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

Date of Decision: 9th December, 2021

+ **C.R.P. 92/2021**

SH. SUNDER SINGH

..... Petitioner

Through: Mr. Ankit Jain, Mr. Mohit Gupta and
Mr. Vishal Saxena, Advocates.
(M:9354808102)

versus

AJAY PAL SINGH & ORS.

..... Respondents

Through: Mr. Gangania, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done in physical Court. Hybrid mode is permitted in cases where permission is being sought from the Court.

CM APPL.44257/2021 (for exemption)

2. Allowed, subject to all just exceptions. Application is disposed of.

C.R.P.92/2021 & CM APPL.44256/2021 (for stay)

3. The present petition challenges the impugned order dated 30th June, 2021 passed by the Ld. ADJ, Karkardooma Courts, Delhi (*hereinafter* “*Trial Court*”) in *CS No.2581/16* titled *Ajay Pal Singh & Ors. v. Rajinder Singh & Ors.* Vide this common order, the Trial Court allowed the application of the Plaintiffs/Respondent Nos.1-6 (*hereinafter* “*Plaintiffs*”) under Order VI Rule 17 Civil Procedure Code, 1908 (*hereinafter* “*CPC*”) and rejected the application under Order VII Rule 11(d) CPC read with Section 11 CPC filed by the Defendants/Petitioner & Respondent Nos.7-54 (*hereinafter* “*Defendant*”).

4. The present petition only relates to the application under Order VII Rule 11 read with Section 11 CPC. The question that has arisen in this case is as to whether the issue of a suit being barred by the principle of *res judicata* under Section 11 CPC can be a ground of rejection of the plaint under Order VII Rule 11 CPC. The case of the Defendant is that there was an earlier suit being **CS No.188/2007** titled **Raj Pal Singh & Ors. v. Ranjit Singh & Ors.**, in which a judgement dated 26th August, 2016 was passed, which would have non-suited the Plaintiffs in the present suit. The Trial Court has held that since the settled position of law is that under Order VII Rule 11 CPC, the Court can only go by the plaint and not by the written statement or the defence, Section 11 CPC cannot be considered as a part of the said application. However, while doing so, the Court has also come to the conclusion that under Order XIV Rule 2(2) CPC all the issues have to be adjudicated comprehensively together *qua* the earlier suit.

5. Mr. Ankit Jain, ld. counsel for the Defendant, submits that irrespective of whether the ground of *res judicata* could have been considered as part of the application under Order VII Rule 11 CPC or not, the Court could have actually considered the judgment passed in the earlier suit, which was an admitted document and a part of judicial record, and proceeded under Order XII Rule 6 CPC.

6. Mr. Gangania, ld. counsel appearing for the Plaintiff, submits that he has received the copy of the petition only yesterday.

7. This Court is of the opinion that the objection of *res judicata* ought to be heard after framing the same as an issue. The same can even be taken up as a preliminary issue. However, the objection of *res judicata* cannot be a ground for an order under Order VII Rule 11 CPC. A recent judgment of the

Supreme Court in ***Srihari Hanumandas Totala v. Hemant Vithal Kamat & Ors. [Civil Appeal No.4665/2021, decided on 9th August, 2021]*** also holds that the principle of *res judicata*, which has been raised under Section 7 CPC may not be a ground for rejection of the plaint under Order VII Rule 11 CPC. The observations of the Supreme Court in this regard are extracted herein below:

“17. Section 11 of the CPC enunciates the rule of res judicata: a court shall not try any suit or issue in which the matter that is directly in issue has been directly or indirectly heard and decided in a ‘former suit’. Therefore, for the purpose of adjudicating on the issue of res judicata it is necessary that the same issue (that is raised in the suit) has been adjudicated in the former suit. It is necessary that we refer to the exercise taken up by this Court while adjudicating on res judicata, before referring to res judicata as a ground for rejection of the plaint under Order 7 Rule 11. Justice R C Lahoti (as the learned Chief Justice then was), speaking for a two Judge bench in V. Rajeshwari v. T.C. Saravanabava discussed the plea of res judicata and the particulars that would be required to prove the plea. The court held that it is necessary to refer to the copies of the pleadings, issues and the judgment of the ‘former suit’ while adjudicating on the plea of res judicata:

“11. The rule of res judicata does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of

judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai v. Mohd. Hanifa [(1976) 4 SCC 780] the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in Gurbux Singh v. Bhooralal [AIR 1964 SC 1810 : (1964) 7 SCR 831] placing on a par the plea of res judicata and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore v. Secy. of State for India in Council [(1887-88) 15 IA 186 : ILR 16 Cal 173] pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the

judgment in the previous suit.” (emphasis supplied)

18. At this stage, it would be necessary to refer to the decisions that particularly deal with the question whether res judicata can be the basis or ground for rejection of the plaint. In Kamala & others v. KT Eshwara Sa, the Trial Judge had allowed an application for rejection of the plaint in a suit for partition and this was affirmed by the High Court. Justice S B Sinha speaking for the two judge bench examined the ambit of Order 7 Rule 11(d) of the CPC and observed:

“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.” (emphasis supplied)

The Court further held:

“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 hearing, 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.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained.” (emphasis supplied)

The above view has been consistently followed in a line of decisions of this Court. In Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust, Justice P Sathasivam (as the learned Chief Justice then was), speaking for a two judge Bench, observed that

“10. [...] It is clear from the above that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected

within the time allowed by the court, insufficiently stamped and not rectified within the time fixed by the court, barred by any law, failed to enclose the required copies and the plaintiff fails to comply with the provisions of Rule 9, the court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order 7 Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial.

