

CRA 36 2019

IN THE HIGH COURT OF BOMBAY AT GOA

CRA/ 36 /2019

ASMAT KHAN GAFAR
KHAN AND ANR.,

..... APPLICANT

VS

MADINA MASJID TRUST
AND 2 ORS.,

..... RESPONDENT

WITH
CA/147/2019
IN
CRA/36/2019

ASMAT KHAN GAFAR
KHAN AND ANR.,

..... APPLICANT

VS

MADINA MASJID TRUST
AND 2 ORS.,

..... RESPONDENTS

Ms. Amira A. Razaq, Advocate for the Applicant.
None for the Respondents.

CORAM: M. S. SONAK, J.
DATE: 30th June 2021.

P. C. :

Heard Ms. Amira Razaq, the learned counsel for the petitioner.

2. These revision applications challenge the order below exhibit D-15 in Regular Civil Suit No.28/2019/D by which the petitioner's application under Order 7 Rule 11 of CPC came to be dismissed by the learned Trial Judge.

3. Ms. Razaq submits that the impugned order is purported to have been made on 27/5/2019. However, in reality, the said order was never made on the said date. She points out that the record bears out this position and the record comprises inter alia, a report called by this Court itself. She submits that from the report it is clear that at least up to 29/5/2019 no order dated 27/5/2019 was uploaded on the official website. She submits that this revision had to be filed on an urgent basis even without a copy of the order, which in any case was not uploaded because the learned trial Judge had placed the matter for hearing the application on the injunction on 30/5/2019. She submits that as result, the petitioner was deprived of an effective opportunity to challenge the impugned order. She submits that it is only because the records and proceedings were called by this Court, the injunction application could not be heard and the suit could not proceed further. She relies on **Balalji Baliram Mupade and anr Vs. State of Maharashtra and ors. 2020 SCC Online SC 893**, to submit that no Court should pronounce orders unless the orders were, in fact, ready and reasons could be supplied to the affected party.

4. Ms. Razaq then pointed out that the records available indicate that the Court Superintendent was not available on a particular date since he was on leave and yet, the signatures of that Court Superintend appear on certain records. She refers to the affidavit filed by Ms. Maria Lourdes Carvalho, the

Advocate on record appearing on behalf of the petitioner before the trial Court to submit that the affidavit bears out what is now submitted and this is an additional ground to interfere with the impugned order.

5. Ms. Razaq, on the merits of the impugned order submits that this is a clear case where no cause of action is disclosed, but an illusion of the cause of action is sought to be created. She elaborates by submitting that the statements in the plaint as also the documents annexed to the plaint establish that plaintiff nos. 2 was expelled as trustee of the plaintiff no.1 Trust. Admittedly, no proceedings were have been taken out to question such an expulsion. Despite the same, the plaint is sought to be filed by Plaintiff no. 2 in the name of the trust and alleged causes of action which are entirely personal to plaintiffs nos. 2 and 3 are sought to be masqueraded, as causes of action accrued to the trust. She submits that this is a clear case of failure to disclose the cause of action which entails a rejection of the plaint.

6. Ms. Razaq submits that the bank, in respect of whom certain incidental reliefs are applied for has not even been impleaded as a defendant to the suit. She submits that there is an issue of defalcation of over Rs.3.00 lakhs of the trust property involved and despite the same, the suit is filed for the relief of declaration and injunction and valued for only Rs.1000/-. She submits that this is a case of undervaluation of the suit and, therefore, some opportunity could have first be given to the plaintiffs to value the suit correctly, failing which, the

plaint was required to be rejected in terms of Order 7 Rule 11 of C.P.C.

7. In so far as the first two contentions are concerned, the records to some extent bear out that possibly the order was pronounced on a particular date, but the same was not uploaded for the next two or three days. From this, it is possible to urge that the order in its entirety was not ready on the date on which the same was pronounced. In terms of the ruling in **Balaji (supra)**, this is required to be avoided. However, the fact situation in *Balaji (supra)* was entirely different from the fact situation in the present case.

8. At times, orders are pronounced even though the final draft is may not be ready in all respects. The Court may have reached its conclusion and even formulated its reasoning, yet there can for several bonafide reasons, be a slight delay between the pronouncement and the actual uploading of the order. Even this, is required to be avoided to the extent possible. Mainly this is because the party who is affected by the order should have an effective opportunity to question the same before the appellate or revisional forum or by way of a writ petition. If orders are not uploaded and reasons are not discernible, then, this right and opportunity may, in a given case, be affected.

9. The petitioner, in this case, was possibly justified in rushing to this Court and raising the aforesaid contentions, particularly as the application for injunction filed by the plaintiff was ordered to be taken on 30.5.2019. Ms. Razaq is quite justified in her submission that the petitioner ought not to have

compelled to argue on the application for a temporary injunction even before some reasonable opportunity was granted to question the impugned order dated 27/5/2019 which was not even uploaded up to 29/5/20219. As a result, the records and proceedings had to be called due to which, the application for an injunction could not be taken up immediately.

