A.No.1107 of 2020
in
C.S.No.6 of 2020

P.T.ASHA, J.,

The 1st defendant in a suit for partition has moved an application for rejecting the plaint. The parties are referred to in the same array as in the suit.

2. The plaintiff had filed a suit for partition stating that all the properties and the businesses has been purchased from out of family business started by their father late Shri Bhawarlal Bohara. On 04.04.2020, the said Shri Bhawarlal Bohara passed away and the 1st defendant taken over the business as Karta of the joint family. Thereafter, the 1st and 3rd defendants had formed partnership firm in the name and style of M/s.Pradeep International, which was also formed from the funds generated from the joint family property, namely, Pradeep Industries. The firm

Pradeep International was later converted into a Private limited company which is the 7th defendant in the suit. Even the capital contribution for the company came out of the joint family funds.

3. The plaintiff therefore submitted that despite his seeking a partition of his 1/3 share, the 1st defendant had not come forward to partition the properties and therefore he has come forward with the suit. The plaintiff would also submit that he has included all the properties of which he has knowledge and that in the event of any properties or business being left out he may permitted to include the same.

Reject the plaint application:

4. After receipt of the suit summons, the 1st defendant on entering appearance has taken out this application for rejecting the plaint. The basis on which the application has been moved as contained in the affidavit filed in support of the application are as follows:

a) *Failure to disclose the cause of action:*

The 1st defendant would contend that the plaintiff has filed the suit without disclosing as to how the Hindu undivided family come into existence and whether such an Hindu undivided family had come into existence by inheritance or by throwing the individual properties into the common hotchpotch. The 1st defendant would contend that as per Hindu Succession Act, 1956, the concept of Hindu undivided family would come into existence only if the property is thrown into a common hotchpotch. A pleading to this effect as contemplated under Provisions of Order VI Rule 4 of the Code of Civil Procedure is missing.

b) *The suit is barred by partial partition:*

The 1st defendant would contend that the plaintiff has not chosen to include the properties acquired by the plaintiff and the defendants 3 to 6 in their names and since these properties have not been included, the suit is hit by partial partition. The 1st defendant would describe the properties which have not been included for partition in the plaint as filed.

c) *Civil Court's Jurisdiction barred:*

The 1st defendant would contend that the suit is not maintainable in the light of Section 430 of the Companies Act, 2013 and other provisions of the Companies Act. The suit not only seeks declaration of the title of the shares in the 7th defendant Company but also seeks direction for partition by metes and bounds, transfer and separate possession of the plaintiff. The 1st defendant would submit that such a relief can be granted in respect of the shares only by rectification of the register of members under Section 59 of the Companies Act. In so far as this relief is concerned, the suit cannot be maintained as it falls within the Jurisdiction of the National Company Law Tribunal.

5. This Court is not extracting the minute details that have been set forth in the application as it is only concerned with the grounds on which

the plaint is sought to be rejected.

Counter to the reject the plaint application:

6. The plaintiff has filed a counter inter alia contending that the application is totally misconceived and an attempt to protract the proceedings as also an abuse of the legal process. The plaintiff would submit that the argument with reference to the coming into existence of the Hindu undivided family and the character of its commencement has no relevance since the plaintiff has come forward with a case that the properties and the subsequent businesses which have been purchased / commenced all had its origin to the funds that has been generated from out of the proprietary concern started by their father, namely, Pradeep Industries. It is this firm that has provided the nucleus for the purchase of the immovable properties as well as for the commencement of the subsequent businesses and therefore the plaintiff, the 1st defendant and the 3rd defendant who had put in their joint exertion are entitled to a share in all

those properties.

7. The plaintiff would further submit that this is the issue which has to be ultimately decided during evidence and Trial. As regards the issue of partial partition the plaintiff would state that he has included all the assets that have been acquired from the income generated from the joint family business which he was able to identify and would also contend that he has reserved his right to include other properties if available for partition. Once again this is an issue which has to be decided in Trial and therefore cannot be a ground for rejecting the plaint.

