

11.07.2023
Court No. 19
Item no.11
CP

C.O. No. 3949 of 2022

Supriya Basu & anr.

Vs.

Smt. Monika Sengupta & ors.

Mr. Tanmoy Mukherjee

Mr. Arindam Chandra

Mr. Tanmoy Sett

Ms. Antara Dey

...for the Petitioners.

Ms. Shohini Chakrabarty

Ms. Prajaaini Das

...for the opposite party no. 1.

The revisional application arises out of an order dated October 31, 2022, passed by the learned Civil Judge (Senior Division), 4th Court, Alipore, in Title Suit No. 227 of 2018. By the order impugned, the learned court below rejected an application under Order 7 Rule 11 of the Code of Civil Procedure. The defendant nos. 3 and 4 prayed for rejection of the plaint on the ground that the said defendants were practicing advocates, who were advising the parties with regard to the procedure for sale of the property in question. They did not have any other interest in the transaction, but acted in their professional capacity, with bona fide intention.

According to the said defendants, the Advocates Act, 1961 was a complete bar for continuation of the suit before the learned court below against the learned advocates who were

engaged by the parties. Reference has been made to Section 35, 44 and 48 of the Advocates Act, 1961 in this regard. Further grounds pleaded for rejection of the plaint was non-service of notice upon the Kolkata Municipal Corporation prior to institution of the suit although the Mayor was a defendant, misjoinder of causes of action, bar under the Specific Relief Act, etc.

Ms. Chakrabarty, learned advocate appearing on behalf of the plaintiff, submits that the plaint case was based on misrepresentation of facts by all the defendants including the defendant nos. 3 and 4. That the defendant nos. 3 and 4 were acting in collusion with the defendant nos. 1 and 2 during the entire course of the transaction and they had defrauded the plaintiff. The defendant nos. 3 and 4 asked the sons and daughter of the plaintiff to be the confirming parties to the agreement of sale. That the entire fraudulent transaction had taken place at the behest of not only the defendant nos. 1 and 2, but all the defendants. Hence such issues were to be decided at the trial on evidence and the plaint could not be dismissed against the defendants as a whole.

Heard the parties. The plaintiff prayed for a decree that the alleged deed of conveyance which was executed by the plaintiff, being misguided by the misrepresentation and fraud perpetuated by all the

defendants, be declared as cancelled and revoked. Further prayers for a decree of recovery of khas possession by evicting the defendant nos. 1 and 2, declaration that the defendants had obtained Rs.70 lakhs from the plaintiff wrongfully, and for damages against all the defendants jointly or severally to the tune of Rs.3 crore, had been made.

The learned court below rejected the said application on the ground that notice upon the Kolkata Municipal Corporation was not necessary in the facts of the case, as no major reliefs had been claimed against the Kolkata Municipal Corporation. With regard to the non-maintainability of the suit, the learned Court found that the allegation of non-existence of a privity of contract between the defendant nos. 3 and 4 and the plaintiff, would not be a ground for rejection of the plaint without trial on evidence. The cause of action pleaded were not barred and the suit could proceed. The other ground with regard to the defect in the framing of the suit was also rejected as the court did not find any defect in the suit at the relevant stage.

Having considered the contention of Mr. Mukherjee, learned advocate for the petitioners, this court is of the view that the plaint, read as a whole, indicates that the plaintiff alleged misrepresentation, fraud, cheating etc. against all the defendants jointly

and severally. The defendant nos. 3 and 4 were not being sued for their professional misconduct. The plaint case was not based on allegations of wrong advice of the learned advocates. The suit was not, simpliciter, based on allegations against the defendant Nos.3 and 4 as advocates alone. Allegations of collusion and concerted action with the defendant Nos.1 and 2 have been made.

