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

+ CM(M) 1058/2022 & CM APPL.43440/2022, CM
APPL.43441/2022

SH. AZAD SINGH & ANR. Petitioners

Through: Mr.Nishant Solanki, Adv.

versus

SH. PRIYA VART TYAGI & ANR. Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T (O R A L)

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10.10.2022

1. This petition under Article 227 of the Constitution of India assails order dated 11th July 2022 passed by the learned Civil Judge in CS SCJ 793/2020 (*Priya Vrat Tyagi v. Dharambir*). By the impugned order, a preliminary issue of maintainability, which had been raised by the petitioner, as the defendant in the suit, has been decided against the petitioner. Aggrieved thereby, the petitioner has invoked the writ jurisdiction vested in this Court by Article 227 of the Constitution of India.

The plaint

2. The respondent, as already noted, is the plaintiff in CS SCJ 739/2020. The petitioners were defendants in the said suit.

3. The respondent claimed, in the suit, to be the owner and in possession of a plot of land, which is described in para 2 of the plaint



thus:

“That the plaintiff is the owner and in possession of a plot measuring 150 sq. yards (30X45) out of Kh.No.68/ /6min (2-8) situated in the Revenue Estate of Village Hastasal, Delhi and Khatauni is Annexure-**B** and now part of the unauthorized colony namely as F-Block, Hastal Vihar, Uttam Nagar, Delhi as clearly shown in red color in the site plan which is **Annexure-C**.”

4. The plaint avers that the respondent's plot was vacant but that, when the respondent visited the plot in May 2020, he found that the petitioner had opened a window and a gate, and had also constructed a latrine on the plot of the respondent. Photographs, evincing this position, were also cited in the plaint. The plaint further averred that though, on the respondent's insistence, the latrine was demolished, *malba* was left lying in the respondent's plot. The door, gate and window which had been opened in the respondent's plot were also undisturbed.

5. *Inter alia* premised on the afore-noted allegations, the respondent, in the suit, sought a decree of mandatory injunction in the respondent's favour and against Defendant 1 in the plaint(who is Petitioner 2 in the present petition), directing the petitioners to remove/close the window/doors/gate/projection from the suit property, which had been marked in red in the site plan filed with the suit. A decree of permanent injunction restraining the petitioners from effecting any further such constructions was also sought.

Written statement

6. Consequent to issuance of summons, a written statement, in



response to the plaint, was filed by the petitioners. The petitioners alleged that the respondent had no right or title over the suit property and was a mere encroacher therein. The assertion of the respondent that he was in possession of the suit property was also disputed. The plaint, it was averred, was aimed at compromising the easementary rights of the petitioners over the land in question. Exception to the plaint was also taken on the ground that the respondent had not provided any specific plot number or filed any titular documents in respect of the suit property.

7. For the purposes of the present petition, it is not necessary to dwell further into the various assertions contained in the written statement filed by the petitioners.

Preliminary Issue

8. During the course of hearing in the suit, the petitioners advanced a preliminary objection regarding the maintainability of the suit instituted by the respondent. In view of the said objection, Issue No.1, as a preliminary issue, was framed in the suit by the learned Civil Judge *vide* the impugned order dated 11th July 2022, which reads thus:

“Whether the present suit is maintainable or not? OPP”

The impugned order

9. The impugned order proceeds to adjudicate the said issue as a



preliminary issue.

10. The stand taken by the petitioners before the learned Civil Judge, as reflected in para 3 of the impugned order, was that, as the petitioners had, in the written statement filed by them in response to the suit, raised a cloud over the title of the respondent, the respondent ought to have amended his suit and sought declaration of title with consequential relief of injunction. The respondent not having done so, it was sought to be contended that the suit was not maintainable.

11. It was further contended, by the petitioners, that the respondent had not provided any specific plot number for the suit property, though it had been averred that the suit property was in Block F. It was also pointed out that no titular documents in respect of the suit property, apart from the revenue records (*khatoni*) had been filed by the respondent. According to the petitioners, the suit property was in fact a road through which the petitioners had easementary rights. These factors, contended the petitioners before the learned Civil Judge, made out a case for deciding the preliminary issue of maintainability in favour of the petitioners and against the respondents and for dismissing the suit as not maintainable.

12. The learned Civil Judge has adjudicated the preliminary issue on the basis of the judgment of the Supreme Court in *Anathulla Sudhakar v. P. Bucha Reddy*¹, from which the following passages have been quoted in the impugned order:

¹ AIR 2008 SC 2033



“11. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

11.1 Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a rightful owner.

11.2 Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

11.3 Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

12. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiffs title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiffs title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only



a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiffs title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed where the suit raised only the issue of possession and not any issue of title.”

