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IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.10 OF 2021

M/s Green Associates,
Through its Partner, Mr Wilfred Joao,
59 years of age,
Having his office at E-14/1,
Merces, Ilhas – Goa.

... Applicant.

Versus

Mr. Avito A. Fernandes,
R/o. H.no.118, Villa Goa,
Bhuttem Bhat, Merces,
Tiswadi, Goa.

... Respondent.

Ms Asha Desai, Advocate for the Applicant.

Mr Clayton Fonseca, Advocate for the Respondent.

CORAM: BHARAT P. DESHPANDE, J.

DATED: 21 September, 2023

JUDGMENT:

1. Admit.
2. Heard Ms Asha Desai for the Applicant and Mr Clayton Fonseca for the Respondent.
3. With consent of both the learned Counsel, the matter is taken up for final disposal at the admission stage itself.

4. The Applicant is challenging the impugned order dated 15.06.2021 passed below Exhibit 15 in Special Civil Suit No.50/2018 whereby an application filed under Order 7 Rule 11 (a) of CPC for dismissal of the counterclaim filed by the Respondent, was rejected by the Trial Court.

5. Ms Desai appearing for the Applicant/Plaintiff would submit that suit for recovery was filed against the Defendant on the basis of agreement executed between the parties for construction of bungalow. On receipt of suit summons, Defendant/Respondent appeared and filed written statement as well as counterclaim. The Respondent/Defendant in the said counterclaim raised the plea that the suit is vexatious and that by the filing of the said suit, the Defendant/Respondent suffered mental agony and thus, is entitled for compensation of ₹10,00,000/-.

6. Ms Desai would then submit that no cause of action accrued in favour of Defendant/Respondent to file such counterclaim only on the basis of receipt of legal notice or the suit summons. She would submit that the aspect as to whether the suit is vexatious will have to be decided by the Trial Court and only then the Defendant/Respondent herein would be entitled to claim compensation. She then submitted that the provisions of Section 35 (A) of CPC deals on different proposition and that could be one of the defences in the written statement for claiming compensation. If the defence is not satisfied with the compensation awarded under Section 35(A) of CPC, he is entitled to file separate suit but not along with the counterclaim.

7. Ms Desai would submit that the reasons disclosed in the impugned order are perverse and that the same needs to be interfered with.

8. Per contra, Mr Fonseca appearing for the Respondent would submit that in order to avoid multiplicity of proceedings, he raised the counterclaim as according to him, suit itself is vexatious and filed with intention to harass the Defendant. He claimed that the cause of action for filing of the counterclaim rose on receipt of legal notice as well as the suit summons.

9. The rival contentions fall for determination as under.

10. Applicant/Plaintiff filed the suit for recovery of money wherein it has been claimed that an agreement was executed between Plaintiff and Defendant with regard to construction of bungalow. However, since the Defendant failed to comply with such terms and conditions, Plaintiff is entitled to recover amount of ₹21,90,125/- together with interest.

11. On receipt of the suit summons, Defendant filed his written statement along with counterclaim. It is specific defence of the Defendant that the suit is vexatious and filed with an intention to harass the Defendant. Apart from raising the available defence, the counterclaim is raised against the Plaintiff wherein it is stated that the Plaintiff by bringing out present litigation is trying to settle the score with the Defendant's brother thereby causing severe inconvenience, hardships and mental stress to the Defendant. In para 25 of the counterclaim, it is claimed that cause of action arose on 26.12.2018 when the Defendant received notice/summons from the Court.

12. Plaintiff filed an application under Order 7 Rule 11 (a) and (b) of CPC wherein it is claimed that counterclaim is not maintainable for want of any cause of action. Defendant filed reply to such application.

13. Learned Trial Court after hearing both the parties observed that counterclaim is tenable as there is cause of action.

14. While arguing before this Court, Ms Desai raised only the aspect of want of cause of action in filing of the written statement and not in connection with valuation of the counterclaim. Therefore, the only challenge raised to the counterclaim is want of cause of action to file such claim. In this respect, Ms Desai placed reliance on the decision of *Bollepanda P Poonacha vs. K M Madappa*; (2008) 13 SCC 173.

15. The provisions of Order 8 Rule 6 (A) of CPC provide that the Defendant in a suit may in addition to his right to plead a setoff set up by way of counterclaim against the claim of Plaintiff, any right or claim in respect of cause of action accruing to the Defendant against the Plaintiff either before or after filing of the suit but before the Defendant has delivered his defence or before the time limit for delivering his defence has expired.

