resides and carries on business or personally works for gain. The trial court on the plea of the petitioner that he is a resident of Dubai concluded that defendant No.1 had merely gone out of residence for the purpose of business. As long as defendant No.1 carries on the business and voluntarily resides in Delhi, a suit can be filed in this court.

It was noted that defendant No.1 is having extensive business in Delhi including the Company Claridges Hotel Private Limited. Hence, this court would have territorial jurisdiction.

On the issue that the suit is barred under Order 23 Rule 1 CPC the trial court noted that an order refusing to allow the plaintiff to sue as forma pauperis would not bar any subsequent application of like nature in respect of the same right to sue and the present application was accordingly dismissed.

5. I have heard learned counsel for the parties. Learned senior counsel for the petitioner has vehemently argued as follows:-

(i) He submits that the prayer clause in the first suit/IPA is identical as the present suit. It is further pleaded that when the earlier suit/IPA was withdrawn no liberty was granted to file a fresh suit based on the same cause of action. Hence, under Order 23 Rule 1 CPC the present suit is barred. No liberty was granted to the plaintiff to file a fresh suit.

(ii) It is further pleaded that the suit is barred by limitation. The suit was filed on 29.7.2015. It is the own case of the plaintiff that she received knowledge about her claim that the defendant No.1 is her biological father sometimes in 2011. Hence, the present suit filed in July 2015 would be barred by limitation. Even otherwise it is pleaded that a communication was sent on 28.7.2012 to the plaintiff by defendant No.1 denying the case of the plaintiff. Hence, limitation ceased prior to 29.7.2015 and the suit is barred by limitation.

6. The legal position regarding rejection of a plaint under Order 7 Rule 11 CPC is quite clear. Order 7 Rule 11 CPC reads as follows:-

“11. Rejection of plaint.- The plaint shall be rejected in the following cases:—

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) where it is not filed in duplicate;
- (f) where the plaintiff fails comply with the provision of Rule 9.

Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff.”

7. The settled legal position is that under Order VII Rule 11 CPC, the Court has jurisdiction to reject the plaint where it does not disclose any cause of action or where the relief claimed is under-valued and the valuation is not corrected within a time fixed by the Court or that the suit appears from the

statement in the plaint to be barred by any law. For the purpose of rejection of the plaint, the Court has to read the entire plaint as a whole to find out whether it discloses a cause of action. So long as the plaint discloses some cause of action, which requires determination, the mere fact that the plaintiff has a weak case and may not succeed would not be a ground for rejection of the plaint. In the above context, reference may be had to the judgment of the Hon'ble Supreme Court in the case of *Mayar (H.K.) Ltd & Ors v. Owners & Parties, Vessel M.V. Fortune Express & Ors, AIR 2006 SC 1828*. In para 11 the Hon'ble Supreme Court has held as follows:

“11. It is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII, Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, willful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint.”

8. Similar are the observations of the Hon'ble Supreme Court in the case

of *Vigneswara Coop. Housing Society Ltd. V. K. Balachandramouli & Ors*, (2005) 13 SCC 506.

9. Moreover while considering an application under Order 7 Rule 11 CPC, the court can only look at the averments in the plaint and the accompanying documents. In *Tilak Raj Bhagat vs. Ranjit Kaur*, 2012 VAD (Delhi) 186 this court held as follows:-

“5. It may be worthwhile to mention here that while considering an application under Order 7 Rule 11 CPC, the Court has to look at the averments made in the plaint by taking the same as correct on its face value as also the documents filed in support thereof. Neither defence of the defendant nor averments made in the application have to be given any weightage. Plaint has to be read as a whole together with the documents filed by the plaintiff.”

10. To the same effect are the judgments of the Division Bench of this Court in the case of *Indian City Properties Ltd. Vs. Vimla Singh & Ors*. 198(2013) DLT 432 and in the case of *Inspiration Clothes & U vs. Collby International Ltd.*, 88(2000) DLT 769.

11. Reference may also be had to a judgment of the Supreme Court in the case of *Hardesh Ores Pvt. Ltd v. M/s Hede and Company* 2007 (7) SCALE 348, noted as follows:

“21. The language of Order VII Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that “law within the meaning of clause (d) of Order VII Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found

out from reading the plaint itself. For the said purpose the averments made in the plaint, in their entirety must be held to be correct.”

12. Hence for the purpose of considering an application under Order 7 Rule 11 CPC only the averments made in the plaint have to be taken presuming them to be correct on the face of it along with the documents filed in support of the plaint.

13. I will first deal with the contention of the defendant No.1 regarding the suit being barred under Order 23 Rule 1 CPC.

14. Order 23 Rule 1 (3) and (4) CPC read as follows:-

“1. Withdrawal of suit or abandonment of part of claim.-

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned Without the leave of the court.

(2)

(3) Where the court is satisfied,—

a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

(4) Where the plaintiff,—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),
he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.
(5)

15. Hence when a suit is likely to fail on account of a formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit, the court may grant permission to withdraw such suit with liberty to institute a fresh suit. Where the plaintiff withdraws a suit without permission as referred to in Sub Rule 3, he is precluded from instituting a fresh suit in respect of such subject matter.

