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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM(M) 82/2019 & CM APPL. 2380-2382/2019**
SANTOSH KUMAR JAIN & ANR Petitioner
Through: Mr. Ashok Gurmani, Adv.

versus

BAHADUR SINGH JAIN & ANR THR LRS Respondent
Through:

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER

% **18.01.2019**

CM APPL. 2381-2382/2019 (Exemptions)

Exemption allowed, subject to just exceptions.

CM(M) 82/2019 & CM APPL. 2380/2019

Vide the present petition, the petitioner assails the impugned order dated 01.11.2018 of the learned trial Court of the Civil Judge-05, Central in CS SCJ No.98985/2016 vide which an application filed by the petitioner herein under Section 151 of the CPC seeking quashing of the proceedings in the suit CS SCJ No.98985/2016 as null and void in view of the agreement between the parties to the suit through a partition deed dated 18.10.1943, - was declined.

The impugned order itself indicates that prior to submission of the application under Section 151 of the CPC seeking quashing of the proceedings which application dated 31.10.2018, one of the petitioners herein i.e. the petitioner no.1 arrayed as defendant no.3 to

the said suit filed an application under Order VII Rule 11 of the CPC seeking rejection of the plaint filed by the respondents herein on the grounds as detailed in para-1 to 9, apart from also contending that the suit was barred by limitation. The impugned order also indicates that an application seeking review of the order dated 10.07.2017 declining the application under Order VII Rule 11 of the CPC was also declined by the learned trial Court vide order dated 21.04.2018.

It has been fairly submitted on behalf of the petitioner by learned counsel for the petitioner that the Revision Petition CRP 119/2018 with its accompanying application filed by the petitioner against the said order whereby the application under Order VII Rule 11 of the CPC and the order declining the review thereof, were dismissed as withdrawn on 01.06.2018 in view of the submissions made on behalf of the petitioners.

On a perusal of the application under Section 151 of the CPC dated 31.10.2018 filed by the petitioner herein seeking quashing of the proceedings in the suit as null and void in terms of the agreement between the parties through the partition deed dated 18.10.1943 indicates that the prayer relates back to the contents of the partition deed as depicted therein and in relation to the controversy of the user of the common passage i.e. the E1, E2, E3 & E4 and two gates i.e. X & Y in the passage which were also sought to be contended through the application under Order VII Rule 11 of the CPC filed by the petitioner no.1 herein as the defendant no.3 to the suit.

Vide order dated 10.07.2017, it was observed by the learned

trial Court vide para 14 thereof to the effect:

“Applying the said to the facts of the present case, I am of the opinion that the plaint clearly disclose a cause of action, since, the documents filed by the Plaintiffs i.e. the said partition deed, the Will executed by the father of the Plaintiff no.1 and Defendant no.1, sale deed executed by Sh. Darayo Singh Jain and Defendant no.1, in favour of Plaintiff no.2 and 1 respectively reveal that the Plaintiffs have been able to prima facie show that they have certain rights in the common passage and the contention of the Defendant that they have been using the common passage, even after the date of execution of the Will of their father cannot be considered at this stage. The said contention is the defence of the Defendants which has to be proved at the stage of trial. Secondly, the fact that the Plaintiffs have alleged that the courtyard and the wall have not been used by the Defendants, is also a fact which has to be determined by the court and which can be done only at the stage of evidence.”

observing thus *inter alia* to the effect that the contentions sought to be raised by the petitioner herein could also be determined at the stage of trial.

On behalf of the petitioner it has been submitted that the withdrawal of CRP 119/2018 against the dismissal of the application under Order VII Rule 11 of the CPC and against the prayer seeking review of the declining of the application under Order VII Rule 11 of the CPC, as dismissed as withdrawn vide order dated 01.06.2018 is not an embargo to the institution of an application under Section 151 of the CPC as had been filed by the petitioner herein before the learned trial Court rejected vide the impugned order in as much as observed by this Court in ***Vidur Impex and Traders Pvt. Ltd. & Ors.***

Vs. Pradeep Kumar Khanna & Ors. 2017 (165) DRJ 314 with specific reference to the observations in paras- 49 to 57 thereof which read to the effect:

“49. From the foregoing, it is clear that the inherent powers under S. 151 of the Code can be invoked only when its exercise is not inconsistent with some express provision or when a provision in the Code dealing with the aspect expressly or by necessary implication exhausts the scope of the powers of the Court. In the present case, what is to be seen is the interplay between Order VII Rule 11 and Section 151, i.e. whether Order VII Rule 11 exhausts the circumstances under which a suit may be dismissed prior to trial?

