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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 28th March, 2023

+ C.R.P. 77/2023

ASHOK KUMAR AND ANR Petitioners
Through: Mr. Aljo K. Joseph, Advocate

versus

SHIV SHANKAR Respondent
Through: None.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

C.M. APPL. 15187/2023 (exemption)

1. Allowed, subject to all just exceptions.
2. Application stands disposed of.

C.M. APPL. 15186/2023 (condonation of delay)

3. This is an application seeking condonation of delay of 85 days in filing the Revision Petition.
4. For the reasons stated in the application, the delay is condoned and the application stands disposed of.

C.R.P. 77/2023 & C.M. APPL. 15188/2023 (stay)

5. Present revision petition has been filed by the Petitioners assailing the impugned order dated 31.10.2022 passed by the Trial Court dismissing the application of the Petitioner filed under Order 7 Rule 11 CPC seeking rejection of the plaint. Petitioners No.1 and 2 herein are Defendants No.1 and 2 before the Trial Court and Respondent is the Plaintiff and parties are referred to hereinafter by their litigating status before the Trial Court.

6. Facts to the extent relevant for adjudication of the present

revision petition are that a suit was filed by the Plaintiff for recovery of proceeds of the Plaintiff's business along with damages, etc. In a nutshell, case of the Plaintiff is that he is a physically handicapped person with 40% disability in his right lower limb. Proprietor of M/s Meena Enterprises, namely, Shri Ashok Kumar Soni, transferred his rights and goodwill along with assets in the proprietorship firm to the Plaintiff through a document executed on 12.12.2013 and also handed over movable assets such as 30 water dispenser machines, 300 bottles and 2 carrier rickshaws with 1 Tata mobile handset to the Plaintiff. Plaintiff changed the name of the firm to M/s Shiv Shankar & Sons and Defendant No.1 who is the son of Defendant No.2 started working with him as a helper/servant.

7. As per Plaintiff's case, the business was continued further under a Partnership Firm by the name of Shiv Shankar Subodh & Co. in partnership with Shri Subodh Sahani and a Partnership Deed was executed. However, the Firm was dissolved in November, 2014 and Defendant No.1 witnessed the Retirement Deed. In order to find a permanent solution for a regular income, on 10.03.2017 an Agreement was entered into between the Plaintiff and Shri Gulshan Kumar, who had worked with the proprietor of M/s Meena Enterprises, whereby Plaintiff agreed to hand over the business and all assets to him on 01.04.2017.

8. It is further stated in the plaint that on 01.04.2017 when the Plaintiff reached the premises, where he was carrying on business, to hand over the assets to Shri Gulshan Kumar, Defendant No.1 namely Shri Ashok Kumar Giri, refused to give the key of the godown as well as other things such as bottles, etc. stocked therein. This led to an altercation where Defendants No.1 and 2 started threatening the Plaintiff and a written complaint was filed thereafter by the Plaintiff at

Police Station Kalkaji. Due to the illegal possession of all the movable assets of the business of the Plaintiff, he was compelled to file the present suit seeking recovery and permanent injunction, etc.

9. Upon being served with summons, Defendants filed a written statement and also filed an application under Order 7 Rule 11 CPC for rejection of the plaint. The Trial Court, by the impugned order, dismissed the application leading to filing of the present petition.

10. It is the case of the Defendants in the application under Order 7 Rule 11 CPC that the foundation of the suit filed by the Plaintiff is an Agreement dated 12.12.2013 for sale of rights and goodwill of the Proprietorship Firm, executed between one Mr. Ashok Kumar Soni and the Plaintiff whereby Mr. Soni transferred his Firm to the Plaintiff for consideration of Rs.1,90,000/-, paid in cash. As per the agreement, Mr. Soni also transferred the goodwill of the firm along with the assets and liabilities. The entire foundation of the suit, according to the Defendants, is against the settled position of law that proprietorship has no independent legal entity and the proprietor and Proprietorship Firm are inalienable from each other. All assets, goodwill, etc. belongs exclusively to the proprietor and therefore, sale and purchase of the Proprietorship Firm or its goodwill, assets and liabilities does not arise. Moreover, the property, which is in possession of the Plaintiff and from where he runs his business, is a public premises and this Court has directed the DDA and other Statutory Authorities to carry out a drive for removal of unauthorized encroachments. No site plan or any other document is filed by the Plaintiff to show how he acquired title to the public premises and therefore, the whole story of carrying on business at the said premises, after purchasing the Proprietorship Firm, is false and fabricated.

