

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 871 of 2016

**N.S.T. Housing Development Pvt. Ltd. & Anr.
Vs.
ICICI Bank Ltd. & Ors.**

For the petitioners : Mr. Shyamal Chakraborty
Mr. Debajyoti Mondal
Ms. Anjana Das

For the opposite party No. 3 : Mr. Sakya Sen
Mr. Manas Das

Heard on : 31.01.2024

Judgment on : 27.02.2024

Ajoy Kumar Mukherjee, J.

1. This application has been directed aggrieved against the order dated 5th February, 2016 passed by the learned Civil Judge (Junior Division) Burdwan in T.S. 101 of 2015. By the order impugned learned Court below rejected defendants application under Order VII Rule 11 of the Code of Civil Procedure (hereinafter called as 'Code') seeking rejection of plaint.

2. Plaintiff of the aforesaid suit Rajab Ali participated before the Debt Recovery Officer in connection with O.A. No. 94 of 2012 dated 22.09.2014 in auction and offered a sum of Rs. 2.90 crores for purchasing the suit

property in connection with a proceeding initiated by the ICICI Bank against secured debtor Sk. Abdul Sabir.

3. The petitioner herein i.e. NST Housing Development Private Limited who is defendant no. 2 in the said suit also participated in the said auction and offered a sum of Rs. 2.30 cores to purchase the said property and such offer was made on 22.09.2014. In the said proceeding the plaintiff of the aforesaid suit Rajab Ali was the most successful bidder but he could not pay the earnest money and for which the petitioner herein being the next bidder was declared as a successful bidder and the sale of the said property was made in favour of the present petitioner. Thereafter, Receiver was appointed before the Debt Recovery Officer and as per the order of the Tribunal, deed of sale was executed in favour of the petitioner vide sale certificate dated 18th March, 2015.

4. Thereafter, defendant no.1, Sk. Sabir who was the secured debtor preferred appeal before Debt Recovery Appellate Tribunal but the appeal was dismissed being Appeal No. 3 of 2014, vide order dated 28.11.2014. The delivery of possession has been made in favour of the present petitioner by the Receiver and the petitioner herein accepted physical possession of the suit property vide letter dated 13.12.2014.

5. It is submitted on behalf of the petitioner that the suit property was originally a '*Shali*' land but after purchase the petitioner converted the said '*Shali*' land to '*Bastu*' land and made the property fit for construction.

6. However, aforesaid Rajab Ali who became unsuccessful in the tender process filed aforesaid suit being T.S. No. 101 of 2015 showing valuation of the suit property at Rs. 99. In the plaint Rajab Ali alleged that 10-12 years

back he started different types of small business over the suit property and in the year 2007, the owner of the suit property, who is the secured debtor before the bank, namely Abdul Sabir leased out the suit property at an annual rent of Rs. 1,44,000/-. Subsequently, in the month of June, 2010 plaintiff requested Sk. Abdul Sabir Ali to sell out the suit property at a rate of Rs. 6,00,000/- per 'cotta' and total price was fixed at an amount of Rs. 4.32 crores by dint of an initial oral agreement which was subsequently reduced into a written agreement dated 21.12.2012. In the said suit aforesaid plaintiff prayed for permanent injunction along with a declaration that plaintiff is entitled to get the suit property enforcing aforesaid 'agreement for sale' dated 21.11.2012.

7. During pendency of the said suit, the petitioner herein as defendant filed an application under Order VII Rule 11 of the Code on the ground that the aforesaid Title Suit No. 101 of 2015 is barred by law and as such plaint is liable to be rejected under Order VII Rule 11 (d) of the Code. However, learned Court below by the impugned order observed that she appreciates the grievances made by defendant/company that plaintiff has suppressed the material truth in his plaint but while considering an application under Order VII Rule 11, the Court is not supposed to consider the averments made in the written statement and she is to confine herself with the averments made in the plaint. Considering only the averments made in the plaint, the Court below ultimately rejected defendants application under Order VII Rule 11 of the Code.