50. Under Order VII Rule 11, the plaint may be rejected in certain circumstances including when the suit appears from a statement in the plaint itself to be barred by any law. The provision may only be invoked when the suit is barred from the pleadings filed by the plaintiff himself and the submissions of the defendant or any other material produced by the defendant cannot be looked into

51. The question as to whether Order VII Rule 11 exhausts the powers of the Court to dismiss the suit/reject the plaint arose before a Single Judge of the Rajasthan High Court in Temple of Thakur Shri Mathuradassji v. Shri Kanhaiyalal & Ors.,⁷³ wherein the appellant temple and some persons acting on its behalf had filed petition, suit and application, one after the other, in order to deny a party to the benefit of his decree. The case pertained to land, wherein the owner sought to get it vacated from the tenant/school, but the Temple and its associates initially filed a PIL, then a suit and ultimately an application under Order 21 Rule 97 of the Code to avoid the land from getting vacated even after a compromise had been effected between the owner and the tenant. In this background, the Trial Court had dismissed the suit after holding the same as an abuse of the process of law. Similar arguments were urged

in respect of the limitations on the power of the Court to dismiss a suit qua the power in Order VII Rule 11; the Single Judge rejected the arguments and observed as follows:

“16. Totality of the circumstances clearly shows that the plaintiffs filed the suit for taking benefit of procedure provided by the Civil Procedure Code and, therefore, submitted that plaint of the plaintiffs could have been rejected under Order 7 Rule 11 CPC. Under Order 7 Rule 11 CPC plaint can be rejected on the grounds mentioned in the Order 7 Rule 11 CPC like the suit is barred by law or it does not disclose the cause of action or proper court fees has not been paid even after order of the court. If the suit is abuse of process of the court and cannot be dismissed under Order 7 Rule 11 CPC then the court is not helpless and can accordingly invoke the powers under Section 151 CPC and can dismiss the suit under Section 151 CPC. Frivolous litigations are required to be nipped in the bud at the earliest possible stage otherwise no relief to the aggrieved party because of the reason that sole object of the frivolous 2008 (1) ILR (Raj) 619: 2008 (3) W LC (Raj) 534 litigation is to drag adversary in the litigation till it is dismissed consuming several years in trial. If court reaches to the conclusion that suit is frivolous from the totality of the facts brought on record or which have come on record then by not dismissing the suit at earliest, the court virtually declares that a frivolous suit can demand trial of suit and aggrieved party has no remedy against frivolous suit. If there are creases in the law or sometimes is left out or not specifically provided in statute then they are required to be ironed out by the courts by interpreting the law in a manner to advance the cause of justice and no party can be left with no remedy against frivolous suits. At the cost of repetition, it is observed that the continuation of frivolous suit against any person on the ground that it cannot be dismissed since there is no provision under Order 7 Rule 11 CPC is virtually denying an aggrieved party his right to crush the frivolous litigation without suffering the trial of suit.”

(Emphasis Supplied)

52. A Division Bench of this Court was also faced with a similar issue in *Aniruddha Dutta & Ors. v. Bhawani Shankar Basu & Ors.*,⁷⁴ wherein the appellants had challenged the judgment of a Single Judge of this Court in two suits, both revolving around the exclusion of certain heirs from the will of one Ms. Nirod Bala Basu after lapse of 38 years.

Dismissing the appeals, Justice Pradeep Nandrajog, delivering the opinion for the bench, observed as follows:

“28. A Court of record has every inherent power to prevent the abuse of its process and Order 7 Rule 11 of the Code of Civil Procedure is not the complete reservoir of the power to nip a frivolous suit when it is still in the stage of infancy. The inherent powers of a Court of record, and we highlight that Section 151 of the Code of Civil Procedure does not confer, but saves the inherent power of a Court also constitutes the reservoir of the power of a Court of record to throw out vexatious suits.”

(Emphasis Supplied)

53. Both *Temple of Shri Mathuradassji* ⁷³ and *Aniruddha Dutta* ⁷⁴ have been accepted and followed in *Keshav Chander Thakur & Anr. v. Krishan Chander & Ors.* ⁷⁵ Therefore, both this Court and the Rajasthan High Court have categorically held that Order VII Rule 11 is not the complete reservoir of power under which a frivolous suit may be nipped in the bud.

54. Even the Supreme Court has accepted that suits may be dismissed under Section 151 in *Machado Brothers*.²³ The appellant therein had appointed the respondent as steamship agents and later terminated the agency, which was challenged before the the City Civil Court, Chennai. During the pendency of the suit, another termination notice was issued and as such, the cause of action of the first suit eclipsed and the suit became infructuous. In this background, the application under S. 151 was filed for dismissal of the suit. The Trial Court

*dismissed the application, which was upheld by the High Court and the applicants approached the Supreme Court by filing a SLP. The Apex Court allowed the petition holding that in case the cause of action disappeared subsequent to the admission of the suit, the court had the inherent power to dismiss the suit under S. 151. One of the contentions which was raised by the respondent therein related to the power under Order VII Rule 11, was that "if the plaint showed the existence of a cause of action on the date of filing of the same, subsequent disappearance of cause of action would not make the suit bad or infructuous."*⁷⁶ The contention did not find favour with the Supreme Court, which came to the conclusion that the application was maintainable and the suit before the City Civil Court was to be dismissed. The relevant paragraphs read as under:

"20. From the above, it is clear that if there is no specific provision which prohibits the grant of relief sought in an application filed under Section 151 of the Code, the courts have all the necessary powers under Section 151 CPC to make a suitable order to prevent the abuse of the process of court. Therefore, the court exercising the power under Section 151 CPC first has to consider whether exercise of such power is expressly prohibited by any other provisions of the Code and if there is no such prohibition then the court will consider whether such power should be exercised or not on the basis of facts mentioned in the application.

