



2023:DHC:9454



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

% **Date of order :15th December, 2023**

+ **C.R.P. 356/2023, CM APPL. Nos. 62196/2023, 62197/2023 & 62198/2023.**

SWARAN MARWAH & ANR. Petitioners

Through: **Mr.K.P.Mavi, Advocate**

versus

RENU KUMARI Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The petitioner vide the present petition under Section 115 of the Code of Civil Procedure, 1908 (hereinafter "CPC"), seeks the following reliefs:

"(a) Set aside the impugned order dated 03/08/2023 passed in CS No. 397 of 2020 by Shri Navjeet Budhiraja, Additional District Judge-03 South East, Saket Court, New Delhi;

(b) Dismiss the CS No. 397 of 2020 pending before Shri Navjeet Budhiraja, Additional District Judge-03 South East, Saket Court, New Delhi;

(c) Or pass any other or further order as may be deemed fit and proper in fact and circumstances of the case."

2. The facts relevant for the adjudication of the instant petition are reproduced hereunder:

a) On 12th February, 1991 the petitioners purchased the second floor



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alongwith terrace of property bearing no. C-264, Defence Colony, New Delhi-110024 (hereinafter “suit property”) from Group Captain Ved Kumar i.e., late father of the respondent.

- b) Subsequently, upon receiving the sale consideration, Group Captain Ved Kumar executed an agreement to sell, general power of attorney, indemnity bond and will.
- c) Thereafter, on 25th May, 2000, the father of the respondent filed a Civil Suit bearing no. 30/2005 before the Additional District Judge, Tis Hazari Court for declaration, mandatory and permanent injunction against the petitioners, thereby, praying for declaring that the petitioners are merely users of the terrace of the second floor of the suit property and further prayed that the petitioners may be directed to remove the partition in the main staircase and remove the lock on the door and passage of the terrace of the suit property.
- d) The aforesaid suit was dismissed vide order dated 17th February, 2006 and pursuant to the same, the father of the respondent filed RFA No. 300 of 2006 before this Court which was dismissed vide order dated 19th September, 2008. By way of the said order, the Division Bench of this Court modified the order dated 17th February, 2006, thereby, directing the petitioners to get an executed deed of rectification recording restricted terms of interest created in their favour *qua* the terrace which has been omitted from the original sale deed.
- e) Further, the petitioners executed the rectification deed on 29th October, 2010 of the sale deed dated 18th June, 1998 in terms of the



judgement passed in RFA No. 300/2006.

- f) Subsequently, on the basis of the complaint filed by the respondent, the Municipal Corporation of Delhi ('MCD') passed an order dated 31st October, 2018, regarding unauthorised construction in respect of the ground, first, second and third floor of the suit property.
 - g) The petitioners challenged the aforesaid order before the MCD Tribunal in order to obtain a stay on the same.
 - h) Thereafter, the respondent filed suit bearing CS No. 397/2020 before the District Judge, South East, Saket Court, New Delhi, thereby seeking to remove all illegal construction from the terrace of the second floor of the suit property.
 - i) Further, the petitioners filed an application under Order VII Rule 11 of the CPC praying for rejection of the suit on the ground that the relief sought by the respondent herein, is squarely covered by the judgement dated 19th September, 2008, passed in RFA No. 300/2006.
 - j) The aforesaid application was dismissed vide order dated 3rd August, 2023 on the ground that in cases wherein multiple remedies are available to enforce its rights the party may resort to are all or either of the remedies.
 - k) Aggrieved by the order dated 3rd August, 2023, the petitioners have preferred the instant revision petition.
3. Learned counsel appearing on behalf of the petitioner submitted that the learned Trial Court committed a serious error by overlooking the judgment passed by the Division Bench of this Court vide order dated 19th



September, 2008 passed in RFA 300/2006.

4. It is submitted that the learned Trial Court has failed to take into account the averments made in the written statement.

5. It is submitted that in the aforesaid judgement, the Division Bench of this Court held that the petitioners could not raise any construction and the father of the respondent shall have the right to use the terrace, but only in respect of maintenance of water tank and antenna.