10. Having said all this at least in the facts of the present case, there is no necessity to set aside the impugned order on the aforesaid grounds. This is because, within two to three days, the impugned order was ultimately uploaded on the website and made available. The petitioner was also granted liberty to amend the petition and to raise grounds once the petitioner, obtained the copy of the impugned order and came to know about the reasons set out therein. This is not a case where the order was pronounced and after some unreasonable delay, the copy was made available as was the position in *Balaji* (supra)

11. The allegation about the superintendent been on leave on a particular date, but yet signing certain documents, according to me, are irrelevant. Based upon such allegations, there is no case made out to interfere with the impugned order. The two issues have no nexus with one and another. Besides, based upon the affidavit filed by the Advocate on procedural and ministerial issues, there is no case made out to interfere with the judicial orders. No case of prejudice has been made out. The prejudice, if any, was on account of the slight delay in uploading the order. This was redressed by this court by calling records and

granting the Petitioners leave to amend. Therefore, based on the material on record and even after perusing the affidavit of the advocate on record for the petitioner no case is made out to interfere with the impugned order based on some allegations against the Court Superintendent.

12. Now on the merits of this revision application, reference is required to be made to the application under Order 7 Rule 11 of C.P.C made by the petitioners. In paragraph 2 of this application, there is a reference to the creation of an illusion of a cause of action. This is elaborated by submitting that plaintiff no.2 has already been expelled as a trustee and his status, therefore, remained under a cloud. It was urged that plaintiff no.2 was not a trustee and, therefore, could not claim to represent the trust. On this ground, in para 2, the petitioners had not urged, and perhaps rightly, that the plaint should be rejected. The petitioners had urged that the suit “*is totally misconceived*” and is to be “dismissed “ at the threshold.

13. Now, there is a clear distinction between rejection of plaint at the threshold by resort to the provisions under Order 7 Rule 11 of C.P.C and dismissal of the suit because the same is misconceived or otherwise lacks merit. While considering an application under Order 7 Rule 11 of C.P.C there is no question of the trial court dismissing the suit. At the highest, if the parameters of Order 7 Rule 11 are satisfied, the Court can reject the plaint at the threshold. Therefore the request to dismiss the suit was itself misconceived.

14. Even if some latitude is shown to the pleadings in para 2 of the petitioner's application, this is surely not a case where it can be said that only an illusion of a cause of action has been created. From the reading of the plaint in its entirety, the cause of action has been disclosed. Whether such cause of action can ultimately be proved or not or whether based on such cause of action ultimately the plaintiff will succeed in obtaining a decree or not are matters which cannot be gone into while deciding an application under Order 7 Rule 11 of C.P.C. The plaint can be rejected only if the same fails to disclose a cause of action. There is also a fine distinction existence of a cause of action and the disclosure of cause of action. Whether the cause of action indeed exists or not is a matter which is to be considered after the trial. But, if there is a failure to disclose any cause of action, then the plaint can be rejected Order 7 Rule 11 of CPC.

15. The plaint, in this case, has been instituted by the Trust as well as the two plaintiffs. The issue as to whether one of the plaintiffs has been expelled or not or whether such expulsion is valid or not are matters which can ultimately be decided after the trial. At this stage, there is no question of looking to the defense which any of the defendants might have on merits. On reading of the plaint in its entirety, it cannot be said that there is no failure to disclose a cause of action or that an illusion of a cause of action has been created only on account of some clever drafting. Therefore, no case is made out for the exercise of powers

under Order 7 Rule 11 to reject the plaint on the ground that there was a failure to disclose a cause of action or that only an illusion of a cause of action was sought to be created by clever drafting.

16. The objection based upon non-joinder of the bank is not an objection which can be gone into while deciding an application under Order 7 Rule 11 of C.P.C. If at all, there is non-joinder of any necessary party, that might affect the ultimate decree which will have to be made against the party which has not been joined. However, this is not an objection that can be ordinarily for the rejection of the plaint.

17. The objection as regards undervaluation has already been raised in the vaguest terms in the petitioner's application. The petitioners simply stated that the suit has been undervalued. The only reason given for this statement was that plaintiff no.2 had unauthorizedly withdrawn Rs. 3,12,000 from the Trust account in the Indian Overseas Bank. There was a suggestion that such withdrawal amounts to defalcation and therefore, the suit should have been valued at least to the extent of Rs.3,12,230/-. Such a contention is misconceived. In any case, such a contention cannot be considered while deciding an application under Order 7 Rule 11 of CPC. Such contention presupposes not only the withdrawal of this amount but also that such withdrawal was unauthorized and constituted defalcation. Accordingly, based on the objection raised, there was no question of rejecting the plaint.

18. For all the aforesaid reasons there is no error whether jurisdictional or otherwise in the impugned order made by the learned trial Judge dismissing the petitioner's application for rejection of the plaint under Order 7 Rule 11 of CPC.

19. These revision applications are required to be dismissed and are hereby dismissed. The Registry to ensure that the records and proceedings are sent to the trial Court as early as possible and in any case within two weeks from today.

20. Miscellaneous application, if any, stand disposed of.

M. S. SONAK, J.

Ap/-

MARIA
AURA
PEREIRA

Digitally signed
by MARIA AURA
PEREIRA
Date: 2021.07.01
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