

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 3239 of 2019

**Shri Kamal Kishor Jhawar
Vs
Shri Sunil Jhawar and others.**

For the petitioners	:	Mr. Arijit Bardhan Mr. Sayan Sinha Mr. Adil Naser Mr. Soham Kumar
For the Opposite parties	:	Mr. Dhiraj Trivedi Mr. Bikash Kumar Singh Mr. Sunil Gupta Ms. Swapna Jha
Heard on	:	16.08.2023
Judgment on	:	30.08.2023

Ajoy Kumar Mukherjee, J.

1. Being aggrieved and dissatisfied with the order no. 58 dated 9th August 2019 passed in Title suit No. 1189 of 2015 by the learned Judge 3rd Bench City Civil Court at Calcutta, present application under article 227 of the constitution of the India has been preferred. By the self-same impugned order learned court below rejected petitioner/defendant's applications under order VII rule 11 of the code of civil procedure (C.P.C) and allowed plaintiff/opposite parties application under order VI rule 17 C.P.C.

2. Petitioner contended that opposite party no 1 and 2 herein filed the aforesaid suit against the defendants including the present petitioner (Defendant no. 2) *interalia* for declaration and permanent injunction. In the said suit the petitioner herein filed an application under order VII rule 11 of the C.P.C seeking rejection of the plaint on 5th December 2017. In the said application the petitioner herein pleaded that the aforesaid suit filed by the plaintiffs is barred under section 69(1) and 69(2) of Indian Partnership Act 1932 as the defendant no. 1 of the suit i.e. the partnership firm is an unregistered firm and the plaintiffs no. 1,2 & the defendant no. 2 are the partners of said partnership firm and the suit relates to the business of an unregistered partnership firm. The plaintiffs/ opposite parties filed their written objection against said application on 8th march 2018 wherein, in paragraph 10, the plaintiffs crave leave to file application for amendment and to add a prayer *interalia* for dissolution of partnership firm. Subsequently the opposite party/ plaintiffs filed application under Order VI Rule 17 of the Code of Civil Procedure on 27th June 2019, *interalia* praying for the amendment in prayers of the plaint to include reliefs like

- (i) Dissolution of the partnership firm
- (ii) For accounts of the said dissolved firm
- (iii) To realise the property of the said dissolved firm

3. Mr. Arijit Bardhan learned counsel appearing on behalf of the petitioners submits that learned court below had illegally taken up both the applications i.e. application under Order VI Rule 17 and application under Order VII Rule 11 simultaneously and had passed the order impugned

ignoring the well settled proposition of law that as and when an application under order VII Rule 11 of the C.P.C is filed in a suit at any stage, before considering any other application or proceeding in the suit, the court has to dispose of the application under order VII rule 11 of the C.P.C first and thereafter to proceed in accordance with law. In this context he relied upon the judgment of this court in ***Abhaya Agarwal Vs. Moyna Devo Surana***, reported in **2016 (2) CHN (Cal) 663**. Mr. Bardhan further contended that in order to consider an application under order VII Rule 11 of the C.P.C., the averments made in the plaint are germane and the averments made in the written statement by the defendant no. 2 are wholly irrelevant and as such the submission of the plaintiff/opposite parties relying upon the averments made in the written statement by defendant no.2 are totally irrelevant. From the averments of the plaint, it is evident that the plaintiff heavily relied upon the last reconstituted deed of partnership dated 17th January 1986, in order to derive their rights as partners of the defendants no. 1/partnership firm. Moreover the said partnership deed itself contains an arbitration clause and as such the suit is also barred under the Arbitration and Conciliation Act 1996. Accordingly Mr. Bardhan contended that learned court below ought to have considered the application filed by Defendant no.2 under order VII Rule 11 of C.P.C dated 5th December 2017 first and to dispose of the same and thereafter if the suit will continue then to proceed with the amendment application. In fact learned court below justified it's reason for allowing the aforesaid application under order VI rule 17 of the CPC filed by the opposite party no. 1 and 2 herein but failed to disclose any reason for rejection of the application under order VII Rule 11 of the CPC filed by defendant

no.2/petitioner herein. In this context Mr. Bardhan further contended that the judgment relied by the opposite parties in support of the order impugned reported in (2009) 3 CHN 24, specifically states in second paragraph when the plaintiffs application for amendment was filed prior to the filing of the defendant's application for rejection of plaint the learned court below did not commit any material irregularity in disposing of the plaintiffs application for amendment of plaint first before dealing with the defendant application for rejection of plaint. Relying upon the same principle, in the instant case, the petitioner's application under order VIII, Rule 11 should have been disposed of first. He further alleged that the amendment application has been filed by the plaintiffs/opposite party no. 1 and 2 herein to destroy petitioner's defence and also the grounds of petitioner's application under order VII Rule 11. Accordingly petitioner has prayed for setting aside the order impugned.