6. It is submitted that the remedy for alleged unauthorized construction is Contempt of Court against the petitioners and the same relief cannot be granted since it has already been adjudicated by the Division Bench of this Court.

7. It is submitted that the respondent has approached the MCD and demolition orders dated 31st October, 2018 have been passed in respect of the alleged unauthorized construction at the suit property, however, the said orders are have been challenged by the petitioners and are pending before the MCD Tribunal Tis Hazari Court, Delhi and hence, Civil Court jurisdiction is barred under section 347 (E) of the MCD Act.

8. Therefore, the respondent has wrongly instituted the suit since, the remedy lies before the MCD Tribunal and not before the Civil Court.

9. In view of the foregoing submissions, it is prayed that the instant petition may be allowed and the reliefs as prayed for are granted.

10. Heard the parties and perused the record.

11. It is the case of the petitioners that the learned Trial Court, vide order dated 3rd August, 2023 dismissed their application under Order VII rule 11 of



the CPC. It is contended that the plaint was liable to be rejected on the ground that the issues raised in the present suit have already been decided by the Division Bench of this Court vide judgment dated 19th September, 2008 and is therefore barred by the principle of *res judicata*. Aggrieved by the dismissal of the application under Order VII Rule 11, the petitioners have approached this Court under its revisional jurisdiction.

12. At this juncture, it is apposite for this Court to analyse the impugned order dated 3rd August, 2023. The relevant portion of the same has been reproduced herein:

“...3. The legal position in regard to the application under Order 7 Rule 11 CPC is well settled that the Court is to confine itself only to the averments made in the plaint, without according any consideration to the written statement. The first paragraph of the application is itself indication of the fact that the applicants/defendants, in support of their stand, seek to refer to the written statement to substantiate how the principle of res judicata applies to the present case. The written statement certainly cannot be read while deciding the present application

4. Reverting to the plaint now, the plaintiff has herself referred to the previous litigation between the parties, which was decided by the High Court vide judgment dated 19.09.2008 with following directions:

- Parties shall execute & register rectification deed to the sale deed dated 18.06.1998;*
- The defendants shall not claim any right to construct on the terrace of the Second Floor;*
- Defendants shall not claim full ownership rights in the terrace of the Second Floor;*
- The defendants for the use and security may take over the charge of the Second Floor Terrace (Roof);*



- *The plaintiff's father is permitted to use the terrace for looking after the water tank and antenna.*

5. *It is submitted that pursuant to the aforesaid judgment, the defendants and plaintiff's father executed the rectification deed, which was duly registered in the office of Sub Registrar, New Delhi on 29.10.2010. It is further canvassed in the plaint that thereafter plaintiff's father died on 15.01.2015 and the defendants in 2018 raised unauthorized and illegal construction on the 2nd floor and also raised further construction on the terrace of the 2nd floor i.e. 3rd floor, without obtaining the sanction of building plan, and breached and violated the assurance given by the defendants to the High Court of Delhi. The SDMC issued a demolition order against the said unauthorized and illegal construction vide order dated 31.10.2018, which was challenged by defendant no.1 in the appellate tribunal, which is still sub judice therein.*

6. *The aforesaid contentions, in my opinion, would constitute a fresh cause of action in favor of the plaintiff, and the present plaint cannot be rejected on the premise that the plaintiff may avail the remedy of contempt of the order of High Court of Delhi, if the defendants have committed any transgression. It is also a settled legal proposition that multiple remedies are available to enforce its rights, the party may resort to are all or either of the remedies.*

7. *Thus, in the face of the aforesaid discussion, I do not find merit in the present application, which stands dismissed."*

13. By way of the aforesaid impugned order, the learned Trial Court held that the petitioners executed a rectification deed dated 29th October, 2010 and in the year 2018, the petitioners made new construction at the suit property, without obtaining sanction plans for the said construction, which raised a fresh cause of action and in lieu of the same, the plaint cannot be rejected as under Order VII Rule 11 of the CPC. Moreover, it has been held



that in their application under the said provision, the petitioners have referred to averments made in the written statement, however, the said provision limits the Courts to the averments made only in the plaint.