8. As regards the other ground on which the application is based, namely, lack of jurisdiction for the Civil Court to consider the issue on hand. The plaintiff would submit that the relief that is sought for in the suit is one to declare that the suit mentioned properties including the share in the 7th defendant Company are joint family properties and that the plaintiff is

entitled to a 1/3rd share in the same. This is an issue, according to the plaintiff which has to be considered by the Civil Court and the same is not barred by Section 430 of the Companies Act. The plaintiff would submit that the Court should only be guided by the averments contained in the plaint to decide as to whether cause of action has been made out and shall not be influenced by any defense raised by the defendants.

9. The defendants 2 and 3 have filed their counter in which they have submitted that the plaint cannot be rejected as the plaintiff has made out a cause of action and further the entire funds for the purchase of the various properties and businesses were generated from out of the Pradeep Industries started by their father, in which each of the sons had a 1/3 share.

Submissions:

10. Mr.Satish Parasaran, learned senior counsel arguing on behalf of the 1st defendant would submit that the 1st defendant has come forward

with the application for rejecting the plaint invoking the provisions of Order VII Rule 11 (a) and (d) of the Code of Civil Procedure, hereinafter called the Code, on the grounds that the suit lacks cause of action and that it is barred by some other law. The learned senior counsel would submit that paragraph no.4 of the plaint contain no pleadings with reference to the existence of coparcenary property. Further a plea as to how the property would devolve on the parties have also not been pleaded. The pleading with regards to this is very sketchy.

11. The learned senior counsel relied upon the Judgement reported in ***2019 SCC OnLine Del 6867 - Aarshiya Gulati (Minor) Thr. Next Vs. Kuldeep Singh Gulati and others***, in support of his argument that the pleadings relating to existence of Hindu Undivided family has to be more explicit. He would draw the attention of the Court to paragraph no.43 of the said Judgement to point out the difference between partnership firm and Hindu undivided joint family property, which reads as follows:

"43. There is also a difference between partnership and Hindu Joint Family firm. Mulla in his Treatise Hindu Law 21 st Edition has pointed out the following points of difference between partnership and Hindu Joint Family firm:-

In a joint family business no member of the family can say that he is the owner of one-half, one-third or one-forth. The essence of joint Hindu family property is unity of ownership and community of interest and the shares of the members are not defined".

12. The learned senior counsel would rely on paragraph no.44 of the said Judgement, wherein the learned Judge relying upon the Judgement of the Honourable Supreme Court in ***Nanchand Gangaram Shetji Vs. Mallappa Mahalingappa Sadalge and others - (1976) 2 SCC 429***, would state that in a joint Hindu family business no member can say that he is the owner of a particular share since the essence of a joint family business does

not pre-suppose the joint family possession of property by the parties.

13. He would argue that paragraph no.90 of the said judgement applies on all fours to the case on hand and therefore the plaint deserves to be rejected on this ground as well, since there is no averments in the plaint as to which is the specific property that was owned by the father and succeeded by the plaintiff and defendants 1 and 3.

14. He would further contend that the suit is clearly barred by provisions of Section 430 of the Companies Act, since the plaintiff is seeking partition with reference to the share of the Company which would clearly fall only within the jurisdiction of the National Company Law Tribunal.

15. Per contra, Mr.Arun Karthik Mohan, learned counsel appearing on behalf of the respondent / plaintiff would contend that the application

under Order VII Rule 11 of the Code is nothing but an attempt to prolong the litigation. He would submit that the application for rejection is based on two grounds:

(a) There is no cause of action for filing of the present suit; and

(b) The suit is barred by Section 430 of the Companies Act, 2013.

