

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 120 of 2022
with
IA No.CAN 2 of 2022
with
IA No. CAN 3 of 2023

Sharmistha Majumder
versus
Kriti Safui & Ors.

For the Appellant : *Mr. Saptanshu Basu, Ld. Sr. Adv.,*
Mr. Debdatta Sen,
Mr. Siddhartha Chatterjee,
Mrs. Suchishmita Ghosh Chatterjee,
Ms. Ledia Dasgupta,
Mr. Malay Kr. Seal.

For the Respondent
Nos.1 & 2 : *Mr. Suddhasatva Banerjee,*
Mr. Soumabho Ghose,
Mr. Siddhartha Sharma,
Mr. Rishav Dutt,
Mr. Soumalya Ganguli,
Ms. Tiana Bhattacharya,
Mr. Rohit Bhattacharjee.

Hearing is concluded on : *18th May, 2023.*

Judgment On : **11th July, 2023.**

Partha Sarathi Chatterjee, J.

1. The plaintiff/appellant has called in question the order dated 28.4.2022 passed by the learned Civil Judge, Senior Division, 5th Court, Alipore in Title Suit No. 1244 of 2019 whereby at the interlocutory stage, considering the entire merit of the matter, the learned Court below *suo moto* rejected the plaint *in limini* invoking the provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 (in short, the Code).

2. Sans unnecessary details, facts required to be frescoed for the purpose of effective adjudication of the appeal are as follows:

- i) One Sharmistha Majumdar (in short, Sharmistha) claiming herself to be the widow of one Rana Safui filed one suit for partition, administration, injunction and damages in respect of the properties left by Rana Safui (in short, Rana), since deceased;
- ii) Sharmistha claimed to have knotted matrimonial chord with Rana on 25.09.2013 under Special Marriage Act, 1954. Rana died intestate on 18.9.2019 leaving Sharmistha as his widow, defendant nos. 1 and 2 being the two daughters born out of the first marriage of Rana with a lady namely, Konika Safui (in short, Konika) and his mother, defendant no.3;
- iii) Rana was a successful businessman. He used to maintain numerous accounts in SBI, HDFC, Canara and Bandhan banks

and he had a good number of LIC policies and huge properties including some flats etc;

- iv) Rana previously married Konika but since matrimonial disputes surfaced in their nuptial life, Rana got that marital tie dissolved and tied matrimonial knot with Sharmistha. After marriage, Sharmistha started living with Rana at 16 RD4, Greenwook Nook at premises no. 369/2, Purbachal Kalitala Road, Ward no. 106, P.S. Garfa, Kolkata-VII8. Sharmistha claimed that she was all along on good terms with defendant nos.1 and 2 and they travelled abroad and various places of interest together;
- v) After death of Rana, behaviour of defendant nos. 1 and 2 towards Sharmistha completely changed and she was denied to take part in Rana's cremation and she also came to learn that Rana's accounts were operated and huge amount of money was transferred from Rana's accounts to the personal accounts of those two defendants. Defendant no.1 got herself inducted as Director of BSA Infotech Pvt. Ltd. and transferred entire share thereof in the name of defendant no.1;
- vi) On 25.9.2019, Sharmistha lodged a complaint with Garfa P.S. and on 24.9.2019 and 26.9.2019, she was constrained to send e-mails to various banks in which Rana maintained his accounts and also to LIC authority and those two defendants also withdrew fixed deposit accounts of Rana and defendant

no.1 also changed some trade licences in her name which were earlier standing in the name of Rana;

- vii) Sharmistha claimed that EMI of the flat, where Sharmistha used to live with Rana, was being paid from the fund of R.S. Construction but such payment has been stopped and names of proprietors of some concerns have also been changed;
- viii) Sharmistha claimed that defendants have misappropriated a sum of Rs.3 crores 66 lacs from various banks and she claimed discoveries of all such transactions and Sharmistha claimed to be entitled to 1/4th share of all the properties, assets, money, fixed deposit amounts etc. left by Rana.

3. The Suit was initially registered as Title Suit no. 5652 of 2019 and the same was transferred to the learned Court below and was renumbered as Title Suit no. 1244 of 2019.

