

(2019) 03 BOM CK 0020

In the Bombay High Court

Case No : Writ Petition No. 6141 Of 2017, Writ Petition No. 11511 Of 2015 (Nob)

Bhavana Kirit Vora And Ors

APPELLANT

Vs

Kushal Surendra Shah And Ors

RESPONDENT

Date of Decision : 11-03-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 2(2), 7(iv)(c), 100, 151, Order 7 Rule 11
Constitution Of India, 1950 — Article 227

Citation : (2019) 03 BOM CK 0020

Hon'ble Judges : M. S. Sonak, J

Bench : Single Bench

Advocate : Ashok Tajane, Sanjay Shinde

Final Decision : Dismissed

Judgement

M. S. Sonak, J

1. Heard Mr. Tajane, learned counsel for the Petitioners and Mr. Shinde for the Respondents.

2. Mr. Tajane, learned counsel for the Petitioners, at the outset seeks leave to withdraw the Writ Petition No. 11511 of 2015 instituted by the Petitioners to challenge the order dated 1st July, 2015 (Exhibit 40) in this Suit. He points out that this very order has also been challenged in the present Petition and therefore, he submits that leave be granted to withdraw the Writ Petition No. 11511 of 2015 with liberty to press the challenge in the present Petition. Though Writ Petition No. 11511 of 2015 is not on board today with consent of the learned counsel for the parties, the same is taken on board and disposed of as withdrawn with liberty to challenge the order dated 1st July, 2015 (Exhibit 40) in the present Petition. The Registry to therefore indicate Writ Petition No. 11511 of 2015 as disposed of by virtue of this order.

3. Rule.

4. Rule is made returnable forthwith with the consent and at the request of learned counsel for the parties.

5. The challenge in this Petition is to orders dated 31st March, 2017 (Exhibit 22), 31st March, 2017 (Exhibit 74) and 1st April, 2017 (Exhibit 76) made by the learned Civil Judge Senior Division, Niphad in Special Civil Suit No. 27 of 2012.

6. At the outset, Mr. Tajane, learned counsel for the Petitioners made it clear that the challenge to the two orders dated 31st March, 2017 (Exhibit 22) and 1st April, 2017 (Exhibit 75) is not being pressed, since, the said orders, are really consequential to the other orders or in any case the said orders relates to stay of the suit pending service upon some of the Defendants. Upon examination of the order dated 31st March, 2017 it is clear that the same were purely procedural orders and there is really no legal infirmity as such in making of said orders.

7. Mr. Tajane, however points out that the Petitioners also challenged the order dated 1st April, 2017 made below Exhibit 40. He submits that this is quite clear from the pleadings in the Petition, though in prayer clause (b) there is no specific reference to the order dated 1st April, 2017 (Exhibit 40). Accordingly he seeks leave to carry out the formal amendment. Leave is granted. Formal amendment to be carried out forthwith.

8. In this case, learned trial judge vide order dated 25th August, 2012 determined that appropriate Court fees were not paid along with Plaint and therefore granted 60 days time to the original Plaintiff to pay the deficit Court fees. However, since the deficit Court fees were not paid within prescribed period, the Plaint came to be rejected vide order dated 15th December, 2012.

9. The original Plaintiff then took out Civil Misc. Application No. 15 of 2013 (Exhibit 76) seeking for extension of time to pay the Court fees and consequently restoration to the suit. Thereupon the present Petitioners took out an application which came to be marked as Exhibit 40 objecting to the maintainability of Civil Misc. Application No. 15 of 2013 (Exhibit 76). By an order dated 1st April, 2017 the learned trial Judge rejected this Application (see Exhibit F, page 50 of the paper book). Further by order dated 1st April, 2017 the learned trial Judge allowed Misc. Application No. 15 of 2013 and extended the time for payment of Court fees and restore the Special Civil Suit No. 27 of 2012, since the deficit Court fees were paid by the original Plaintiff.

10. Mr. Tajane, learned counsel submits that an order rejecting the Plaint is "deemed decree" in terms of Section 2(2) of Code of Civil Procedure. He submits that only remedy to set aside such order is institution of an Appeal. He submits that since specific remedy by way of Appeal is provided under the Code, no application under section 151 of Code of Civil Procedure invoking the inherent powers of the Court was at all maintainable. He relies upon Mable vs. Dolores and Another AIR 2001 Kerala 353 and State of U.P. vs. Roshan Singh and Ors., AIR 2008 S.C. 1190 in respect of his contention.

11. Mr. Tajane submits that the order dated 1st April, 2017 below Exhibit 76 allowing Misc. Application No. 15 of 2013 is violative of the principles of natural justice, since, the same was made without offered of opportunity to the Petitioners. He submits that it is an additional ground to set aside the impugned order made below Exhibit 76.

12. Mr. Shinde, learned counsel for Respondent (original Plaintiff) relies upon ruling of learned single Judge of this Court in Maharashtra State Electricity Board vs. Niranjana Alloys Steels Pvt. Ltd., 2007 (2) Mah.L.J. 229 to submit that since in the present case there was no dispute as to the Court fees, an application simplicitor for extension of time to pay the Court fees was very much maintainable under Section 151 of Code of Civil Procedure. He submits that this was precisely the application taken out by the original Plaintiff and the same has been allowed by the learned trial Judge upon accepting the reason of financial difficulties urged and made out by the original Plaintiff. Mr. Shinde submits that there is absolutely no error much less any jurisdictional error in the impugned order and therefore this Petition may be dismissed.