14. It is a settled principle of law that the provision under Order VII Rule 11 of the CPC, provides for rejection of a plaint, and the scope of judicial inquiry in an application under the said rule is limited to examining the averments made in the plaint. The Court has the authority to dismiss the plaint for lack of cause of action, if the relief sought is undervalued or the valuation is not corrected within the time period set by the Court; or if insufficient court fees is paid or the additional court fees are not provided within the time period set by the Court; or if the plaint alleges that the suit is barred by the provisions of any statute. It is under these circumstances that the Court may consider rejection of a plaint.

15. The Hon'ble Supreme Court has analysed the principles governing Order VII Rule 11 of the CPC. In case titled ***Srihari Hanumandas Totala v. Hemant Vithal Kamat***, (2021) 9 SCC 99, the Hon'ble Supreme Court observed the following:

“18. Section 11 CPC enunciates the rule of res judicata : a court shall not try any suit or issue in which the matter that is directly in issue has been directly or indirectly heard and decided in a “former suit”. Therefore, for the purpose of adjudicating on the issue of res judicata it is necessary that the same issue (that is raised in the suit) has been adjudicated in the former suit. It is necessary that we refer to the exercise taken up by this Court while adjudicating on res judicata, before referring to res judicata as a ground for rejection of the plaint under Order 7 Rule 11. R.C. Lahoti, J. (as the learned



Chief Justice then was), speaking for a two-Judge Bench in *V. Rajeshwari v. T.C. Saravanabava* [V. *Rajeshwari v. T.C. Saravanabava*, (2004) 1 SCC 551] discussed the plea of *res judicata* and the particulars that would be required to prove the plea. The Court held that it is necessary to refer to the copies of the pleadings, issues and the judgment of the “former suit” while adjudicating on the plea of *res judicata* : (SCC pp. 556-57, paras 11 & 13)

“11. The rule of *res judicata* does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of judgment in previous suit is filed in proof of plea of *res judicata* and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in *Mohd. Salie Labbai v. Mohd. Hanifa* [*Mohd. Salie Labbai v. Mohd. Hanifa*, (1976) 4 SCC 780] the basic method to decide the question of *res judicata* is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as *res judicata*. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in *Gurbux Singh v. Bhooralal* [*Gurbux Singh v. Bhooralal*, AIR 1964 SC 1810 : (1964) 7 SCR 831] placing on a par the plea of *res judicata* and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plea in the previous suit



which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore v. Secy. of State for India in Council [Kali Krishna Tagore v. Secy. of State for India in Council, 1888 SCC OnLine PC 17 : (1887-88) 15 IA 186 : ILR (1889) 16 Cal 173] pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.”

(emphasis supplied)

19. At this stage, it would be necessary to refer to the decisions that particularly deal with the question whether res judicata can be the basis or ground for rejection of the plaint. In Kamala v. K.T. Eshwara Sa [Kamala v. K.T. Eshwara Sa, (2008) 12 SCC 661] , the trial Judge had allowed an application for rejection of the plaint in a suit for partition and this was affirmed by the High Court. S.B. Sinha, J. speaking for the two-Judge Bench examined the ambit of Order 7 Rule 11(d) CPC and observed : (SCC 668-69, paras 21-22)

“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.”

(emphasis supplied)

20. The Court further held : (Kamala case [Kamala v. K.T. Eshwara Sa, (2008) 12 SCC 661] , SCC p. 669, paras 23-25)

“23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event,



the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained.”
(emphasis supplied)

21. The above view has been consistently followed in a line of decisions of this Court. In *Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust* [Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust, (2012) 8 SCC 706 : (2012) 4 SCC (Civ) 612] , P. Sathasivam, J. (as the learned Chief Justice then was), speaking for a two-Judge Bench, observed that : (SCC pp. 713-14, paras 10-11)

“10. ... It is clear from the above that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the court, insufficiently stamped and not rectified within the time fixed by the court, barred by any law, failed to enclose the required copies and the plaintiff fails to comply with the provisions of Rule 9, the court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order 7 Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial.