4. Record reveals that along with plaint, an application under Order XXXIX Rule 1 & 2 read with Section 151 of the Code was also taken out by Sharmistha with prayer for interim order and by passing an ad-interim order of injunction on 23.12.2019, the learned Court below restrained the defendants from alienating, transferring and encumbering the properties of Rana and the defendants were further directed to maintain status quo in respect of assets and properties of Rana.

5. Reeti Safui (in short, Reeti), defendant no. 2 filed written objection on behalf of all the defendants wherein Reeti riposted claims of Sharmistha stating as follows :

- i) Rana was married to Konika as per hindu customs on 13.6.1992 in Kolkata and out of their wedlock, Kriti and Reeti were born. Rana instituted a suit *vide*. Mat Suit no. 10 of 2007, which was subsequently renumbered as Mat Suit no. 20 of 2010, seeking decree of dissolution of marriage against Konika;
- ii) Rana obtained an *ex parte* decree of divorce against Konika on 1.3.2007. Such *ex parte* decree was set aside on an application registered as Misc. Case no. 5 of 2010 on 12.9.2011 and marriage between Rana and Konika subsisted till the date of death of Rana on 18.9.2019;
- iii) Sharmistha happened to be a family friend and just after death of Rana, she for the first time claimed herself to be the wife of Rana and claimed share of estate of Rana;
- iv) Reeti claimed marriage between Rana and Sharmistha is not a valid marriage one and the same took place during subsistence of first marriage of Rana;
- v) Reeti claimed that Rana had never acknowledged Sharmistha as his legally wedded wife which would be explicit from a declaration made by Rana on 10.6.2016,

which is duly notarized and also from bank property statement made by Rana on 31.1.2018;

- vi) Reeti claimed that the suit was filed by suppressing material facts and suit was bad for non-joinder of necessary party and properties described against serial nos. 2, 4, 6, 8 to 18 and 24 of the schedule appended to the plaint are barred under Section 4 of the Benami Transactions (Prohibition) Act, 1988 and properties mentioned in serial nos. 2, 6 and 11 are owned by the Company viz. BSA Infotech Pvt. Ltd. and transfer of share of the Company, which is subject matter of corporate jurisprudence, has been ousted from jurisdiction of a Civil Court;
- vii) Reeti claimed that from the photo-copy of passport of Sharmistha it would be evident that she happened to be wife of Mr. Jaydip Majumder;
- viii) Defendants preferred an appeal *vide* FMat no. 67 of 2020 assailing the order dated 23.12.2019 and by filing a supplementary affidavit, she disclosed that one application under Right to Information Act was preferred which was responded to by the competent authority by informing that *'no marriage record of Rana Safui and Sharmistha Majumdar (allegedly registered on 25th September, 2013) under Section 16 of Special Marriage Act,*

1954 by Jayanta Kumar Sinharay, Non-official Marriage Officer) is available matching the certificate of marriage enclosed with RTI application';

- ix) On 17.8.2020, a coordinate Bench directed the defendants to disclose all the assets left by Rana and by passing an order, the Hon'ble Division Bench modified the interim order restraining the defendants from dealing with the assets mentioned in paragraph 3(a) of the supplementary affidavit;
- x) Since there was a confusion regarding payment of EMI in respect of the property mentioned in paragraph 3(a) of the supplementary affidavit, an application being CAN 03 of 2020 was filed seeking clarification of the order dated 18.8.2020;
- xi) While dealing with the application being CAN 03 of 2020, leave was granted to the defendants to prefer an application for review and accordingly, one review application being RVW no. 89 of 2020 and another application being CAN 05 of 2020 in connection thereto were filed;
- xii) On 9.10.2020, by passing an order, a coordinate bench of this Court set aside the interim order dated 23.12.2009.

6. Record postulates that Sharmistha filed affidavit-in-reply to the affidavit-in-opposition used by Reeti wherein Sharmistha contended as follows:

- a) Sharmistha was married to Dr. Jaydip Majumdar and due to said wedlock, one female child namely, Rajendranandini was born and Sharmistha got a decree of dissolution of her first marriage on 22.5.2013 and she got married with Rana on 05.07.2013 in Jagannath Temple, Puri and such marriage was subsequently registered under Special Marriage Act, 1954;
- b) Prior to her marriage with Rana, Rana represented to her that his marital tie with Konika was dissolved on 1.3.2007 and basing upon such representation of Rana, she agreed to marry Rana and Rana removed the name of Konika from his passport since 2007;
- c) Sharmistha claimed that she used to live with Rana as his legally wedded wife till the date of death of Rana and she placed reliance upon some photographs and documents to lend support of her such claim;
- d) She claimed that since as per the rule prevailing at that time, names of parents were required to be mentioned for issuance of passport to a minor, she used her first husband's name in the passport of her

daughter taking permission of her first husband on the basis of advice of Rana;