13. Having quoted the afore-noted passages, the learned Civil Judge holds, in the impugned order, that there was no cloud over the title of the respondent and that the petitioners had merely raised an averment, disputing the respondent’s title. The assertion that the area in question was merely a road was also, it is noted in the impugned order, unsupported by evidence. Merely on the basis of the averments contained in the written statement, the learned Civil Judge notes that the suit could not be dismissed as not maintainable.

14. Aggrieved by the aforesaid decision, the petitioner is before this Court.

15. I have heard Mr. Solanki, learned Counsel for the petitioner at some length. The impugned order, inasmuch as it decides a preliminary issue of maintainability, is relatable to Order XIV Rule 2(2) of the CPC, which reads thus:

“2. Court to pronounce judgment on all issues.—

(1) Notwithstanding that a case may be disposed of on preliminary issue, the Court shall, subject to the provisions of



sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

- (a) the jurisdiction of the Court, or
 - (b) a bar to the suit created by any law for the time being in-force.
- and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”

16. On the scope and ambit of Order XIV Rule 2(2), one may refer to the decisions of the Supreme Court in ***Ramesh B. Desai v. Bipin Vadilal Mehta***² and ***Alka Gupta v. Narender Kumar Gupta***³.

17. In ***Ramesh B. Desai***², the Supreme Court has, with respect to Order XIV Rule 2(2) of the CPC, held thus:

“13. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in ***Major S.S. Khanna v. Brig. F.J. Dillon***⁴ and it was held as under: (SCR p. 421)

“Under Order 14 Rule 2, Code of Civil Procedure *where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any*

² (2006) 5 SCC 638

³ (2010) 10 SCC 141

⁴ AIR 1964 SC 497



part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit.”

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the abovequoted decision still holds good and *there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.*

14. *The plea raised by the contesting respondents is in fact a plea of demurrer. Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further. In **O.N. Bhatnagar v. Rukibai Narsindas**⁵ (SCC para 9) it was held that the appellant having raised a plea in the nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by Respondent 1 under Section 91(1) of the Act and those allegations must be taken to be true. In **Roop Lal Sathi v. Nachhattar Singh Gill**⁶ (SCC para 24) it was observed that a preliminary objection that the election petition is not in conformity with Section 83(1)(a) of the Act*

⁵ (1982) 2 SCC 244

⁶ (1982) 3 SCC 487



*i.e. it does not contain the concise statement of the material facts on which the petitioner relies, is but a plea in the nature of demurrer and in deciding the question the Court has to assume for this purpose that the averments contained in the election petition are true. Reiterating the same principle in **Abdulla Bin Ali v. Galappa**⁷ it was said that there is no denying the fact that the allegations made in the plaint decide the forum and the jurisdiction does not depend upon the defence taken by the defendants in the written statement. In **Exphar SA v. Eupharma Laboratories Ltd.**⁸ (SCC para 9) it was ruled that *where an objection to the jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law.* In this case the decision of the High Court on the point of the jurisdiction was set aside as the High Court had examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of the Delhi High Court and also that Respondent 2 did not carry out business within the jurisdiction of the said High Court. Following the same principle in **Indian Mineral & Chemicals Co. v. Deutsche Bank**⁹ (SCC paras 10 and 11), it was observed that *the assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on the point of demurrer.**

15. *The principle underlying clause (d) of Order 7 Rule 11 is no different. We will refer here to a recent decision of this Court rendered in **Popat and Kotecha Property v. State Bank of India Staff Assn.**¹⁰ where it was held as under in para 10 of the report: (SCC p. 515)*

“10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies

⁷ (1985) 2 SCC 54

⁸ (2004) 3 SCC 688

⁹ (2004) 12 SCC 376

¹⁰ (2005) 7 SCC 510



in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.”

16. It was emphasised in para 25 of the report that *the statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11 CPC*. The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by clause (d) of Order 7 Rule 11 CPC, *the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence*. Applying the said principle, the plea raised by the contesting respondents that the company petition was barred by limitation has to be examined by looking into the averments made in the company petition alone and any affidavit filed in reply to the company petition or the contents of the affidavit filed in support of Company Application No. 113 of 1995 filed by the respondents seeking dismissal of the company petition cannot at all be looked into.”