16. As regards the first ground it is the contention of the learned counsel that a reading of the entire plaint and the narration contained there in would disclose the cause of action for filing of the suit. A reading of paragraph nos. 4 to 10 of the plaint would clearly bring out the plaintiff's case with reference to the nucleus for the joint acquisition. The learned counsel would further submit that even on a perusal of the documents that has been filed along with the plaint which are series of correspondence that have been exchanged between the plaintiff and the 1st defendant would clearly demonstrate that not only has the 1st defendant acknowledged the fact that the suit schedule properties are the joint family property but also

acknowledged the plaintiff's share to it. He would submit that a mere perusal of the document Nos.8 to 13 would prove the above contention.

17. He would therefore submit that the allegations that the suit does not disclose a cause of action is an absolute fallacy. The Judgement relied upon by the learned Senior counsel on the side of the 1st defendant, namely, ***2019 SCC OnLine Del 6867 - Aarshiya Gulati (Minor) Thr. Next Vs. Kuldeep Singh Gulati and others*** has been distinguished by the learned counsel for the plaintiff by contending that in the case of ***Aarshiya Gulati*** there was absolutely no pleading with reference to the existence of a nucleus of joint family property, whereas in the instant case, the plaint contains the entire details regarding the same and which has been corroborated by the documents filed along with the plaint. That apart, in the case of ***Aarshiya Gulati*** there were four earlier partitions by reason of which the coparcenary status has been dissolved, whereas in the case on hand no such partition had come into existence.

18. The learned counsel for the plaintiff would further argue that whether the property is a joint family property or otherwise is a matter that has to be settled through evidence and arguments and cannot be thrown out at the threshold. For the afore stated propositions the learned counsel would rely upon the Judgements reported in ***(2014) 15 SCC 785 - John Kennedy and another Vs. V.Ranjana and others*** and ***(2015) 8 SCC 331 - P.V.Guru Raj Reddy Vs. P.Neeradha Reddy.***

19. As regards the bar of Jurisdiction, the learned counsel would submit that in the instant case the plaintiff is not seeking rectification of the register of members of company under Section 59 of the Companies Act, but has filed the suit seeking a declaration that certain suit schedule properties which including shares in the 7th defendant company are joint family property which is available for division and on such declaration the plaintiff seeks separate possession of his share. Therefore, by no stretch of

imagination can it be stated that the relief sought for in suit falls within the Jurisdiction of the National Company Law Tribunal. He would rely upon the Judgement reported in ***2020 SCC Online SC 557 - Aruna Oswal Vs. Pankaj Oswal and others*** in support of the above contention.

20. The learned counsel would submit that the Judgements relied upon by the learned senior advocate in ***2019 SCC Online SC 223*** and the Judgement in ***O.S.A.Nos.29 and 30 of 2019*** are totally misconceived since the above two Judgements do not deal with a suit involving determination of right, title and interest to properties including shares by way of partition. Therefore, the reliance upon the said Judgements is totally misplaced.

Discussion:

21. The issue for consideration in the instant case is whether the plaint on the basis of which the suit is instituted is liable to be rejected at the threshold. The two grounds on which the 1st defendant has come forward

with the application for rejecting the plaint is

(a) The plaint does not disclose a cause of action; and

(b) The suit is barred under provisions of Section 430 of the Companies Act, 2013, this Court lacks jurisdiction to entertain the suit.

Though partial partition was raised as a ground for rejecting the plaint in the affidavit filed in support of the application, however, arguments were not raised in this regard and therefore it can be presumed that the 1st defendant was not canvassing the said point.

