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**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

C.O. 1068 of 2022

Maidul Islam Molla

versus

Kartick Kanchra & ors.

Mr. Tanmoy Mukherjee

Mr. Amal Saha

Mr. Iresh Paul

Mr. Souvik Das

Mr. K. R. Ahmed

Mr. Soumyadip Panda

... For the petitioner/defendant no.1

Mr. Sukanta Chakraborty

Mr. Anindya Halder

... for the opposite party no.1/plaintiff

This revisional application has been filed by defendant no.1-petitioner under Article 227 of the Constitution of India challenging order dated 5th April, 2022 passed by the learned Civil Judge (Senior Division), 10th Court, Alipore in Title Suit No.126 of 2017 rejecting his application under Order VII Rule 11 of the Civil Procedure Code.

The brief fact of the case is that opposite party no.1-plaintiff filed a suit for declaration and permanent injunction contending, *inter alia*, that by virtue of a registered Deed of Partition dated 19th September, 1978 the father of the plaintiff namely, Amulya Charan Kanchra acquired the suit property and after his demise

his four sons and five married daughters jointly inherited the suit property in equal share with their brothers. The plaintiff all on a sudden found defendant no.1 accumulating sand and garbage around the suit property and was filling the pond. The plaintiff upon searching found that defendant nos.2 to 6 (his sisters) conveyed the suit property within Second Schedule measuring 13.88 sataks in favour of defendant no.7 and he further came to know that by conveyance dated 5th August, 2016 the defendant no.7 transferred the suit property within Second Schedule in favour of defendant no.1. On such premise, plaintiff-opposite party no.1 was compelled to file the instant suit for declaration and permanent injunction. In the said suit, the defendant no.1-petitioner filed an application under Order VII Rule 11 of the Civil Procedure Code. Since the application under Order VII Rule 11 of the Civil Procedure Code was not disposed of on merit at the first instance, the defendant no.1 moved a revisional application before this Hon'ble Court being C.O. 3420 of 2019 wherein this Court directed the learned Trial Court to dispose of the application under Order VII Rule 11 of the Civil Procedure Code within the period of one month. Thereafter, the learned Trial Court upon hearing both sides rejected the application under Order VII Rule 11 of the Civil Procedure Code.

Being aggrieved by and dissatisfied with the impugned order the petitioner-defendant no.1 has preferred the present revisional application.

Mr. Tanmoy Mukherjee, learned Advocate for the petitioner submits that the defendant no.1 in the application under Order VII Rule 11 of the Civil Procedure Code has precisely raised two-fold grounds; *firstly*, that since the brothers of the plaintiff have not been impleaded in the proceeding hence the suit is bad for want of necessary parties and *secondly*, the suit is barred under Section 34 of the Specific Relief Act since no prayer for partition has been made in a suit against a co-sharer. Relying on the decision of Hon'ble Supreme Court passed in ***Raghunath (dead) by Legal Representatives versus Radha Mohan (dead) through legal representatives & Ors.***, reported in ***(2021) 12 SCC 501*** he submits that the plaintiff till date has not exercised his right of pre-emption under Section 4 of the Partition Act in respect of the property conveyed in favour of defendant no.1, which should have been exercised at first time when such right accrued and thus upon purchase of the portion conveyed, the defendant no.1 has become a co-sharer in respect of the suit property. Therefore, since defendant no.1-petitioner is a co-sharer in respect of the suit property hence suit for permanent injunction is not maintainable without claiming partition and to buttress his contentions he

relies on a decision of this Court passed in ***Bachaspati Bhattacharya & Ors. versus Smt. Mira Bhattacharjee & Ors.***, reported in ***AIR 2008 Calcutta 68***. In light of his above submissions, he prays that the suit of plaintiff is liable to be rejected under Order VII Rule 11 of the Code.

In reply to the contention raised on behalf of the defendant no.1-petitioner, Mr. Sukanta Chakraborty, learned Advocate for the opposite party no.1-plaintiff submits that while dealing with an application under Order VII Rule 11 of the Civil Procedure Code, the Court has to consider the averments made in the plaint and decide whether such averments disclose cause of action or not. In support of his contention, he relies on the decision of the Hon'ble Supreme Court passed in the case of ***Madanuri Sri Rama Chandra Murthy versus Syed Jalal***, reported in ***(2017) 13 SCC 174***. He further submits that defendant no.1 is a stranger purchaser and precisely the suit falls under Section 44 of the Transfer of Property Act which entitles a co-sharer of a property to restrain a stranger purchaser from disturbing the right of a co-sharer in the suit property and he relies on the decision of Hon'ble Supreme passed in ***Dorab Cawasji Warden versus Coomi Sorab Warden and Others*** reported in ***(1990) 2 SCC 117***. He further submits that since the suit has been initiated under Section 44 of the Transfer of Property Act against a

stranger purchaser hence the suit cannot be said to be not maintainable in the absence of prayer for partition. He distinguishes the proposition in *Bachaspati Bhattacharya's case (supra)* on the score that the suit was by and between the co-sharers and not between a co-sharer and stranger purchaser as in the case at hand and therefore, Section 34 of the Specific Relief Act cannot be a bar in exercising right of the plaintiff by filing a suit under Section 44 of the Transfer of Property Act. Mr Chakraborty, learned Advocate for the opposite party no.1 further distinguishes the decision of Hon'ble Supreme Court passed in *Raghunath's Case (supra)* on the ground that such judgement has been passed in respect of Rajasthan Pre-emption Act, 1966 and the facts have no bearing so far as the present case is concerned. In the aforesaid backdrop, he submits that the learned Trial Court has rightly rejected the application under Order VII Rule 11 of the Civil Procedure Code on the ground that the issues agitated in the application are matters which are to be dealt with by taking evidence and prays that the impugned order of learned trial Court be affirmed.