11. This position was explained by this Court in *Saleem Bhai v. State of Maharashtra* [Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557] , in which, while considering Order 7 Rule 11 of the Code, it was held as under : (SCC p. 560, para 9)

‘9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint.



The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court.'

It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the court to scrutinise the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in Raptakos Brett & Co. Ltd. v. Ganesh Property [Raptakos Brett & Co. Ltd. v. Ganesh Property, (1998) 7 SCC 184] and Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express [Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express, (2006) 3 SCC 100] .”

22. Similarly, in Soumitra Kumar Sen [Soumitra Kumar Sen v. Shyamal Kumar Sen, (2018) 5 SCC 644 : (2018) 3 SCC (Civ) 329] , an application was moved under Order 7 Rule 11 CPC claiming rejection of the plaint on the ground that the suit was barred by res judicata. The trial Judge dismissed the application and the judgment of the trial court was affirmed in revision by the High Court. A.K. Sikri, J., while affirming the



judgment of the High Court held : (Soumitra Kumar Sen case [Soumitra Kumar Sen v. Shyamal Kumar Sen, (2018) 5 SCC 644 : (2018) 3 SCC (Civ) 329] , SCC p. 649, para 9)

“9. In the first instance, it can be seen that insofar as relief of permanent and mandatory injunction is concerned that is based on a different cause of action. At the same time that kind of relief can be considered by the trial court only if the plaintiff is able to establish his locus standi to bring such a suit. If the averments made by the appellant in their written statement are correct, such a suit may not be maintainable inasmuch as, as per the appellant it has already been decided in the previous two suits that Respondent 1-plaintiff retired from the partnership firm much earlier, after taking his share and it is the appellant (or appellant and Respondent 2) who are entitled to manage the affairs of M/s Sen Industries. However, at this stage, as rightly pointed out by the High Court, the defence in the written statement cannot be gone into. One has to only look into the plaint for the purpose of deciding application under Order 7 Rule 11 CPC. It is possible that in a cleverly drafted plaint, the plaintiff has not given the details about Suit No. 268 of 2008 which has been decided against him. He has totally omitted to mention about Suit No. 103 of 1995, the judgment wherein has attained finality. In that sense, the plaintiff-Respondent 1 may be guilty of suppression and concealment, if the averments made by the appellant are ultimately found to be correct. However, as per the established principles of law, such a defence projected in the written statement cannot be looked into while deciding application under Order 7 Rule 11 CPC.”

(emphasis supplied)

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25. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarised as follows:



25.1. *To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to.*

25.2. *The defence made by the defendant in the suit must not be considered while deciding the merits of the application.*

25.3. *To determine whether a suit is barred by res judicata, it is necessary that (i) the “previous suit” is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit.*

25.4. *Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the “previous suit”, such a plea will be beyond the scope of Order 7 Rule 11(d), where only the statements in the plaint will have to be perused.”*

16. The aforesaid judgement makes it abundantly clear that the plaint may only be rejected as per the principle of *res judicata* wherein the cause of action is identical with the one decided previously by the Court. It is crystal clear that in order to reject the plaint under the said provision, the Court cannot go beyond the averments made in the plaint.

17. In the instant case, the petitioners have referred to the averments made in the written statement in paragraph 1 of their application under Order VII Rule 11, to establish their case as under the said provision. It is a settled law that the Courts cannot go beyond the averments made in the plaint and moreover, the issues in the present suit and the previous suit are required to be identical.



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18. In the instant revision petition, the petitioners have made fresh construction at the suit property, giving rise to a fresh cause of action and thus, it differs from the one decided by the Division Bench of this Court in RFA 300/006. Since the cause of action is afresh and there are no material averments in the plaint, this Court is not inclined to interfere with the impugned order.

19. In view of the aforesaid facts and scenarios, this Courts finds no reason to interfere with the order dated 3rd August, 2023 passed in civil suit bearing CS No. 397 of 2020 by Shri Navjeet Budhiraja, Additional District Judge-03 South East, Saket Court, New Delhi.

20. Accordingly, the instant petition stands dismissed.

21. Pending applications, if any, also stand dismissed.

22. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

DECEMBER 15, 2023

SV/DS/DB

Click here to check corrigendum, if any