8. Being aggrieved by the said order Mr. Shyamal Chakraborty, learned Counsel appearing on behalf of the petitioner submits that it is evident that

the plaintiff is not in possession of the suit property and the petitioner had accepted the possession from the Receiver and is in possession of the same but the plaintiff of the suit has not prayed for recovery of possession. He further submits that the deed of sale has been made as per the order of the Tribunal in favour of the present petitioner in connection with a proceeding under the SARFAESI Act and title of the suit property has been vested in favour of the petitioner, therefore any suit seeking specific performance is barred under Section 18 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993.

9. Mr. Chakraborty further submits that the plaintiff alleged that agreement for purchase was made on oral basis in the year of 2010 and in writing on 21.12.2012 but he did not make any whisper about such agreement when auction took place nor challenged the sale before Debt Recovery Tribunal. In fact present plaintiff who was given chance to purchase the suit property as an highest bidder at a price of Rs. 2.90 crores but failed to purchase the suit property at the said price of Rs. 2.90 crores in September, 2014, how he was agreed to purchase the same suit property by dint of an alleged agreement in the year 2010 at a price of 4.32 crores. He further submits that the present suit has been filed after sale is completed in favour of petitioner and on issuance of certificate on execution of deed in his favour. He further submits that the consideration price of the suit property is shown as Rs. 4.32 crores but he valued the suit property at Rs.99/- only and filed the suit before the Civil Judge (Junior Division), which Court has no jurisdiction to try such suit. Accordingly, he submits that the suit is not only barred under Section 34 of the Specific Relief Act for

not making consequential relief for recovery of possession but also the suit is barred under Order II Rule 2 of the Code since all the reliefs had not been prayed for.

10. Mr. Chakraborty further submits that the suit is also barred by the law of limitation since the agreement for sale was allegedly made in the year 2010 and suit has been filed in 2015 i.e. after the expiry of period of limitation. He also submits that the present suit is vexatious and illusory cause of action of the suit has been created by clever drafting. In fact suit does not disclose any cause of action and as such plaint is also liable to be rejected under Order VII Rule 11 (a) of the Code. He further submits that in the instant case plaintiff has also not prayed for cancellation of the deed of defendant/petitioner and for which the plaint filed by the plaintiff is also not maintainable. Accordingly, Mr. Chakraborty concluded by saying that the plaint filed by the plaintiff is clearly barred by law and the same has been filed before the Court having no jurisdiction. Moreover by clever drafting, the plaintiff has tried to create an illusory cause of action and as such the order impugned is required to be set aside and the plaint is liable to be rejected. Petitioner in this context relied upon following judgments.

- (i) ***T. Arivandandam vs. T.V. Satyapal & Anr.*** reported in ***AIR 1977 SC 2421***
- (ii) ***Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Virudhunagar vs. Chandran & Ors.*** reported in ***2017 3 SCC 702***
- (iii) ***Venkataram & Ors. vs. Vidyane Doureradjaperumal (dead) through Legal Representatives & Ors.*** reported in ***2014 (14) SCC 502***

- (iv) ***Vinay Krishna vs. Keshav Chandra & Anr.*** reported in ***AIR 1993 SC 957***
- (v) ***Kumud Ranjan Banerjee vs. Manabendra Banerjee*** reported in ***AIR 1974 CAL 342***
- (vi) **Ramisetty Venkatanna & another Vs. Nasyan Jamal Saheb & others**, reported in **(2023) 3 ICC 746 (SC)**

11. Mr. Sakhya Sen, learned Counsel appearing on behalf of the opposite party, supporting the order impugned contended that the principle for consideration of an application under Order VII Rule 11 is that the statements made in the plaint alone have to be considered for the purpose of determining whether the suit as framed is barred by law or not and whether it discloses any causes of action or not. He further contended that it is the settled law that nothing apart from the plaint can be looked into for the purpose of consideration as to whether any of the grounds stipulated under Order VII Rule 11 has been made out or not. In this context, he relied upon judgment of the Hon'ble Apex Court reported in **2023 SCC Online SC 1407**.