Before delving into the issues raised in the present application, it would be profitable to refer the relevant provisions embodied under Order VII Rule 11 of the Civil Procedure Code which is reproduced hereunder:

“Rejection of plaint.- *The plaint shall be rejected in the following cases: -*

- (a) where it does not disclose a cause of action;*
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*
- (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*
- (d) where the suit appears from the statement in the plaint to be barred by any law;*
- (e) where it is not filed in duplicate;*
- (f) where the plaintiff fails to comply with the provisions of Rule 9.*

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.”

Order VI Rule 2(1) of the Code clearly stipulates that the pleadings should contain material facts. Omission of material facts leads to an incomplete cause of action and the statement or the plaint becomes bad. Order VII Rule 11 of the Code lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself irrespective of his right to contest the same on merits. The real object of Order VII Rule 11 of the Code is to keep out irresponsible law

suits out of court. The only restriction is that the consideration of application for rejection should not be on the basis of the allegations made by defendant in the written statement or on the basis of the allegations made in the application for rejection of plaint. The court has to consider the plaint as a whole, and in case, the entire plaint comes under situations covered under Order VII Rule 11 (a) to (f), the same has to be rejected. Thus, I find substance in the submissions of learned advocate for opposite party no.1-plaintiff relying on the decision of Hon'ble Supreme Court in *Madanuri Sri Rama Chandra Murthy's Case (supra)* that while dealing with an application under Order VII Rule 11 of the Code the Court is consider the averments contained in the plaint only and find out whether same discloses any cause of action or not.

Having heard the learned advocates it is found that in the present revisional application the petitioner has raised two-fold grounds for rejection of plaint; *firstly*, that the suit is bad for want necessary parties and *secondly*, the suit is barred under Section 34 of the Specific Relief Act.

So far as the first ground is concerned regarding the suit being bad for want of necessary parties, it is found that the brothers of the plaintiff have not been arraigned as parties though they have also inherited the suit property as per plaint case. Be that as it may, such

ground could only be successfully urged as a procedural objection which may either enable the Court to implead the necessary parties or permit the plaintiff to take appropriate steps in order to remove such defect, if any. Therefore, such ground not contained within the provisions of Order VII Rule 11 of the Civil Procedure Code cannot lead to rejection of plaint.

Now coming to the second ground regarding the suit being barred by law, this is precisely covered under Order VII Rule 11(d) of the Code. Upon perusal of the plaint, it is found that the plaintiff has contended that after the demise of his father, he alongwith his three brothers and five married sisters jointly inherited the suit property in equal share. The plaintiff all on a sudden found defendant no.1 accumulating sand and garbage around the suit property and was filling the pond. The plaintiff upon searching found that defendant nos.2 to 6 (his sisters) conveyed the suit property within Second Schedule measuring 13.88 sataks in favour of defendant no.7 and he further came to know that by conveyance dated 5th August, 2016 the defendant no.7 transferred the suit property within Second Schedule in favour of defendant no.1. On such premise, plaintiff-opposite party no.1 was compelled to file the instant suit for declaration and permanent injunction. Thus it is found that the plaint discloses cause of action. The petitioner-defendant no.1 has also not disputed that the

plaint discloses cause of action. Relying on the decision of this Court in *Bachaspati Bhattacharya (supra)* Mr Mukherjee, learned advocate for defendant no.1-petitioner strenuously argues that since he is a co-sharer in respect of the suit property hence suit for permanent injunction is not maintainable without claiming partition. On the other hand, Mr Chakraborty, learned advocate for opposite party no.1-plaintiff relying on *Dorab Cawasji Warden's Case (supra)* refutes such argument of the petitioner and submits that since the suit has been initiated under Section 44 of the Transfer of Property Act against a stranger purchaser the suit cannot be said to be not maintainable there being no prayer for partition. Upon consideration of the pleadings, it is seen that the plaintiff has initiated the suit contenting that defendant no.1 is a stranger purchaser and therefore whether in due course of time the defendant no.1 has become a co-sharer in the suit property or whether the suit is not maintainable against a co-sharer in the absence of prayer for partition as asserted by Mr Mukherjee is to be decided in trial by taking evidence. For such reason the decision rendered by Hon'ble Court in *Raghunath's Case (supra)* that right of pre-emption is to be exercised at first time when such right accrues is not applicable at this stage of proceeding.

In *Bachaspati Bhattacharya (supra)* undisputedly the suit was by and between the co-sharers whereas as per the plaint case the suit is between the co-sharer and the stranger purchaser and therefore, the proposition of the said decision is not applicable in the present case at this stage.

Save and except the aforesaid aspect no other express law has been placed into service barring maintainability of the suit.

Considering the above, I find that there is no impropriety in the order passed by the learned Trial Court rejecting the application under Order VII Rule 11 of the Civil Procedure Code on the ground that the issues raised are to be decided after taking evidence.

In view of the above discussion, the Civil Revisional application being **C.O.1068 of 2022** stands dismissed. The impugned order under challenge of the learned trial Court is affirmed.

All connected applications, if any, stand disposed of.

Interim order, if any, stands vacated.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)