- e) Rana introduced her as his legally married wife to all of his relatives and friends and she along with Rana and defendant nos. 1 and 2 travelled abroad also and Rana appointed her as his nominee for handling his legal matters;
- f) Sharmistha after being served with a copy of the application taken by the defendants in connection with FMAT no. 67 of 2020 for the first time came to know that marriage between Rana and Konika had not been dissolved since *ex parte* decree of divorce was set aside on 12.9.2011;
- g) She claimed that if the documents produced by defendants are found to be genuine, then it would prove that fraud had been practised upon her by Rana;
- h) She lamented that she discharged all the marital obligations towards Rana and arranged all sort of medical treatment for Rana and even sradh ceremony of Rana was arranged in the premises where she used to live along with Rana and she accepted the defendant nos. 1 and 2 as her own daughters and reposed trust and confidence in them and handed over all the documents relating to bank accounts etc. to Reeti on

18.9.2019 itself and immediately, on receipt of such document, attitude and behaviour of those two defendants towards Sharmistha completely changed;

- i) She claimed that she was dependent upon Rana and Rana made provision for her. She would get salary from BAS Infotech Pvt. Ltd. and RS Construction and one tenancy agreement was executed in her favour and there was a provision for allowance of Rs. 16000/- towards fuel charge for her and for the maintenance and electric charge of Greenwood Nook apartment which were directly paid from the fund of RS construction.;
- j) Since during subsistence of interim order dated 23.12.2009, defendant no.1 substituted her name as proprietor of RS Construction, she was forced to prefer an application under XXXIX Rule 2A of the Code;
- k) EMI payable for the properties mentioned in serial no. 3(a) of supplementary affidavit being the premises where Sharmistha is still living was directed to be paid from the estate of Rana but defendants have stopped making payment of such EMI and by an order dated 9.10.2020, a coordinate bench of this Court directed that Sharmistha shall continue to be in possession of the properties of which she is in possession;

- 1) Sharmistha contended therein that '*the suit was filed on the bonafide presumption of fact that the marriage with the first wife Konika Safui was dissolved as represented by the said Rana Safui and accordingly the partition was asked for claiming $\frac{1}{4}$ share in the estate of deceased*'.

7. Reeti and Kriti, defendant no.2 jointly filed one written statement resisting the suit in the same tune reiterating the facts enumerated in their written objection.

8. Learned Court below while dealing with application under XXXIX rule 1 and 2 of the Code held that certificate of marriage produced by Sharmistha to show she got married with Rana is forged and no document has been produced by Sharmistha to show that her first marriage with Dr. Jaydip Majumder was dissolved and she knotted marital tie with Rana during subsistence of first marriage of Rana with Konika and hence, Sharmistha had no *prima facie* case and Court exercised its power conferred upon it under Order VII Rule 11 to declare that Sharmistha had no cause of action to institute the suit and hence, considering the entire merit of the case, rejected the plaint and disposed of the matter. Aggrieved thereby, Sharmistha preferred the present appeal.

9. Mr. Basu, learned senior advocate representing Sharmistha argues that learned Court below disposed of the suit by invoking Order VII Rule 11 (a) of the Code *suo moto*. Under Order VII Rule 11 of the Code, plaint can be rejected, but suit cannot be disposed of considering entire merit of the suit.

He argues that indisputably, Court can *suo moto* exercise the power conferred upon it under Order VII Rule 11 of the Code to reject the plaint but Court cannot travel beyond the plaint and documents annexed with the plaint but in the given case, learned Court below has considered the averments made by the defendants in their pleadings and even averments made in the affidavit-in-reply used by the plaintiff and hence, learned Court below entered into the prohibited area.

10. He contends that averments made in the plaint have to be presumed to be true and then Court is to decide whether the plaint disclosed a cause of action or not. He contends that no issue has been framed and no evidence has been taken and hence at this stage, Court cannot say that the plaintiff has failed to prove her case.