16. The admitted fact in the present case is that the plaintiff filed a petition seeking somewhat identical prayers including a decree of declaration declaring that the plaintiff is the natural born daughter of defendant No.1 and defendant No.1 is the father of the plaintiff. This was an Indigent Person Application filed without payment of court fees. It has been pleaded by the plaintiff that on account of the fact that the plaintiff was unable to prove her indigent status the present IPA was withdrawn with liberty to file a fresh case.

17. The above IPA was withdrawn on 24.4.2015. The relevant order reads as follows:-

“IPA 48/2013

Learned counsel for the petitioner does not press this petition. He seeks permission of this Court to withdraw the petition. Permission is granted.

This petition is permitted to be withdrawn with liberty granted to the petitioner to take appropriate legal remedy as permitted by law.

Petition stands disposed of.”

18. Hence, the plaintiff has withdrawn the IPA with liberty to take appropriate legal remedy as permitted by law. It is not as if she has not taken any permission to pursue her case. The question that arises is as to whether the plaintiff was granted liberty to file the present suit as per order dated 24.04.2015 in compliance of Order 23 Rule 1(3) CPC.

19. The Calcutta High Court while dealing with the issue of liberty under Order 23 CPC in ***Sukumar Banerjee vs. Dilip Kumar Sarkar and Ors. AIR 1982 CAL 17*** held as follows:-

“5. It appears that Title Suit No. 284 of 1977 was permitted to be withdrawn by the learned Munsif. The plaintiff made a prayer for liberty to bring a fresh suit. No order was given thereon, but that prayer was not refused. In the Bench case of Golam Mahomed v. Shibendra reported in (1908) ILR 35 Cal 990 at p. 995, it has been stated that when the plaintiff files an application to withdraw from the suit with liberty to sue afresh, on which an order was passed on the same date giving permission to withdraw the suit and although nothing was said in that order as to the plaintiff's liberty to institute a fresh suit on the same cause of action, that order ought to be read along with the application, on which it was passed. It has already been indicated that that prayer was not refused. Hence it is held that that order has the effect of granting permission to the plaintiff with liberty to sue afresh on the same cause of action.”

20. In my opinion, the IPA was not withdrawn simplicitor. Liberty was sought to agitate her contentions as permitted by law. The court did not foreclose the right of the plaintiff to take steps for adjudication of her contentions.

If one were to look closely at the order dated 24.04.2015, it becomes manifest that it dealt with grant of liberty to file the present suit. Liberty was granted to take appropriate legal remedy. The petitioner has not been able to spell out as to what other legal remedy would be available to the plaintiff to agitate her rights other than by means of filing the present suit. It is quite clear that the court while granting permission to withdraw the IPA had granted liberty to file the present suit. Hence, in my opinion, it cannot on a reading of the plaint and the accompanying documents be concluded that the suit is barred under Order 23 Rule 1(3) CPC.

21. The next contention urged is regarding the suit being barred by limitation. The issue of limitation normally is a mixed question of law and fact. As per the plaint, the cause of action arose in favour of the plaintiff and against the defendant on 29.07.2012 when the defendant first denied the relationship with the plaintiff and replied to the legal notice dated 23.07.2012 sent by the attorney of the plaintiff. What defendant No.1/the petitioner has urged is that the date of the reply to the notice is 28.07.2012 and not 29.07.2012.

22. It is settled legal position that limitation is a mixed question of law and fact. In ***Panchanan Dhara & Ors. v. Monmatha Nath Maity (Dead) Through LRs. & Another, (2006) 5 SCC 340***, the Supreme Court held as follows:

“20. Contention of Mr.Mishra as regards the applicability of the first or the second part of Article 54 of the Limitation Act will have to be judged having regard to the aforementioned findings of fact. A plea of limitation is a mixed question of law and fact. The question as to whether a suit for specific performance of contract will be barred by limitation or not would not only depend upon the nature of the agreement but also on the conduct of the parties and also as to how they understood the terms and conditions of the agreement.....”

23. The Supreme Court in *Ramesh B.Desai & Ors. v. Bipin Vadilal Mehta & Ors.*, AIR 2006 SC 3672, held as follows:

“19. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of facts. A plea of limitation is a mixed question of law and fact.....”

24. The petitioner has raised issues as noted above regarding the date of commencement of the period of limitation. This is a factual controversy. That apart, issue of Section 14 of the Limitation Act may also arise keeping in view the fact that the plaintiff had earlier filed an Indigent Person Application. These are all issues which cannot be adjudicated upon while deciding an application under Order 7 Rule 11 CPC. It is only after parties have led their evidence that the court would be in a position to factually determine as to whether the claim in the plaint is barred by limitation.

25. In my opinion, the trial court has rightly rejected the application of defendant No.1 under Order 7 Rule 11 CPC. There are no grounds made out

for this court to interfere with the said order under its powers of revision. Present petition is dismissed. Interim order stands vacated. All pending applications, if any, also stand dismissed.

JAYANT NATH, J.

JULY 06, 2018

n