4. Mr Dhiraj Trivedi learned counsel appearing on behalf of the opposite parties submits that enforcement of statutory right or common law right is not barred under section 69 of the partnership act 1932. There is no bar to claim rights on the property of a firm as well as rights of individual on the rented property i.e. the suit schedule property. Article 300 (A) of the constitution of India provides such right to the plaintiff and in this context he relied upon **V. Subramaniam Vs. Rajesh Raghuvandra Rao**, passed on 20th March 2009. He further submits that the court below heard both the applications and disposed of both the applications by the impugned order after considering submissions and materials placed by all the parties and the order impugned is proper and based on articulate reasoning, derived

from various judgments of Hon'ble High court and Hon'ble Apex court. He further contended that added defendant no. 3 has not challenged the order of the learned court below and only the petitioner /defendant no.2 has filed this application challenging the order impugned on frivolous grounds. He also submits that the suit is pending for last eight years and if the plaint is rejected now on the ground of technicalities, it shall further delay the redressal of the dispute inter-se. He further contended that it is well established that no one should suffer due to the technicalities and considering the same the court have the jurisdiction to hear both the petitions simultaneously and to dispose of the same by a single order. He further contended that the jurisdiction of High court under article 227 of the Constitution of India, being supervisory in nature, may not be exercised to upset conclusion, howsoever erroneous they may be, unless there was something grossly wrong or unjust in the impugned order shocking the court's conscience or the conclusion is so perverse that it becomes absolutely necessary in the interest of justice for this Court to interfere. The impugned order does not qualify such test of interference by this Court, as the Court below decided the issue on the basis of firm logical conclusion supported by various judgments. In this context opposite parties/ plaintiff relied upon judgments reported in

(i) AIR 1951 Cal 262, (ahmed Hossain Vs.Chambelli)

(ii) (2009) 3 CHN 24, (Phool patti and another Vs.Ram Singh another.)

(iii) Reva Jeetu Builders and Developers Vs. Narayana Swamy and sons and others in Civil Appeal No. 6921 of 2009.

(iv) (2015) 8 SCC 331, (P.V. Guru Raj Reddy Vs.P. Neeradha Reddy and others)

5. I have considered the submissions made by both the parties. It appears that the defendant no. 2/petitioner filed application under Order VII Rule 11 of the Code of Civil Procedure on 5th December, 2017 praying for rejection of the plaint on the ground that the suit is barred under Section 69 of the Indian Partnership Act. The opposite party/plaintiff filed written objection on 8th March, 2018. However, the aforesaid application filed by the petitioner/defendant no. 2 was rejected earlier by the Trial Court vide order no. 30 dated 5th April, 2018 as petitioner/defendant no. 2 did not turn up on repeated calls, when the petition was taken up for hearing. Being aggrieved by the said order, the petitioner preferred civil revisional application being C.O. 1290 of 2018 before this court and this court vide order dated 8th March, 2019 disposed of the said application with a specific direction upon the court below to dispose of the petitioner's application under Order VII Rule 11 of the Code afresh positively within a period of one month from the date of communication of the order to the court below, and thereby set aside the order impugned dated 5th April, 2018.

6. In view of using the term "positively" by this court in the order, the court below was duty bound to dispose of said application by 8th April, 2019. From the facts of the case, it appears that the court below without complying the said order dated 8.3.2019 had taken up the amendment

application which was filed on 22nd June, 2019 under Order VI Rule 17 of the Code filed by the opposite party/plaintiff along with petitioners' earlier application filed under order VII, Rule 11 and passed the order under challenge. Even apart from the direction the application filed under Order VII Rule 11 being the earlier petition, the court below ought to have disposed of the said application first. In **Abhay Agarwal Vs. Maina Devo Surana**, reported in **(2016) 2 CHN 663** a co-ordinate Bench of this court in a similar circumstance clearly held, when application under order VII, rule 11 was filed earlier than the Application filed under section order VI, Rule 17, it is needless to say that the petition which was filed earlier has to be disposed of first and thereafter the next petition, if pending be heard. When a vital issue has been raised in the petition under Order VII, Rule 11 of the Code, the duty of the court was to hear out the said application first and thereafter to proceed in accordance with law, so that the purpose of Justice be best served.

7. The court below did not bother to give reason as to why direction made by this court could not be complied within one month. In fact shameful failure to fulfil Trial Court's obligation in terms of this Court's order dated 8th March 2019, amounts to dereliction of duty in one hand and procedural impropriety on the other which , warrants this court to interfere, involving supervisory jurisdiction under Article 227 of the Constitution of India, in order to keep the court below within the limit of his authority and also in order to meet ends of justice.

8. Accordingly the order impugned dated 9th August, 2019 is hereby set aside. The court below is again directed to hear out defendant/petitioner's Application under order VII, rule 11 of the code positively within a period of one month from the date of communication of the order and thereafter to decide the fate of the application under Order VI Rule 17, if situation demands.

9. However it is made clear that I have not gone into the merit of either of the two Applications and the court below shall dispose of such application(s) without being influenced by any observation made herein.

10. C.O 3239 of 2019 is accordingly disposed of.

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

(AJAY KUMAR MUKHERJEE, J.)