11. This position was explained by this Court in Saleem Bhai v. State of Maharashtra [(2003) 1 SCC 557], in which, while considering Order 7 Rule 11 of the Code, it was held as under: (SCC p. 560, para 9)

“9. A perusal of Order 7 Rule 11 CPC 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 7 Rule 11 CPC 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 7 CPC, 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 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court.”

It is clear that in order to consider Order 7 Rule

11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in Raptakos Brett & Co. Ltd. v. Ganesh Property [(1998) 7 SCC 184] and Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express [(2006) 3 SCC 100].”

Similarly, in Soumitra Kumar Sen (supra), an application was moved under Order 7 Rule 11 of the CPC claiming rejection of the plaint on the ground that the suit was barred by res judicata. The Trial Judge dismissed the application and the judgement of the Trial Court was affirmed in revision by the High Court. Justice AK Sikri, while affirming the judgment of the High Court held:

“9. In the first instance, it can be seen that insofar as relief of permanent and mandatory injunction is concerned that is based on a different cause of action. At the same time that kind of relief can be considered by the trial court only if the plaintiff is able to establish his locus standi to bring such a suit. If the averments made by the appellant in their written statement are correct, such a suit may not be maintainable inasmuch as, as per the appellant it has already been decided in the previous two suits that Respondent 1 -plaintiff retired from the partnership firm much earlier,

*after taking his share and it is the appellant (or appellant and Respondent 2) who are entitled to manage the affairs of M/s Sen Industries. **However, at this stage, as rightly pointed out by the High Court, the defense in the written statement cannot be gone into. One has to only look into the plaint for the purpose of deciding application under Order 7 Rule 11 CPC. It is possible that in a cleverly drafted plaint, the plaintiff has not given the details about Suit No. 268 of 2008 which has been decided against him. He has totally omitted to mention about Suit No. 103 of 1995, the judgment wherein has attained finality. In that sense, the plaintiff-Respondent 1 may be guilty of suppression and concealment, if the averments made by the appellant are ultimately found to be correct. However, as per the established principles of law, such a defense projected in the written statement cannot be looked into while deciding application under Order 7 Rule 11 CPC.***

Referring to Kamala (supra), the Court further observed that

“12. ... The appellant has mentioned about the earlier two cases which were filed by Respondent 1 and wherein he failed. These are judicial records. The appellant can easily demonstrate the correctness of his averments by filing certified copies of the pleadings in the earlier two suits as well as copies of the judgments passed by the courts in those proceedings. In fact, copies of the orders passed in judgement and decree dated 31-3-1997 passed by the Civil Judge (Junior Division), copy of the judgment dated 31-3-1998 passed by the Civil Judge (Senior Division) upholding the decree passed by the Civil Judge (Junior Division) as well as copy of the judgment

and decree dated 31-7-2014 passed by Civil Judge, Junior Division in Suit No. 268 of 2008 are placed on record by the appellant. While deciding the first suit, the trial court gave a categorical finding that as per MoU signed between the parties, Respondent 1 had accepted a sum of Rs 2,00,000 and, therefore, the said suit was barred by principles of estoppel, waiver and acquiescence. In a case like this, though recourse to Order 7 Rule 11 CPC by the appellant was not appropriate, at the same time, the trial court may, after framing the issues, take up the issues which pertain to the maintainability of the suit and decide the same in the first instance. In this manner the appellant, or for that matter the parties, can be absolved of unnecessary agony of prolonged proceedings, in case the appellant is ultimately found to be correct in his submissions.” (emphasis supplied)

While holding that “recourse to Order 7 Rule 11” by the appellant was not appropriate, this Court observed that the Trial Court may, after framing the issues, take up the issues which pertain to the maintainability of the suit and decided them in the first instance. The Court held that this course of action would help the appellant avoid lengthy proceedings.

19. In a more recent decision of this Court in **Shakti Bhog Food Industries Ltd. v. Central Bank of India and Another**, a three Judge bench of this Court, speaking through Justice AM Khanwilkar, was dealing with the rejection of a plaint under Order 7 Rule 11 by the Trial Court, on the ground that it was barred by limitation. The Court referred to the earlier decisions including in **Saleem Bhai v. State of Maharashtra, Church of Christ Charitable Trust (supra)**, and observed that

“18. It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averment. These principles have been reiterated in Raptakos Brett & Co. Ltd. v. Ganesh Property, (1998) 7 SCC 184 and Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express, (2006) 3 SCC 100.”

8. A perusal of the above shows that the correct course of action when a plea of *res judicata* is raised, would be to frame *res judicata* as one of the issues in the suit and the said issue could even been considered as a preliminary issue for the purpose of expeditious disposal of the suit. Ld. counsel for the Plaintiffs has no objection to the same.

9. Thus, this Court is of the opinion that the following issue of *res judicata* be framed in the suit **CS No.2581/16** titled **Ajay Pal Singh & Ors. v. Rajinder Singh & Ors.** as under:

“Whether the suit is barred by the principles of res judicata? OPD”

10. The trial in the suit is stated to have commenced. However, Ld. counsel for the Plaintiffs submits that he does not wish to lead any evidence on this issue. Accordingly, this issue which has now been framed, shall be decided by the Trial Court, as a preliminary issue, in accordance with law.

11. Needless to add, the observations made in the judgment impugned

before this Court dated 30th June, 2021, shall not come in the way of the adjudication of the preliminary issue and the same shall be decided on its own merits.

12. The present petition, along with pending applications, is disposed of in the above terms.

13. A copy of this order be sent to the Court of Ld. ADJ, Karkardooma Courts, Delhi, where *CS No.2581/16* titled *Ajay Pal Singh & Ors. v. Rajinder Singh & Ors.* is pending.

PRATHIBA M. SINGH
JUDGE

DECEMBER 9, 2021/dk/MS