(Emphasis Supplied)

18. *Alka Gupta*³, in para 28 of the report, enumerates the circumstances in which a civil suit could be dismissed without trial, thus:

“**28.** The Code enumerates the circumstances in which a civil suit can be dismissed without trial. We may refer to them (not exhaustive):

(a) Dismissal as a consequence of rejection of plaint under Order 7 Rule 11 of the Code in the following grounds:

- (i) where it does not disclose a cause of action;
- (ii) where the relief in the plaint is undervalued and the plaintiff fails to correct the valuation within the time fixed;



- (iii) where the court fee paid is insufficient and the plaintiff fails to make good the deficit within the time fixed by court;
 - (iv) where the suit appears from the statement in the plaint to be barred by law;
 - (v) where it is not filed in duplicate and where the plaintiff fails to comply with the provisions of Order 7 Rule 9 of the Code.
- (b) Dismissal under Order 9 Rule 2 or Rule 3 or Rule 5 or Rule 8 for non-service of summons or non-appearance or failure to apply for fresh summons.
- (c) Dismissal under Order 11 Rule 21 for non-compliance with an order to answer interrogatories, or for discovery or inspection of documents.
- (d) Dismissal under Order 14 Rule 2(2) where issues both of law and fact arise in the same suit and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only and it tries such issue relating to jurisdiction of the court or a bar to a suit created by any law for the time being in force first and dismisses the suit if the decision on such preliminary issue warrants the same.
- (e) Dismissal under Order 15 Rule 1 of the Code when at the first hearing of the suit it appears that the parties are not at issue on any question of law or fact.
- (f) Dismissal under Order 15 Rule 4 of the Code for failure to produce evidence.
- (g) Dismissal under Order 23 Rules 1 and 3 of the Code when a suit is withdrawn or settled out of court.”

19. Para 30 of the same decision reads thus:

“30. But where the summons have been issued for settlement of issues, *and a suit is listed for consideration of a preliminary issue, the court cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the*



claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. A suit cannot be short-circuited by deciding issues of fact merely on pleadings and documents produced without a trial.”

(Emphasis Supplied)

20. A conjoint reading of the decisions in **Ramesh B. Desai**² and **Alka Gupta**³ make it clear that ordinarily a suit cannot be short-circuited. A suit should classically be decided only after trial. Order XIV Rule 2(2) permits a suit to be disposed of on a preliminary issue only if, proceeding on demurer, analogous to the principles applicable to Order VII Rule 11 of the CPC, the allegations and assertions *in the plaint* indicate that the suit is not maintainable. Assertions contained in the written statement are not to be taken into account while deciding the issue of maintainability as a preliminary issue. That is the unequivocal legal position, that flow from **Ramesh B. Desai**² and **Alka Gupta**³.

21. Before me, learned Counsel for the petitioner restricted his arguments to one submission, which was that the suit property had not been identified. He submits that no plot number, identifying the suit property was provided and that the site plan which was filed with the plaint was vague and did not properly identify the suit property. He submits that, for that reason, the suit was liable to be dismissed at the threshold as not having been filed in accordance with Order VII Rule 3 of the CPC.

22. This particular submission, in the manner in which it has been urged before this Court, does not appear to have been canvassed



before the learned Civil Judge. Nonetheless, even on merits, I am not convinced that it makes out a case for interference with the impugned order. Order VII Rule 3 of the CPC reads thus:

“3. Where the subject-matter of the suit is immovable property.— Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.”

23. Order VII Rule 3 of the CPC does not require, any particular plot number to be provided in a plaint, with respect to the property forming subject matter thereof. Providing of a no. with respect to the suit property is needed only where the property can be identified by boundaries or numbers in a record of settlement or survey. In respect of property which cannot be so identified, there is no requirement, in Order VII Rule 3, for the property to be identified by boundaries or numbers. The only mandate of Order VII Rule 3 is that the plaint should contain a description of the property sufficient to identify it.

24. I have already reproduced, hereinabove, para 2 of the plaint which, according to the plaintiff, is sufficient to identify the property forming subject matter of the suit. As to whether the property can be sufficiently identified by the said details, would have to be decided in trial. It cannot be said that, on the basis of the averments in the plaint, the plaint is liable to be dismissed as having been filed in violation of Order VII Rule 3 of the CPC and as not maintainable for that reason.

25. Indeed, the contention that the suit property was not properly



identified may also not be in sync with the averments contained in the written statement filed by the petitioners which refer, particularly, to the “suit property”. The written statement, therefore, impliedly acknowledges the existence of an identifiable suit property.

26. In view thereof, no case for rejecting the plaint as not maintainable at a preliminary stage cannot be said to have been made out. At the very least, the plaint raises disputed and triable issues.

27. Though, before me, it was not sought to be contended, as it was contended before the learned Civil Judge, that the written statement of the petitioners had raised a cloud over the title of the respondent over the suit property, I am in agreement with the findings of the learned ADJ in that regard.

28. It cannot, therefore, be said that a case for dismissal of the suit at the preliminary stage as not maintainable, within the parameters of Order XIV Rule 2(2) of the CPC and the law laid down in that regard, can be said to have been made out. No occasion, therefore, arises for this Court to interfere with the impugned order.

29. The petition is accordingly dismissed in *limine*. Miscellaneous applications also stand disposed of.

C.HARI SHANKAR, J

OCTOBER 10, 2022/kr