The plaint case in a nutshell was that when the plaintiff wanted to sell the property, the defendant nos. 1 and 2 approached the plaintiff. The defendant nos. 1 and 2 introduced the plaintiff to the defendant nos. 3 and 4 who were learned Advocates. The plaintiff being a resident of UK, trusted the said defendants and entered into the transaction by executing a deed of conveyance. Thereafter, two cheques totalling to Rs.70 lakhs were issued by the defendant nos. 1 and 2 towards part consideration money. The cheques bounced. Rs.57 lakhs was allegedly deducted as TDS, but no certificate was issued. The defendants together, had acted in a collusive manner to deprive the plaintiff of the legitimate consideration money, which had been agreed upon. The entire work of preparing the deed, execution, registration etc. were done by the defendant Nos.3 and 4 to facilitate the ill intentions of the defendant Nos.1 and 2 and allegation of unjust

enrichment has been leveled against all. Hence, the suit was filed for a declaration that the deed of conveyance was null and void, for recovery of possession from the defendant nos. 1 and 2 and for damages against all the defendants, jointly or severally, as also for a decree of recovery of Rs.70 lakhs which was tendered by two cheques, which had bounced.

The plaint as a whole does not indicate that the sole allegation against the defendant nos. 3 and 4 was professional misconduct as contemplated under the Advocates Act. Moreover, the reliefs claimed, *prima facie*, are not covered by the Advocates Act. Section 35(3) of the Advocates Act enumerates the orders that may be passed while deciding a complaint with regard to conduct of advocates. Such disciplinary committee is not empowered to pass a decree for recovery of money or for payment of damages. Secondly, Section 43 and 48 of the Advocates Act cannot be pressed into service, at this stage. This court is of the *prima facie* view that the said sections do not deal with the reliefs claimed by the petitioners in the suit. Whether the defendant nos. 3 and 4 acted strictly in their professional capacity or whether the allegations against the defendant nos. 3 and 4 were severable, can be decided only at the trial on evidence. Reading the

plaint as a whole and assuming the averments to be correct, this court is of the view that this is not a case where the plaint should be rejected as a whole.

In the decision of ***Kamala and ors. v. K.T. Eshwara Sa and ors.***, reported in ***(2008) 12 SCC 661***, the Hon'ble Apex Court held as follows:-

“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.”

In this case, the prayer for rejection of the plaint was made on several grounds namely, non-disclosure to cause of action, consolidation or joinder of several causes of action, bar under Section 41(h) of the Specific Relief Act etc. All these issues are triable issues and the averments taken in the application for rejection of the plaint, cannot be looked into. Only the plaint and documents filed with the plaint must

be considered. The plaint discloses a cause of action against all the defendants.

The allegations are neither vexatious nor meritless. This is not a case of clever drafting which creates an illusion of a cause of action. Inconsistency in the averments is not sufficient ground for rejection of the plaint. Reference is made to the decision of **G. Nagaraj and Anr. vs, B.P. Mruthunjayanna and Ors.** decided in **Civil Appeal No.- 2737 of 2023.**

The Hon'ble Apex Court held as follows:-

“6. The law is well settled. For dealing with an application under Rule 11 of Order VII of CPC, only the averments made in the plaint and the documents produced along with the plaint are required to be seen. The defence of the defendants cannot be even looked into. When the ground pleaded for rejection of the plaint is the absence of cause of action, the Court has to examine the plaint and see whether any cause of action has been disclosed in the plaint.

7. A perusal of the judgments of the Trial Court and the High Court will show that the Courts have gone into the question of correctness of the averments made in the plaint by pointing out inconsistent statements made in the plaint. The Courts have referred to the earlier suits filed by the appellants and have come to the conclusion that the plaint does not disclose cause of action.

8. The learned counsel appearing for the second and third respondents vehemently submitted that on a plain reading of the plaint, it is crystal clear that cause of action is not disclosed. Therefore, we have perused the plaint. After having perused the plaint and in particular paragraphs 16 and 17, we find that the cause of action for filing the suit has been pleaded in some detail. It is pleaded how the first appellant acquired title to the property. The facts constituting alleged cause of action have been also incorporated in paragraph 17.

