



\$~9

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

+ **C.R.P. 304/2023 & CM APPL. 55252/2023**

SHRI GOPAL & ORS.

..... Petitioners

Through: Mr. S.S. Panwar, Mr. S.D. Baloni, Ms. Nivedita Panwar, Mr. Ravi Panwar & Ms. Punam Singh, Advs.

versus

SHRI SAURABH DHINGRA & ANR. Respondents

Through: Mr. Sumeet Lall, Mr. Sidhart Kapoor, Mr. Nikhil Lal and Ms. Palak Rawat, Advs.

CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

01.03.2024

%

1. The petitioner, who is the defendant in the suit for specific performance filed by the respondent/plaintiff pending before the learned Trial Court, assails the impugned order dated 05.07.2023 passed by the learned ADJ-05, (South), Saket Courts, New Delhi, whereby his application under Order VII Rule 11 CPC has been dismissed.

2. Having heard learned counsels for the parties and on perusal of the record, shorn off unnecessary details, suffice to state that the respondent/plaintiff has filed a suit for specific performance in terms of the Agreement to sell dated 04.03.2012, executed between the parties.

3. Learned counsel for the petitioners has vehemently urged that the present suit is barred by Order II Rule 2 CPC and is without any



cause of action since the earlier suit for permanent injunction filed by the respondent/plaintiff was dismissed vide order dated 08.04.2013 by the then learned Civil Judge-01, South District, Saket Courts, New Delhi without giving any liberty to the respondent/plaintiff to institute a fresh suit on the same cause of action.

4. It is further urged that the petitioner has already served a notice upon the respondent/plaintiff thereby terminating the Agreement to Sell in respect of the suit property vide notice dated 19.07.2022, which was admittedly received by respondent/plaintiff and replied by him as well.

5. The learned Tribunal considered the submissions advanced by the learned counsels for the parties and made the following observations while dismissing the application under Order VII Rule 11 CPC:-

“4. In the present matter, application has been filed by defendant raising the ground that suit is barred u/o 2 rule 2 of CPC as well was in view of provision u/s 17 of Registration Act and section 35 of Indian stamp Act. It is also contended that the contract which is made basis of filing of this suit is cancelled and was not subsisting and therefore, present suit also does not lie. It is also argued that the doctrine of lis- pendens contained in section 52 of Transfer of property Act is not available to the plaintiffs. That this is additional ground on the basis of which suit be rejected /o 7 rule 11 of CPC.

6. Matter is at the stage of considering the application u/O VII Rule 11 of CPC. It is trite law that while disposing of the application o/o VII rule 11 of CPC, plaint/documents filed by plaintiff alongwith suit are to be considered. It is also settled position of law that no other material except plaint can be considered and if meaningful reading alongwith plaint does attract provisions contained in order VII rule 11 of CPC, plaint should be rejected otherwise suit should continue.

6. Coming to the facts of the present case. Suit has been filed by plaintiff seeking specific performance of the agreement to sell stating that defendant failed to honor their commitment. It is specified in the plaint itself that the suit was filed seeking permanent injunction which was dismissed by Ld. Court on the ground that the appropriate remedy was of specific performance. In



the judgement titled as '*Srihari Hanumandas Totala Versus Hemant Vithal Kamat & Ors.*' Hon'ble Supreme Court of India has laid down the guidelines which needs to be considered at the time of disposal of application u/o VII rule 11 of CPC. which are as follows:-

"11. Rejection of plaint.- The plaint shall be rejected in the

following cases:-

(a) where it does not disclose a cause of action;
(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

[(e) where it is not filed in duplicate;]

[(f) where the plaintiff fails to comply with the provisions of rule9:]

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]"

(emphasis supplied)

16. Order 7 Rule 11(d) of CPC provides that the plaint shall be rejected "where the suit appears from the statement in the plaint to be barred by any law". Hence, in order to decide whether the suit is barred by any law, it is the statement in the plaint which will have to be construed. The Court while deciding such an application must have due regard only to the statements in the plaint. Whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case. Before proceeding to refer to precedents on the interpretation of Order 7 Rule 11(d) CPC, we find it imperative to refer to Section 11 of CPC which defines res judicata:

"11. Res judicata. - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and



substantially in issue in a former suit between the same parties' or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

20. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarized as follows: (i) 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; (ii) The defence made by the defendant in the suit must not be considered while deciding the merits of the application; (iii) 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; and (iv) 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."

7. As noted above, it has been specifically held by Hon'ble Supreme Court of India that applicability of res-judicata cannot be adjudicated while deciding application u/o VII rule 11 of CPC. The principles contained in order 2 rule 2 of CPC is one of the dimensions of principle contained in section 11 i.e. to bring finality to litigation on same cause of action. Explanation IV is pari materia with provision contained in order II rule 2 of CPC. Thus, above noted principles laid down by Hon'ble Supreme Court of India shall be applicable in the present case as well. Further, as far as question/contentions that agreement on the basis of which suit is filed was cancelled by defendant, is question of trial and pertains to contention which has been raised in written statement by the defendant. In terms of established principle of law on this issue, contention raised in written statement cannot be considered at this stage of adjudication of application u/o VII rule 11 if CPC. Thus, this ground does not find force at this stage, Further to access if cause of action is reflected, facts of the case are to be considered and the evidentiary value of the documents is be considered at appropriate stage. Thus, the ground raised in respect of



applicability of principle of lis pendens section 17 of Registration Act and section 35 of Indian Stamp Act also does not have applicability at this stage. Hence, in view of above lis arisen present application is disposed of being not allowed.”

6. Ex facie, the reasons assigned by the learned Trial Court dismissing the application under Order VII Rule 11 CPC do not suffer from any illegality, perversity or incorrect approach in law. The plea that there is no cause of action for the suit being barred under Order II Rule 2 CPC is misconceived since the earlier suit was for permanent injunction and the same was dismissed on the ground that there was an efficacious remedy of filing a suit for specific performance. There is no dispute that the second suit for specific performance has been filed within the prescribed period of limitation.

7. Further, there is no merit in the plea that the Agreement to Sell has already been cancelled or terminated, and therefore, there is no cause of action in favour of the respondent/plaintiff. Whether or not the termination of the Agreement to Sell is *bona-fide, justified* and lawful, that remains to be addressed during the trial. No other grounds are canvassed before this Court either.

8. Accordingly, the present civil revision petition is dismissed without prejudice.

9. A copy of this Order be sent to the learned Trial Court for information and necessary compliance.

DHARMESH SHARMA, J.

MARCH 1, 2024/sp