22. The Honourable Supreme Court has time and again stated that while dealing with an application for rejecting the plaint it is only the contents of the plaint that has to be considered. In the Judgement reported in ***2003 (1) SCC 557 - Saleem Bhai and others Vs. State of Maharashtra and others***, the Honourable Supreme Court was called upon to answer a question as to whether an application for rejecting the plaint can be decided on the basis of the allegations in the plaint and filing of the written

statement was totally irrelevant. The Honourable Supreme Court after analysing the provisions of Order VII Rule 11 of the Code held as follows:

> *"A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 C.P.C. at any stage of the suit-before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII C.P.C. the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial*

court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects. We are, therefore, of the view that for the afore-mentioned reasons, the common order under challenge is liable to be set aside and we, accordingly, do so. We remit the cases to the trial court for deciding the application under Order VII Rule 11 C.P.C. on the basis of the averments in the plaint, after affording an opportunity of being heard to the parties in accordance with law."

23. This Judgement was also followed once again in the Judgement of ***Mayar (H.K.) Ltd. & Ors vs Owners & Parties, Vessel M.V - (2006) 3 SCC 100.*** In this case the Honourable Supreme Court has also held that it is the contents of the the plaint that has to be looked into and not the written statement. In this Judgement the Honourable Supreme Court has also held

that a plaint cannot be rejected in part. The following observations of the said Judgement would make useful reading:

> *"From the aforesaid, 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, wilful 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. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order VII Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants. Similarly, the Court could not have taken the aid of Section 10 of the Code for stay of the suit as there is no previously instituted suit pending in a competent court between the parties raising directly and substantially the same issues as raised in the present suit."

24. Therefore, while analysing the plaint in this legal backdrop, it is evident that the plaintiff has elaborately discussed from paragraph no.4, the establishment and source of income for the purchase of the properties and commencement of the various businesses to be the income from Pradeep Industries, the sole proprietary concern started by their father Shri Bhawarlal Bohara. The plaintiff has narrated the various acquisition thereafter and has stated that some properties were in the name of certain individuals / family members. Since the same had been purchased from out of the joint family funds it is their contention that the property definitely partakes the character of a joint family property available for partition.

25. Whether the properties in question are joint family properties or whether the properties are the individual properties is an issue which can be decided only by letting in evidence during Trial and the suit cannot be thrown out at the threshold. In the Judgement relied upon by the learned counsel for the plaintiff in ***P.V.Guru Raj Reddy Vs. P.Neeradha Reddy -***

(2015) 8 SCC 331, the Honourable Supreme Court has succinctly analysed the scope and exercise of power under Order VII Rule 11, which reads as follows:

> *"Rejection of the plaint under Order VII rule 11 of the CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order VII rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred*

under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial."

26. In the case of ***John Kennedy***, the Honourable Supreme Court has held that whether the suit schedule property is an ancestral property or self acquired property depends upon various factors and these are the matters which can be decided only after the pleadings are completed and evidence adduced. Therefore, the contention of the 1st defendant that the suit on hand does not disclose a cause of action cannot be countenanced.

27. As regards the second argument with reference to the suit being barred by the provisions of Section 430 of the Companies Act, it is to be borne in mind that this suit has been filed for a declaration that the properties described in the schedule to the plaint which includes the shares in the 7th defendant firm are joint family properties which are available for

division and on such declaration to direct partition and separate possession of the same. As argued by the learned counsel appearing for the plaintiff the suit is one not for seeking rectification of the register of members by including the plaintiff as a share holder. The prayer sought for in the suit does not come within the Jurisdiction of the National Company Law Tribunal.

28. The Judgement of ***Aruna Oswal Vs. Pankaj Oswal and others*** relied upon by the learned counsel for the plaintiff would apply on all fours to the case on hand. In the said Judgement, the Honourable Supreme Court after analysing the various earlier Judgements of the Honourable Supreme Court had observed that the proceedings regarding the right, title and interest to the shares should await the decision in the Civil suit, since it is only the Civil suit that can adjudicate upon the question of right title and interest to the shares.

29. In the light of the above discussion, I do not find any merit in the arguments made on behalf of the 1st defendant / 1st applicant and consequently the application seeking to reject the plaint is dismissed. The defendants shall file their written statement on or before 11.11.2020.

06.10.2020

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P.T.ASHA, J.,

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