...

31. For the reasons stated above, we are of the opinion that continuation of a suit which has become infructuous by disappearance of the cause of action would amount to an abuse of the process of the court, and interest of justice requires that such suit should be disposed of as having become infructuous. The application under Section 151 CPC in this regard is maintainable."

(Emphasis Supplied)

55. From the foregoing, it is clear that the Apex Court

has also accepted that Order VII Rule 11 is not exhaustive and frivolous suits may be dismissed as nipped in the bud by relying upon S. 151 of the Code.

56. Therefore, both this Court and the Rajasthan High Court have categorically held that Order VII Rule 11 is not the complete reservoir of power under which a frivolous suit may be nipped in the bud. The view has been accepted by the Supreme Court in *Machado Brothers*.²³ Even otherwise, ***I am of the view that the Court cannot be helpless and be forced to continue a vexatious suit, which is an abuse of its process, merely because the same cannot be rejected under the Order VII Rule 11.***

57. In the present scenario, the objections of limitation, suit being barred by Order XXIII Rule 11 and the effect of the judgment of the Supreme Court in *Vidur Impex* could not have been entertained in an application under Order VII Rule 11; therefore, the present applications are maintainable. This is primarily for the reason that the scope of Order VII Rule 11 is limited and the court can only go into the contents of the plaint and accompanying documents; while adjudication of such objections other documents need to be gone into. This was also the reason that the applicants made statements before the Division Bench that they shall not press the applications under Order VII Rule 11, but prefer applications under S. 151 of the Code.”

to contend that the application under Section 151 of the CPC ought not to have been rejected by the learned trial Court outright in view of the previous rejection of the application under Order 7 Rule 11 of the CPC and the dismissal of the application seeking review of such rejection.

Reliance has also been placed on behalf of the petitioner on the

verdict of this Court in ***Kirti Pardeep Sood & Ors. Vs. Keshav Sood 205 (2013) DLT 112*** with specific reference to observations in para-7 thereof which read to the effect:

*“7. The words used in Section 11, CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against or in favour of a party then the subsequent proceedings would be barred by the principles of res judicata. Further if the issue was 'necessary' to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue. The test to determine whether an issue was directly and substantially in issue in earlier proceedings or collaterally or incidentally, is that if the issue was 'necessary' to be decided for adjudicating on the principal issue and was decided, it would have to be treated as 'directly and substantially' in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case. Reference: ***Sajjadanashin Sayed Md. B.E. Edr. (D) by L.Rs., vs. Musa Dadabhai Ummer and others, AIR 2000 SC 1238.***”*

to contend that unless there is a decision of an issue directly and substantially in a prior proceedings or a litigation or collaterally or incidentally that had been determined, the provision of Section 11 of the CPC would apply.

On a perusal of the application under Order VII Rule 11 of the CPC that had been filed by the petitioner no.1 as defendant no.3 to the suit and on a perusal of the application under Section 151 of the CPC filed by the petitioners seeking the dismissal of the suit, it is

apparent that the contentions that have been sought to be raised vide the application under Section 151 of the CPC rejected vide the impugned order are substantially the same as averred through the application under Order VII Rule 11 of the CPC in relation to the determination of rights between the parties on the basis of the partition deed dated 18.10.1943. Though undoubtedly, in view of the verdict of this Court in *Vidur Impex & Traders Pvt. Ltd. & Ors.* (Supra), an application under Section 151 of the CPC to the extent that it would seek to contend in relation to the maintainability of a suit in the absence of a substantive right of plaintiff, may be filed in the event of the contentions sought to be raised through the application under Section 151 of the CPC not being covered within the ambit of Order VII Rule 11 of the CPC, the facts and circumstances of the instant case are not in *pari materia* with the facts of the case relied upon in *Vidur Impex & Traders Pvt. Ltd. & Ors.* (Supra) and furthermore as observed hereinabove already, the contents and issue involved in the application under Order VII Rule 11 of the CPC filed by the petitioner rejected vide the learned trial Court qua which the application seeking review was declined and qua which the petition seeking the revision of the said orders was withdrawn by the petitioner, in the facts and circumstances undoubtedly, forms an embargo against the petitioner to raise the contentions now through an application under Section 151 of the CPC.

Thus, there is no merit in the prayer made by the petitioner

submitting to the effect that impugned order dated 01.11.2018 be set aside in relation to it rejecting the application under Section 151 of the CPC filed by the petitioner seeking the dismissal of the suit.

As regards the other prayer made in the petition also to the effect that the petition was only seeking to agitate their legitimate rights, taking into account the withdrawal of the revision petition on 01.06.2018, there is no infirmity found in the impugned order also in relation to the imposition of costs as imposed thereby.

The petition and accompanying application are rejected.

ANU MALHOTRA, J

JANUARY 18, 2019

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