11. He submits that learned Court below has held that plaintiff has suppressed the material facts. Suppression of material facts may be fatal but in the case at hand, suppression of facts of former marriage and divorce of Sharmistha are not at all material facts so far as the suit for partition is concerned.

12. Quite apart from the above, Mr. Basu contends that in case of solemnization of a special marriage, the parties of the marriage have to give notice as per Section 5 of Special Marriage Act, 1954 (in short, Act of 1954) and that notice is to be published in the mode and manner prescribed in Section 6 of the Act inviting objection under Section 7 of the Act and hence, there is provision of double checking and then after completion of the requisite formalities, certificate of marriage is issued and as per Section 13

of the Act, such certificate shall be conclusive proof of marriage and Section 24 of the Act lays down that such marriage can be declared to be null and void only by a competent Civil Court on a petition presented by either of the party to the marriage against the other party. According to Mr. Basu, no other person except a party to marriage can claim that any marriage is null and void.

13. He argues that subject suit is suit for partition and plaintiff claimed 1/4th share of estate of deceased and in suit for partition, interim order is granted on mere asking and if suit survives, interim order dated 9.10.2020 passed in the review application shall survive and possession of the part of the estate of Rana by the plaintiff is to be protected and properties of Rana are to be preserved till the decision taken in the partition suit.

14. To buttress his argument, he placed reliance upon judgments delivered in cases of *Puspa Chand & Ors. –vs- Kolkata Municipal Corporation & Ors.* reported in (2006) 3 CHN 592, *Mayar (H.K.) Ltd. & Ors. –vs- Owners & Parties, Vessel M.V. Fortune Express & Ors.* reported in (2006) 3 SCC 100, *Dahiben –vs- Arvindbhai Kalyanji Bhanusali (Gajra) Dead thr. Lrs. & Ors.* reported in (2020) 7 SCC 366, *Calcutta Municipal Corporation –vs- Pawan Kumar Saraf & Anr.* reported in (1999) 2 SCC 400, *Smt. Prafulla Bala Biswas –vs- Smt. Ila Das & Anr.* reported in (1996) 2 CLT 315, *Western Coalfields Ltd. & Ors. –vs- Chandraprakash w/o Krishnalal Khare* reported in 2010(4) Mh. L.J. 34, *Gangubai Bablya Chaudhary & Ors. –vs- Sitaram Bhalchandra Sukhtankar & Ors.* reported in (1983) 4 SCC 31, *S.J.S. Business Enterprises*

(P) Ltd. –vs- State of Bihar & Ors. reported in (2004) 7 SCC 166, *Maharwal Khewaji Trust (Regd.), Faridkot –vs- Baldev Dass* reported in (2004) 8 SCC 488 & *Virender Nath Gautam –vs- Satpal Singh & Ors.* reported in (2007) 3 SCC 617.

15. In response, Mr. Banerjee appearing for the respondents argues that foundation of the case of Sharmistha is based on the facts that she knotted marital chord with Rana, since deceased and hence, she is entitled to get share of estate of Rana. He submits that Sharmistha got married during subsistence of first marriage of Rana. Taking us to Section 4(a) of Act of 1954, he contends that if at the time of marriage any party to the marriage has a spouse living, such marriage shall be void *ab initio* and consequently, it has come out that marriage of Sharmistha with Rana is nothing but void marriage and such marriage cannot entitle her to get any share in the properties left by Rana. According to him, foundation of plaint case, which was depicted in paragraphs 2, 15 and 30 of the plaint, has just collapsed.

16. He argues that Sharmistha suppressed two material facts, *viz-* i) she got married earlier and got decree of divorce from her former husband and ii) her certificate of 2nd marriage is forged.

17. According to him, Section 13 of the Act of 1954 speaks about the conclusive evidence whereas Section 4 of Evidence Act defines the expression ‘conclusive proof’ and there is a difference between these two expressions.

18. He contends that Sharmistha herself has changed her stand and relegated herself from wife to a concubine which would be explicit from affidavit-in-reply of Sharmistha and such admitted facts need not be proved. Requirement of Order VII Rule 11 of the Code is *prima facie* satisfaction of the Court and if it appears that suit is frivolous and vexatious litigation, then it is obligation of the Court to nip the suit in the bud. He asserts that Sharmistha did not come to Court with clean hands and continuance of such suit would have been an abuse of process of law.