12. Quoting relevant portions of paragraph 3,4,5,8 and 9 of the plaint he contended that the plaint proceeds on the basis of an agreement for sale executed between the plaintiff and the defendant no.1 followed by delivery of possession to the plaintiff but as the defendant no. 1 did not perform his promise to transfer the suit property, the plaintiff filed the suit claiming decree for permanent injunction with a declaration in the nature of specific performance of the agreement for sale dated 21.12.2012. In the plaint plaintiff has also averred about his readiness and willingness and as plaint proceeds on the premises that the plaintiff is in possession of the property,

he has not prayed for consequential relief of delivery of possession and therefore Section 34 of the Specific Relief Act has got no application in the present context and the averments made in the plaint must have to be assumed as true and correct for the purpose of considering application under Order VII Rule 11 of the code.

13. Mr. Sen further submits that the expression 'barred by law' necessarily implies an inherent lack of jurisdiction of the Court to entertain a suit. There is no such prohibition in Section 34 of the Specific Relief Act so as to come within the expression 'barred by law'. He strenuously argued that the plea of any defect in the suit as envisaged in the proviso to Section 34 of the Specific Relief Act may at the best be a lacuna which will not enable the Court to pass a decree in favour of the plaintiff, but the said provision does not envisage absolute prohibition upon the Court to entertain the suit. Though petitioners have relied upon various documents namely letter of Joint Receiver, Certificate of Sale etc. but such documents are not part of the plaint and as such the Court has rightly declined to consider any such document for the purpose of adjudication of the application under Order VII Rule 11. He also contended that defect relating to lack of pecuniary jurisdiction is also not a ground, which can be urged in an application seeking rejection of a plaint. In fact the question relating to pecuniary jurisdiction of the Court to try the suit is to be seen in the context of the relief claimed in the suit and as the plaintiff has claimed decree for permanent injunction and declaration so the suit is very much maintainable within the jurisdiction of the Court below. In this context, he also distinguished the case laws referred by the petitioner, contending that such

judgments are distinguishable on facts, because no case could be made out at Order VII Rule 11 stage alleging that the plaintiffs claim is based on an agreement for sale on an illusory cause of action, which actually does not exist but has been made out on the basis of clever drafting.

14. I have considered submissions made by both the parties. On perusal of the averments made in the plaint, it appears to me that the suit as has been framed and the cause of action as has been set out in the plaint, in support of relief claimed does not disclose any such averment to come to a conclusion that plaint is liable to be rejected only of point of law. As per averments made in the plaint there is also hardly any scope to say that the plaint does not disclose any cause of action. In such view of the matter, the observation of the Trial Court that *the Court while dealing with an application cannot go beyond the averments made in the plaint while deciding an application seeking rejection of plaint*, is neither perverse nor illegal, since it is settled law from various judicial pronouncements that at the time of consideration of a prayer regarding rejection of plaint, only the averments made in the plaint is relevant.

15. Furthermore the High Court while dealing with an Application under Article 227 of the Constitution of India, is not supposed to interfere with the order of the Trial Court as a matter of routine. Such power cannot also be taken as a right of another appeal to the aggrieved party. The main grievance ventilated by the petitioner herein is that by way of clever drafting the petitioner has tried to create an illusory cause of action for framing the suit. In this context it is well settled that order VII, Rule 11 is applicable to

the plaint which does not disclose cause of action and not the cases where the plea is nonexistence of cause of action.

16. Since such order impugned passed by the Trial Court, in the context of Order VII, Rule 11 of the Code, has not resulted in any gross or manifest failure of justice nor it appears from the face of the order that there has been any apparent illegality or perversity committed by the Court below, while passing the impugned order, I am of the view that in such circumstance, the petitioner/defendant instead of filing the present petition before this Court under Article 227 of the Constitution of India, ought to have filed an application before the learned Trial Court questioning the maintainability of the suit with a prayer to frame and decide the said issue as a preliminary issue.

17. In such view of the matter I find no merit in the present Application. Thus, **C.O 871 of 2016** stands dismissed.

18. However, this order will not preclude the petitioner herein to prefer appropriate application questioning maintainability of the suit on the basis of his grievances before the Court below and in the event of filing such application by the petitioner herein before the Court below, he will frame a preliminary issue regarding maintainability of the suit and before deciding any other issue, he will dispose of such issue at the earliest without being influenced by any observation made herein.

19. 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.)