

21.04.2021
Court No. 19
Item no.19
CP

C.O. 611 of 2021

Sri Aparesh Adhikari & ors.
vs.
Sri Dipak Kumar Kar & ors.

(via video conference)

Mr. Pratik Kumar Bhattacharya
Mr. Aniruddha Bhattacharya

.....for the petitioners.

This revisional application arises out of an order dated December 18, 2019, passed by the learned Civil Judge (Junior Division), 1st Court, Tamluk in Title Suit No. 76 of 2014.

By the order impugned, the learned court below rejected an application filed by the defendants/petitioners for rejection of the plaint under Order 7 Rule 11 (d) of the Code of Civil Procedure 1908.

The main contention of the petitioners in the application for rejection of the plaint is that in view of the pendency of the W.P. No. 22083 (W) of 2009 before the Hon'ble High Court on the self-same cause of action, the suit should not continue.

The learned court below upon considering the contentions of the petitioners/defendants came to the conclusion that the burden of proof of showing

that the writ petition before the High Court was pending, was upon the petitioners. The petitioners having failed to discharge such burden could not pray for rejection of the plaint.

The learned court below also came to the conclusion that the petitioners had failed to refer to the particular law which would bar the suit under Order 7 Rule 11(d) of the CPC. Order 7 Rule 11 (d) of the CPC bars a suit when, from the statement in the plaint it appears that the suit is barred by any law.

Learned advocate, appearing on behalf of the petitioners, submits that when the Division Bench of this court had directed that the petitioners should be added as respondents in the pending writ petition, a suit with regard to the self-same property should not be continued. Parallel proceedings were not permissible. Reference was made to the orders passed by this court in the writ petition.

What falls for consideration is whether the pendency of W.P. No. 22083 (W) of 2009 would be a reason for holding that the suit was barred by law. From the order passed by the learned Single Judge dated July 27, 2012 in W.P. No. 22083 (W) of 2009, it appears that the writ petition was filed against the inaction of the municipality in constructing a pucca road in terms of a resolution taken by the municipality. Further contention of the opposite

parties/plaintiffs, in the writ petition was that the municipality was not providing civic amenities like street lighting, water and sewerage connection etc. Allegation of some illegal encroachments was also made. The learned Single Judge directed the municipality to consider the representation of the plaintiffs/writ petitioners with regard to the aforementioned allegations.

The defendants filed an appeal on the ground that the defendants were owners of certain properties involved in the writ petition and they should be made parties to the proceeding. Thus the Division Bench directed that the defendants be added as parties to the writ petition and amended writ petition be filed and served upon the added respondents. The order of the learned Single Judge was set aside.

It is contended that over the self-same property the suit has been filed and, as such, the suit was barred by law. It is further submitted that the writ petition was not served upon the defendants and, as such, the defendants could not produce the documents before the learned court below. It is submitted that the order impugned should be set aside and the plaint should be rejected. It is also submitted that ad-interim orders have been passed against the defendants in respect of their own property. It is further submitted that the suit was

filed after the amendment as per the direction of the Division Bench in the appeal.

I have considered the contentions of the petitioners. The only ground taken for rejection of the plaint is pendency of the writ petition. Primarily the writ petition was against the municipal authorities and their failure to provide civil amenities in respect of the moram road marked as R-R-R and A strip passage in the schedule of the plaint. The plaintiffs, as writ petitioners, prayed for directions upon the municipal authorities to make a concrete road on the basis of a resolution and provide street lights and other facilities as the said road was used for ingress and egress to the plaintiff's properties. Provisions for proper sewerage etc. was also prayed before the writ court. The writ court passed an order directing the municipal authority to consider the representations made by the petitioners. Aggrieved by the aforementioned order, the defendants/petitioners filed an appeal. The Division Bench of this court set aside the order of the learned Single Judge and directed that the petitioners be added as respondents in the writ petition as the petitioners claimed to be owners of certain lands. Thereafter, the writ petition has been pending. No effort has been made by either of the parties for expeditious hearing of the same.