13. The rival contention now fall for determination.

14. As against the order rejecting the Plaint for failure to deposit the Court fees within the prescribed period, no doubt remedy of Appeal is available. However, as has been held in the case of Niranjana Alloys (supra), when there is no controversy as regards the liability to pay the demanded Court fees, the quantum of Court fees an application simplicitor seeking extension of time to pay such Court fees can always be taken out under section 151 of Code of Civil Procedure as was taken out in the present case.

15. In the above regard, reference can be made to the observations made in paragraph 11 and 18 of the Niranjana Alloys (supra) which read as follows:

11. There cannot be any duality of opinion that an order rejecting a plaint Under Order 7 Rule 11 of C.P.C., for nonpayment of the additional court-fees demanded is appealable as a decree. The Apex Court held in Shamsher Singh v. Rajinder Prasad and Ors. (supra) that it is appealable as a decree and even a second appeal would lie Under Section 100 of C.P.C. on the ground that the decision of the first appellate Court on the interpretation of Section 7(iv)(c) is a question of law. It cannot be, however, overlooked that such rejection of plaint would be appealable when there is a controversy raised regarding correctness of the demand for court-fees under any particular provisions of the law. Where, there is controversy regarding interpretation of the provisions of the Court fees Act or Suits Valuation Act then the plaintiff is required to prefer an appeal against adverse finding which entailed dismissal of the suit. In the present case, however, there was no controversy raised by the plaintiff regarding liability to pay the demanded court- fees. Nay, he had applied for payment of such court-fees and was permitted to pay the same. He had deposited the cheque with the Court, although, it could not be encashed. He immediately filed next application,

explaining that his bank account was having sufficient funds but due to fault of the Bank, the cheque was returned. This fact was not controverted by the petitioner before the trial Court. It appears, therefore, that there was sufficient substratum before the trial court to reach conclusion that the demand for court-fees was acceptable to the plaintiff/respondent herein.

18. I am inclined to hold that the time could be extended by the trial Court irrespective of the fact that the remedy of appeal was also available. For, it was just a formality to prefer an appeal inasmuch as the plaintiff had not raised any question related to interpretation of the Bombay Court fees Act or the Suits Valuation Act. Secondly, the plaintiff submitted the application immediately after he came to know about bouncing of the cheque. There was no substratum available to say that the cheque was returned only because cash amount was not at his credit. His statement on affidavit was not controverted in this context and moreover, the plaintiff had expressed willingness to deposit the deficit court-fees immediately without demur. The impugned order has not caused any prejudice to the rights of the petitioner. The rejection of the application would have, on the other hand, caused grave injustice to the plaintiff as he would have been put to excessive financial burden without a very serious lapse on his part. Normally, when there is express provision in the C.P.C. then the powers Under Section 151 C.P.C. may not be invoked. Still, however, such remedy must be of exhaustive character and the relevant provision should be such that there is express or implied prohibition on the exercise of powers Under Section 151 of C.P.C. The intention of the legislature can be gathered from proviso appended to Rule 11 of Order 7. Considering the purport of the proviso and peculiar facts of the instant case, there appears no serious error committed by the trial Court while exercising the inherent powers Under Section 151 of the C.P.C. There is no perversity committed by the trial Court in this behalf. It follows, therefore, that interference by this Court in exercise of the supervisory jurisdiction under Article 227 of the Constitution of India is not called for.

16. Mr. Tajane however points out that in *Niranjan Alloys* (supra) there is no consideration of the judgment of the Honn'ble Apex Court in the case of *Mable* (supra) and *Roshan Singh* (supra). The Hon'ble Supreme Court held that inherent powers cannot be exercised for the benefit of litigant who has remedy under Code of Civil Procedure. In the present case, as noticed earlier, it is not as if the original Plaintiff had any grievance against the order of rejection of the Plaint. In fact, the original Plaintiff in a sense accepted the order but only applied for extension of time to comply with the direction for payment of deficit Court fees. In such circumstances, it cannot be said that the view taken by the learned single Judge of this Court in *Niranjan Alloys* (supra) is in conflict with the ruling of the Hon'ble Supreme Court in *Roshan Singh* (supra). The learned trial Judge was therefore justified in relying upon *Niranjan Alloys* (supra) and holding the application made by the original Plaintiff was maintainable.

17. The record indicates that the Petitioners were fully heard in the matter on the

issue of maintainability. The Petitioners also urged that even on merits the application under section 151 of Code of Civil Procedure was not required to be granted. In such circumstances, the Petitioners cannot take any benefit of ambiguity in the Roznama when it comes to hearing of Civil Misc. Application No. 15 of 2013 (Exhibit 76). The record indicates that there was no failure of natural justice. The trial Court has accepted the case of the original Plaintiff that they had genuine and financial difficulties and therefore they could not arrange to pay the Court fees amount within the period of 60 days. The original Plaintiff also came ready with the amount of Rs. 76,000/- which corresponded to the deficit Court fees. Learned trial Judge has exercised discretion in the matter and there is absolutely no unreasonableness in the exercise of such discretion.

18. For the aforesaid reasons, there is no case made out to interfere with the impugned order which even otherwise promotes substantial justice. The Plaintiff cannot be deprived of opportunity to prosecute their suit on merits on account of some marginal delay in payment of deposit of Court fees. The desecration for extension of time to pay the deficit Court fees has been exercised by the learned trial Judge in a fair and reasonable manner. Such exercise of desecration, which clearly promotes substantial justice, cannot be interfered with in the exercise of equitable writ jurisdiction.

19. This Petition is liable to be dismissed and the same is hereby dismissed.

20. There shall be however no order as to cost.