16. A plain reading of the provision would suggest that the Defendant must have a right or claim accrued in his favour against the Plaintiff either before or after filing of the suit but before delivery of the written statement. The words, “right” or “claim” appearing in Rule 6(A) of Order 8 CPC assumes importance. Such right or claim is directly connected to the cause of action in favour of the Defendant which is against the Plaintiff and accruing before or after filing of the suit but before delivering the written statement.

17. In this context, the counterclaim filed by the Respondents against the Applicant herein will have to be meaningfully considered.

18. It is the contention of the Defendant that the suit itself is vexatious and filed only to harass the Defendant. Therefore, the Defendant is entitled for compensation.

19. The Civil Court has to consider whether the claim raised by the Applicant/Plaintiff against Respondent/Defendant is maintainable i.e. for recovery of amount mentioned in the plaint. Secondly, the Civil Court has to consider and decide whether such suit filed by the Plaintiff is in fact vexatious or filed only with an intention to harass the Defendant. Only if the Civil Court comes to the conclusion that the suit is vexatious or filed only to harass the Defendant, the Defendant would be considered to have a cause of action against the Plaintiff for claiming of compensation. Such compensation would be considered in the light of any compensation awarded by the Court in this proceedings under Section 35 (A) of CPC. Both these provisions cannot be considered together. Section 35 (A) of CPC will have to be considered only if the Court comes to the conclusion that the suit is vexatious. Only then the Civil Court in the same proceedings is entitled to award compensation as provided in Sub-section (2). If the person in whose favour such compensation is awarded under Section 35 (A) considers that such compensation is inadequate and that he has suffered more, he is entitled to raise claim of compensation for the mental agony, vexatious litigation, etc. However, unless the Court comes to the conclusion that the suit filed by the Plaintiff is vexatious, the Defendant would not get any cause of action to file claim for compensation.

20. In *Bollepanda P Poonacha* (supra), Supreme Court while considering the provisions of Order 8 Rule 6 (A) CPC observed that such

counterclaim must be on a cause of action accruing to the Defendant either before or after filing of the suit but before raising a defence.

21. It is a settled proposition of law that there has to be a meaningful reading of the pleadings in order to find out whether cause of action mentioned in such pleadings is actual cause of action or illusory in nature. If it is found that the cause of action mentioned in the pleadings is not an actual cause of action accruing in favour of the concerned party, the Court is duty-bound to exercise its power under Order 7 Rule 11 (a) of CPC.

22. Learned Counsel for the Respondent relied upon the case of *Daya Ram and Ors vs. Ganesh Ra; AIR 2000 Raj 377*. In those proceedings, a suit for compensation was filed under Section 35 (A) of CPC wherein application under Order 7 Rule 11 CPC was moved for rejection of the plaint. In that context, the Rajasthan High Court observed that a separate suit for compensation is maintainable when the earlier suit is found to be vexatious. This judgment is totally on different context and will not help the Respondent in any manner.

23. The learned Trial Court has completely lost sight of the provisions of Order 7 Rule 11 (a) of CPC and the settled proposition that there has to be a cause of action in favour of Defendant and against the Plaintiff to raise such counterclaim. There is no discussion as to whether the cause of action mentioned in the counterclaim is illusory and not the actual cause of action.

24. As discussed earlier, the cause of action for the Defendant to raise claim for compensation would accrue only if the Court comes to the conclusion that the suit filed by the Plaintiff is vexatious. Only on receipt of legal notice or a suit summons for recovery of money, the Defendant cannot claim accrual of cause of action for raising claim of compensation on the ground of the suit being vexatious. At the most, Defendant can raise the defence that the suit is vexatious and he is entitled for compensation as per Section 35 (A) of CPC. Only if the Court comes to the conclusion after the evidence is led that the suit is vexatious and that the Defendant is not satisfied with the compensation awarded under Section 35 (A) of CPC, he is entitled to raise further claim. The compensation awarded under Section 35 (A) of CPC is required to be adjusted or to be taken into account in any subsequent suit for damages or compensation which is raised with respect to such claim or defence, as found in Sub-section (4) of Section 35 (A) of CPC.

25. The learned Trial Court is found confused with regard to the provisions of Section 35 (A) and Order 8 Rule 6 (A) of CPC and thus, the impugned order needs interference.

26. The Revision stands allowed. The impugned order is quashed and set aside. Application filed by the Plaintiff/Applicant vide Exhibit 15 under Order 7 Rule 11 (a) CPC for rejection of counterclaim stands allowed. Accordingly, the counterclaim raised by Respondent/Defendant stands rejected under Order 7 Rule 11 (a) CPC for want of any cause of action against the Plaintiff.

27. Proceedings stand disposed of accordingly.

BHARAT P. DESHPANDE, J.

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