19. He argues that in view of her own statements made in paragraph 3 (xviii) & (xix) and paragraph 10 of her affidavit-in-reply wherein she herself admitted that her marriage was solemnized during subsistence of first marriage of Rana and Rana had practised fraud upon her and she filed the suit on bona fide presumption that she was legally wedded wife of Rana, cause of action of the suit instituted by Sharmistha has disappeared. He contends that in such sequence of facts, Court should not embark on trial and relegate the parties to a long pending trial. He asserts that in the case at hand, plaint loses its cause of action.

20. To bolster his submission, Mr. Banerjee placed reliance upon the judgments delivered in cases of *Ravindra Kishore Sinha –vs- Majula Bhusan* reported in 2009 SCC OnLine Del 3942, *State Trading Corporation of India Ltd. & Ors. –vs- Glencore Grain B.V.* reported in (2016) 1 CHN 581, *Holy Health and Educational Society (Regd.) –vs- Delhi Development Authority* reported in 1999 SCC OnLine Del 396, *S.P. Chengalvaraya Naidu (Dead) by Lrs. –vs- Jagannath (Dead) by Lrs. & Ors.* reported in (1994) 1 SCC 1,

Shipping Corporation of India Ltd. –vs- Machado Brothers & Ors. reported in AIR 2004 SC 2093, *Yamunabai Anantrao Adhav –vs- Anantrao Shivram Adhav & Anr.* reported in (1988) 1 SCC 530, *Bhaurao Shankar Lokhande –vs- State of Maharashtra* reported in AIR 1965 SC 1564, *Nirmal Dass Bose –vs- Km. Mamta Gulati* reported in AIR 1997 All 401 & *Sopan Sukhdeo Sable & Ors. –vs- Assistant Charity Commissioner & Ors.* reported in (2004) 3 SCC 137.

21. Indisputably, power conferred upon the Court to terminate civil action is drastic and accordingly, conditions prescribed under Order VII Rule 11 of the Code have to be strictly adhered to. With reference to Order VII Rule 11 of the Code it can be held that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The pleas taken in the written statement and in other pleadings would be wholly irrelevant. Plaint is to be read in its entirety. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Pleading have to be construed as it stands without any addition or subtraction of words or change of its apparent grammatical sense and the Court must give a meaningful reading to the plaint. At this stage, the Court has to presume that every allegation made in the plaint is true. Plaint can be rejected if the averments made therein *ex facie* do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law.

22. Rejection of plaint follows the procedure that on admitting the plaint or even before admitting the same, if the Court on presentation of the

plaint is of the view that the same does not fulfil the statutory and institutional requirements referred to in clauses (a) to (f) of Rule 11, it can reject the plaint.

23. Order VII Rule 11(a) of the Code lays down that the plaint shall be rejected where it does not disclose a cause of action. Cause of action embodies a bundle of facts which may be necessary for the plaintiffs to prove in order to get a relief from the Court. Order VI Rule 2(1) of the Code mandates that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved and Order VII Rule 1 (e) of the Code directs that the plaint shall contain the facts constituting the cause of action and when it arose. Order VI Rule 9 lays down that wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or part thereof, unless the precise words of the document or any part thereof are material and Order VI Rule 4 says that when the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence etc., particulars shall be stated in the pleading.

24. The expression 'material facts' has not been defined in the Code. According to the dictionary meaning, 'material' means 'fundamental', 'vital', 'basic', 'cardinal', 'central', 'crucial', 'decisive', 'essential', 'pivotal', 'indispensable', 'elementary' or 'primary'.

25. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party.

26. 'Particulars', on the other hand, are details in support of material facts pleaded by the party. What particulars could be said to be 'material facts' would depend upon the facts of each case and no rule of universal application can be laid down. The object and purpose is to enable the opposite party to know the case he has to meet with. In the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition.

27. An elementary rule in pleading that, when a state of facts is relied it is enough to allege it simply, without setting out the subordinate facts which are the means of proving it.

28. For determining whether the plaint discloses any cause of action or not, the Court has to see only the averments made in the plaint and the accompanying documents relied upon in the plaint and it is axiomatic that only a part of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected. The inquiry under Order VII Rule 11(a) CPC is only as to whether the facts as pleaded disclose a cause of action and not complete cause of action. The limited inquiry is only to see whether the petition should be thrown out at the threshold. Mere fact

that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint.