11. Plaintiff has also sought recovery of possession of 30 water

dispenser machines, 300 bottles and 1 Tata mobile handset, etc. but has failed to provide necessary details regarding mode and manner of transfer or the shapes, sizes, models, etc. of the said articles or even the documents/bills indicating the prices at which they were purchased by the Plaintiff. Plaintiff relies on an Agreement dated 10.03.2017 executed between him and one Shri Gulshan Kumar which is in the nature of a lease document, leasing out the premises for 11 months at the rate of Rs.21,000/- per month, which even if true, is wholly illegal as he does not have the right to sell premises which is a public premises and is not owned by him. In a nutshell, the argument was that the plaint discloses no cause of action and the reliefs sought in the suit are barred by law.

12. Reply was filed to the application by the Plaintiff who denied the averments and the allegations made in the application by the Defendants. The application was opposed on the ground that at the stage of deciding an application under Order 7 Rule 11 CPC, Court is only required to examine the plaint and see if it merits rejection and cannot enter into examination of disputed facts and/or defence raised by the Defendants in the written statement. It was denied that the plaint did not disclose a cause of action or that the Proprietorship Firm was not transferred to the Plaintiff. Plaintiff also denied that he was carrying on business on public premises, which is impermissible in law. Insofar as the movable assets such as water dispensers, etc. were concerned, Plaintiff stated that details with respect to the mode and manner of transfer, purchase prices, shapes and models of the articles, etc. are a matter of evidence and on this ground alone, the plaint cannot be rejected.

13. The learned Trial Court rejected the application on the grounds:
(a) plaint discloses that Plaintiff has purchased the business of Sole

Proprietorship Firm and there is reference to an Agreement executed on 12.12.2013 and therefore, it cannot be said that no cause of action is disclosed by the Plaintiff and whether or not the business could be legally purchased, would be a matter of trial; (b) Plaintiff has filed a list of documents executed between him and one Gulshan Kumar leasing the premises being basement near Madan House, Nehru Place, Delhi and the legality of the document can only be decided at the appropriate stage and plaint cannot be rejected at the threshold; and (c) the details of the movable assets i.e. water dispenser machines, bottles, mobile handset can be furnished at a subsequent stage and parties can be given a chance to prove their respective case by leading evidence, but lack of details cannot be a ground to allow the application.

14. Learned counsel for the Petitioners contends that the impugned order is passed on conjectures and surmises. The plaint is founded on an Agreement to Sell/transfer the rights and goodwill in a Proprietorship Firm, which is impermissible in law as a proprietor and Proprietorship Firm are inalienable from each other and therefore, the suit is barred by law. Plaintiff has not furnished any details with regard to the alleged movable assets and neither have any bills or documents annexed showing their purchase by the Plaintiff and therefore, his title to the said assets. Trial Court failed to appreciate that Plaintiff alleges to have leased out the premises in question, however, the premises are public premises, to which an individual has no right of ownership or sale. This Court, in writ petition being W.P.(C) 8430/2021, has directed the Government of NCT of Delhi to remove all encroachments in the Nehru Place market and there is no reason why the Plaintiff should continue in the garb of having filed a suit before the Trial Court. Therefore, according to the learned

counsel, the plaint ought to have been rejected by the Trial Court as disclosing no cause of action, being time barred and an abuse of process of law.

15. I have heard the learned counsel for the Petitioners and examined the contentions raised impugning the order passed by the Trial Court.

16. Law with regard to adjudication of an application under Order 7 Rule 11 CPC is no longer *res integra*. It is settled that Court has to examine only the plaint on a mere demurer and the documents annexed thereto and cannot delve into the defence set up by the Defendant or disputed questions of fact at this stage. The expression 'cause of action' has been explained by the Supreme Court in ***Rajasthan High Court Advocates' Association v. Union of India & Ors., (2001) 2 SCC 294***, as follows:-

"17. The expression "cause of action" has acquired a judicially-settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously the expression means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove each fact, comprises in "cause of action". It has to be left to be determined in each individual case as to where the cause of action arises. The Chief Justice of the High Court has not been conferred with the legislative competence to define cause of action or to declare where it would be deemed to have arisen so as to lay down artificial or deeming test for determining territorial jurisdiction over an individual case or class of cases. The permanent Bench at Jaipur has been established by the Presidential Order issued under sub-section (2) of Section 51 of the Act. The territorial jurisdiction of the permanent Bench at Jaipur is to be exercised in respect of the cases arising in the specified districts. Whether the case arises from one of the specified districts or not so as to determine the jurisdictional competence to hear by reference to territory bifurcated between the principal seat and the Bench seat, shall be an issue to be decided in an individual case by the Judge or Judges hearing the matter if a question may arise in that regard. The

impugned explanation appended to the order of the Chief Justice dated 23-12-1976 runs counter to the Presidential Order and in a sense it is an inroad into the jurisdiction of the Judges hearing a particular case or cases, pre-empting a decision to be given in the facts of individual case whether it can be said to have arisen in the territory of a particular district. The High Court is right in taking the view which it has done."