9. We are of the view that merely because there were some inconsistent averments in the plaint, that was not sufficient to come to a conclusion that the cause of action was not disclosed in the

plaint. The question was whether the plaint discloses cause of action. As observed earlier, the plaint does disclose cause of action. Whether the appellants will ultimately succeed or not is another matter.”

Moreover, the plaint cannot be rejected qua one or two defendants, but must be rejected as a whole. Hence such prayer was rightly rejected.

In the decision of ***Madhav Prasad Aggarwal & Anr. Vs. Axis Bank Ltd. & Anr.*** decided in Civil Appeal No.- (arising out of SLP (C) No.31579 of 2018), the Hon’ble Apex Court held as follows:-

“**11.** We do not deem it necessary to elaborate on all other arguments as we are inclined to accept the objection of the appellant(s) that the relief of rejection of plaint in exercise of powers under Order 7 Rule 11(d) of CPC cannot be pursued only in respect of one of the defendant(s). In other words, the plaint has to be rejected as a whole or not at all, in exercise of power Order 7 Rule 11 (d) of CPC. Indeed, the learned Single Judge rejected this objection raised by the appellant(s) by relying on the decision of the Division Bench of the same High Court. However, we find that the decision of this Court in the case of Sejal Glass Limited (supra) is directly on the point.

In that case, an application was filed by the defendant(s) under Order 7 Rule 11(d) of CPC stating that the plaint disclosed no cause of action. The civil court held that the plaint is to be bifurcated as it did not disclose any cause of action against the director's defendant(s) 2 to 4 therein. On that basis, the High Court had opined that the suit can continue against defendant No.1 company alone. The question considered by this Court was whether such a course is open to the civil court in exercise of powers under Order 7 Rule 11(d) of CPC.

The Court answered the said question in the negative by adverting to several decisions on the point which had consistently held that the plaint can either be rejected as a whole or not

at all. The Court held that it is not permissible to reject plaint qua any particular portion of a plaint including against some of the defendant(s) and continue the same against the others. In no uncertain terms the Court has held that if the plaint survives against certain defendant(s) and/or properties, Order 7 Rule 11(d) of CPC will have no application at all, and the suit as a whole must then proceed to trial.

12. In view of this settled legal position we may now turn to the nature of reliefs claimed by respondent No.1 in the notice of motion considered by the Single Judge in the first instance and then the Division Bench of the High Court of Bombay. The principal or singular substantive relief is to reject the plaint only qua the applicant/respondent No.1 herein. No more and no less.

13. Indubitably, the plaint can and must be rejected in exercise of powers under Order 7 Rule 11(d) of CPC on account of noncompliance of mandatory requirements or being replete with any institutional deficiency at the time of presentation of the plaint, ascribable to clauses (a) to (f) of Rule 11 of Order 7 of CPC. In other words, the plaint as presented must proceed as a whole or can be rejected as a whole but not in part. In that sense, the relief claimed by respondent No.1 in the notice of motion(s) which commended to the High Court, is clearly a jurisdictional error.”

The learned court below did not commit any material irregularity in passing the order impugned.

The order impugned is not interfered with.

The revisional application is dismissed.

However, the contention of the petitioners that they may be allowed to adduce the evidence on commission in view of the professional interest involved, this court grants liberty to the petitioners to approach the learned court below, with such prayer. If such prayer is made, the same shall be heard upon

allowing the plaintiff adequate opportunity to contest the same.

As it is informed that issues have already been framed, this court directs that in case the issue of maintainability of the suit against the defendant nos. 3 and 4 has not been separately framed, such issue shall be incorporated in the list of issues. The maintainability of the suit against the defendant nos. 3 and 4 who allegedly claim to have acted in their professional capacity, shall be decided as a separate issue, at the trial.

There shall be no order as to costs.

Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)