29. We may fruitfully refer to the authoritative pronouncement made in case of *T. Arivandandam –vs- T.V. Satyapal*, reported in (1977) 4 SCC 467 wherein it was ruled that if clever drafting has created the illusion of a cause of action, it has to be nipped at the first hearing by examining the party searchingly under Order 10 of the Code.

30. Admittedly, use of the word ‘shall’ imply that Order VII Rule 11 casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the clauses of Order VII Rule 11 of the Code, even without intervention of the defendant and such power can be exercised at any stage of the suit before the conclusion of the trial. Power bestowed in the Court under Order VII Rule 11 of the Code can be exercised on the application presented by the defendant also.

31. In the case before us, defendants used affidavit-in-opposition to the application taken out by Sharmistha under XXXIX Rule 1 & 2 of the Code and Sharmistha had filed affidavit-in-reply to that opposition and defendants used written statement also. While going to dispose of that application preferred under Order XXXIX Rule 1 & 2 of the Code, the learned Court below has considered rival claims of the parties and opined that certificate of marriage produced by Sharmistha is forged and she did not produce any document to show she had got decree of divorce from her former husband and hence, she suppressed the material facts and she

relegated herself to a concubine and then rejected the application for interim order and simultaneously, exercised the power conferred upon the Court under Order VII Rule 11 of the Code and rejected the plaint on the ground that it does not disclose any cause of action after considering entire merit of the case and disposed of the case accordingly. Such order indicates that while exercising its power under Order VII Rule 11 of the Code, the learned Court below has travelled beyond the plaint and its accompanying documents.

32. Mr. Banerjee himself submits that foundation of the case of Sharmistha is imbedded in her plaint in paragraphs 2, 15 and 30 of the plaint wherein Sharmistha claimed that she knotted matrimonial chord with Rana and Rana died intestate leaving behind Sharmistha as one of his legal heirs and then giving particulars of some properties and narrating incidents of transfer of certain properties in the name of the defendants, she claimed discovery of details of transaction pertaining to the properties belonging to Rana after his death and lastly claimed 1/4th share of the properties left by Rana. Now, question is whether such bundle of facts constitute a cause of action in the suit for partition or not! After giving our thoughtful consideration to the plaint, we have no qualm to hold that in a suit for partition, such pleading is sufficient to disclose a cause of action.

33. Learned Court below while rejecting the application for interim order held that Sharmistha married earlier but she did not disclose whether she got divorce from her former husband and hence, there is suppression of material fact. An elementary rule of pleading is that, when a state of facts is

relied upon it is enough to allege it simply, without setting out the subordinate facts which are the means of proving it. In the suit for partition, Sharmistha knotted nuptial chord with Rana is the material fact and the fact that she got divorce from her former husband being a precondition towards solemnization of special marriage with Rana can at best be construed to be a subordinate fact. The present case does not involve any element of deliberate deception or any fraudulent suppression of material facts and the plaintiff had also not deliberately withheld any document to gain undue advantage.

34. Learned Court below held that Sharmistha's certificate of marriage (with Rana) is forged and she relegated herself to a concubine. Such observations have been made by the learned Court below basing upon the averments made by the defendants in their pleadings. It is axiomatic that while going to exercise its power under Order VII Rule 11, Court should not decide the merit of the averments made in the plaint but in the case at hand, Court has considered the entire merit of the case and disposed of the matter and hence, we express our agreement with the argument advanced by Mr. Basu to the effect that the Court has stepped into the prohibited area of considering the correctness of averments of plaint and its accompanying documents at this stage.

35. It is well-known that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction on fact or an additional fact may make a lot of difference in decision making process. The judgment is a precedent for the issue of law that is raised and