17. In **Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success I and Another**, (2004) 9 SCC 512, the Supreme Court held as under:

"139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed."

18. In **Snowwhite Apparels Ltd. v. K.S.A. Technopak (I) Ltd.**, 2005 SCC OnLine Del 479, this Court has observed that rejection of a Plaint is a serious matter as it non-suits the Plaintiff and kills the cause for good. Therefore, a plaint should not be rejected cursorily without satisfying the requirements of provisions of Order 7 Rule 11 CPC.

19. Having carefully perused the plaint, which is on record, this Court cannot agree with the Defendants that the plaint does not disclose a cause of action. Plaintiff has averred at more than one place that initially, through an Agreement executed on 12.12.2013, Shri Ashok Kumar Soni, earlier employer of Defendant No.1 had sold his Proprietorship Firm with its goodwill, assets and liabilities to the Plaintiff and Defendant No.1 continued working with him as his servant. The name of the firm was changed to M/s Shiv Shankar & Sons from M/s Meena Enterprises. Subsequently, Plaintiff entered into a partnership with one Subodh Sahani but the partnership was later on dissolved. It is further averred that Defendant No.1 started misguiding the customers of the Plaintiff and interfering in his business which caused financial loss to the Plaintiff.

20. It is stated that in order to ensure a regular income, Plaintiff agreed to transfer his business along with assets to Shri Gulshan Kumar and executed an Agreement to this effect on 10.03.2017. However, before the relationship could take off, Defendants started harassing the Plaintiff and interfered and obstructed by refusing to give the key of the basement as well as other movable assets such as water dispensers, etc. in their symbolic possession. Since Defendants had illegally grabbed the assets of the Plaintiff, he also lodged a police complaint at Police Station Kalkaji and the matter is pending in the Court.

21. As to the lease of the premises from which the Plaintiff is carrying out his business is concerned, it is noticed from the plaint that there is no averment for claiming possession of the premises and there is only a passing reference that the Defendants have refused to hand over the key of the godown on 01.04.2017 when the Plaintiff reached the premises to hand over the assets to Shri Gulshan Kumar. The suit is for seeking possession of the movable assets and not the premises on which the business is run. In fact, the Plaintiff has not made any averment with respect to the premises/godown and nor is there a relief for handing over possession. It is also averred by the Plaintiff that the cause of action arose on 01.04.2017 when the Defendants wanted to forcibly take over the business of the Plaintiff and Plaintiff apprehended that Defendants may create third party rights by selling the movable assets. Since the issue of leasing out the premises in question was raised by the Defendants in the application under Order 7 Rule 11 CPC for the first time *albeit* this is not the claim of the Plaintiff, he has denied in the reply to the application that the said Premises is a public premises and that he is in lawful ownership of the same. Therefore, it cannot be said that the plaint discloses no cause of

action.

22. Trial Court, in my view, has rightly held that the details of the movable assets such as the water dispensers, mobile handset, etc. pertaining to their prices, shapes, sizes, etc. would be a matter of evidence as also the legality of the business run by the Plaintiff in the basement. Insofar as the legal issue raised by the Defendants that the plaint is barred by law being founded on transfer of business to the Plaintiff by a Proprietorship Firm by the Defendants is concerned, in my *prima facie* view, the same merits rejection. There is no law which bars the selling/transfer of the business conducted by a Sole Proprietorship Firm and none has been shown by the counsel for the Defendants. On the contrary, law permits a sole Proprietorship Firm to be transferred by the owner although it is true that there is no legal distinction between a sole Proprietorship and its owner and he owns the business assets the same way he owns his personal assets. Whether or not the business of the sole Proprietorship was transferred to the Plaintiff in 2013, would be a matter for trial and the respective parties would be entitled to lead evidence to prove and establish their stands. This, however, cannot be a ground, as rightly observed by the Trial Court, for rejection of the plaint under Order 7 Rule 11 CPC, at the threshold.

23. As far as the argument that there are directions of this Court in a writ petition directing the Government of NCT of Delhi for removal of encroachments at Nehru Place is concerned, the said issue was admittedly never raised in the application and cannot be entertained at this stage. Moreover, the Plaintiff, as aforementioned, is not seeking possession of the premises but of the business and movable assets and therefore, in any case, this argument does not aid the Defendants, as this is not the subject matter of the suit.

24. For all the aforesaid reasons, the Revision Petition is dismissed, along with the pending application, being devoid of merit.

JYOTI SINGH, J

MARCH 28, 2023/kks