In any event, having considered the plaint as a whole it does not appear that the suit is barred under any law. While deciding an application under Order 7 Rule 11(d) of the CPC, the court cannot look into other extraneous documents. Moreover, the plaint case is that the moram road was being used by the plaintiffs for their ingress and egress to their respective houses but the defendants were disturbing their use. Accordingly the suit was filed for declaration of their easmentary rights, permanent injunction and other consequential reliefs.

It is the contention of the defendants before this court that in the plaint itself the pendency of the writ petition has been mentioned.

I have also carefully considered paragraphs 10 and 11 of the plaint, from which it appears that the plaintiffs have mentioned that a writ petition has been pending against the municipal authorities and the order of the learned Single Judge in the writ petition was set aside in an appeal by the defendants with a direction to add the defendants as parties.

From the plaint it appears, as I have already mentioned before, that the dispute is with regard to the ownership, possession of certain properties including the moram road, the use of the said road for ingress and egress. The defendants' case as argued before this court is that the moram road was

constructed on a land which was the exclusive property of the defendants. However, these are not issues to be decided while deciding an application under Order 7 Rule 11(d) of the CPC. Reference is made to several decisions of the Hon'ble Supreme Court on the subject as stated hereunder.

In Popat and Kotecha Property vs. State Bank of India Staff Association reported in (2005) 7 SCC 510 the Hon'ble Apex Court has opined that the ground for rejection of plaint, Order VII Rule 11(d) shall get attracted only where the statement as made in the plaint without any doubt or dispute shows that the suit is barred by any law for the time being in force.

In Kamala and Others vs. K.T.Eshwara Sa and Others reported in (2008) 12 SCC 661, the Hon'ble Apex Court has viewed that to fit the case in Order VII Rule 11(d), a decision has to be made from the averments made in the plaint and no amount of evidence can be looked into for the invocation of Order VII Rule 11(d) CPC. The relevant paragraphs are as follows:-

“21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear

finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision.

23. The principles of *res judicata*, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final bearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.”

By now, the law has been well settled by various decisions of the Supreme Court that while considering an application under Order VII Rule 11 CPC, the court has to examine the averments in the plaint and the pleas taken by the defendants in their written statements would be irrelevant and that no amount of evidence can be looked into for invoking the power of rejection of the plaint under Order VII Rule 11 CPC.

In this case, the plaint cannot be thrown out as being barred by law as the suit is otherwise maintainable in law, if the plaint is read as a whole.

Reliance placed by the learned advocate for the petitioners in **AIR 1965 SC 1153** in the matter of **Gulabchand Chhotalal Parikh v. State of Gujarat** does not help the petitioners. It is not in doubt that the High Court is the superior court and any order passed by the High Court in a writ proceeding shall operate as a *res judicata* in a subsequent suit. In this case, the petitioners have not been able to show that any order has been passed by the High Court thereby adjudicating the issues which are substantially in issue in the suit. The averments and prayers in the alleged writ petition are substantially different. Whether some of the reliefs involved in the writ petition have been claimed as reliefs in the plaint is a matter to be decided upon trial on evidence. While disposing of an application for rejection of the plaint, the court shall only consider whether on a meaningful reading of the plaint as a whole, it would appear that the suit was barred by law.

In this case, the writ petition has been pending but no orders have been passed. The order passed upon the municipal authorities by the learned Single Judge has also been set aside and, as such, there is no order passed by the Hon'ble High Court in the

writ petition filed by the plaintiffs against the municipality for certain reliefs. Directions sought for against the municipal authorities, for providing civic amenities cannot be held to be a proceeding which would bar a suit for declaration and injunction without trial on evidence.

The learned court below shall frame an issue on the maintainability of the suit in view of the pending the writ petition and the said issue will be decided as the first issue in the trial.

The revisional application is disposed of. There shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible subject to compliance of all usual formalities.

(Shampa Sarkar, J.)