decided and not observations made in the facts of any particular case. There is no dispute as regards the proposition of law upon which reliance has been placed by Mr. Banerjee, however, the same are distinguishable on facts. In the case of *Bhaurao Shankar Lokhande (supra)*, appellant no. 1 was married to one Kamlabai during lifetime of his first wife, the complainant and after trial, appellant no. 1 was convicted under Section 494 IPC, in case of *Holy Health and Educational Society (Regd.)*, suit was instituted praying for decree of permanent injunction, restraining the DDA from giving effect to the letter of cancellation of lease and plaintiff suppressed institution of earlier suit and the appeal was preferred to impugn the order passed on application for interim order, in case of *S.P.Chengalavaraya Naidu (dead) by Lrs.(supra)*, respondent filed a suit for partition and obtained preliminary decree and when he preferred application for final decree, then it was revealed that he obtained preliminary decree by practising fraud and his application for final decree was rejected and High Court set aside the order of the Trial Court and hence, special leave to appeal. The judgment in the case of *Shipping Corporation Of India Ltd. (supra)*, was on the issue as to whether the Court can take cognizance of a subsequent event to decide as to whether the pending suit should be disposed of or kept alive. In case of *Yamunabai (supra)*, 2nd wife claimed maintenance by taking out an application under Section 125 of Code of Criminal Procedure, 1973. In case of *Nirmal Dass Bose (Supra)*, wife filed matrimonial suit seeking decree of annulment of marriage on the ground that she was put under coercion to sign some papers before marriage officer and marriage was never

consummated. In case of *Sopan Sukhdeo Sable & Ors. (supra)*, plaintiffs claimed themselves to be tenants under a Public Trust and on the pleadings of both the parties, Trial Court framed two preliminary issues i.e. (a) whether the plaint was liable to be rejected for want of cause of action, and (b) whether the suit was tenable against all the defendants. Findings in respect of such issues were recorded against the plaintiff and it was held that Section 80 of Bombay Public Trusts Act took away jurisdiction of civil Court. Hon'ble Apex Court held that rejection of plaint was bad and suit was tenable to the limited extent.

36. In case of *State Trading Corporation Of India Ltd. & Ors. (supra)*, plaintiff filed a suit for recovery of damages on the plea of breach of contract by the defendants. In the original contract and subsequent contract, there was an arbitration clause and under the Bill of lading, there was a forum selection clause. The application under Order 7 Rule 11 read with Section 151 of the Code was filed seeking dismissal of the suit on the ground that arbitration proceeding was pending in foreign country and in the said conspectus the Court observed that as the cause of action in the suit was founded on initiation of an arbitration proceeding in foreign country, the continuation of the suit would be an abuse of process of Court. In case of *Ravindra Kishore Sinha (supra)*, plaintiff took back earnest money and hence, agreement stood repudiated yet he filed suit for specific performance of contract. The Learned Single Judge held that at every stage of the suit, Judges have to be vigilant to see as to whether cause of action to further proceed with the suit survives or not. If answer comes in negative, it should

not await a formal application under Order VII Rule 11 and can '*suo moto*' exercise its inherent power under Section 151 of Code. In Order VII Rule 11(a), the legislature has used the word 'disclose' and not the word 'survive' or 'appear' or 'disappear'. Court is not permitted to see whether after being attacked by the pleadings of defendant, cause of action set up in the plaint survives or not.

37. In view of discussion made hereinabove, we are inclined to hold that the portion of the order impugned by which plaint has been rejected cannot be sustained.

38. Needless to observe that learned Court below has ample opportunity to examine the parties under Order X at the first hearing of the suit and learned Court below has power to pronounce the judgment under Order XII Rule 6 of the Code and even to absolve the party from agony of prolong litigation, the trial Court can take up the issue of maintainability of the suit at the first instance also but if the learned Court invokes its power under Order VII Rule 11, then it can reject the plaint only if any of the conditions incorporated in clause (a) to (f) of Rule 11 is fulfilled considering the averments made in the plaint and its accompanying documents.

39. In view thereof, part and portion of the order impugned herein whereby the plaint was rejected is set aside. The suit is revived to its original number and file. Learned Court below shall have liberty to examine the parties under Order X and it can exercise its power under Order XII Rule 6 of the Code if it finds there is or are admission or admissions either in the pleading or otherwise, whether orally or in writing or even, it can take up the

issue of maintainability of the suit at the first instance and pass necessary order. Since we have confined our deliberation to test the legal tenability of the portion of the order impugned in the appeal, we are not inclined to respond to the submission of Mr. Basu regarding the certificate of marriage, status and validity of subject marriage. It is clarified that all the observations have been made hereinabove only for the purpose of disposal of the appeal and learned Court shall proceed with the suit without being influenced by any such observations.

40. The appeal and its connected applications being CAN 2 of 2022 and CAN 3 of 2023 are disposed of accordingly. Parties to bear their own costs.

41. Let a copy of this judgment along with LCR be sent down to the learned Court below forthwith.

42. Urgent Photostat certified copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)