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(2023) 03 BOM CK 0055

In the Bombay High Court

Case No : First Appeal No. 143 Of 2023, Interim Application No. 1375 Of 2023

M/s. Gangotri Developers And Others — APPELLANT

Vs

Ajit Anantrao Butte Patil And Others — RESPONDENT

Date of Decision : 14-03-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Order 7 Rule 11, Order 7 Rule 11(a), Order 7 Rule 11(b), Order 7 Rule 11(c), Order 7 Rule 11(d), Order 7 Rule 11(e), Order 7 Rule 11(f)
Indian Partnership Act, 1932 — Section 69, 69(1), 69(2)

Citation : (2023) 03 BOM CK 0055

Hon'ble Judges : K. R. Shriram, J;Rajesh S. Patil, J

Bench : Division Bench

Advocate : Madhavi Ayyappa, Anil Sakhare, Vivek V. Salunke, Shubham Budhvant, Chetan Patil

Final Decision : Allowed/Disposed Of

Judgement

K.R. Shriram, J

1 Appellant is impugning an order dated 16.01.2021 passed by the Additional Judge, Small Cause Court, Pune, rejecting the plaint under Order VII Rule 11(d) of the Code of Civil Procedure (CPC). The Trial Court came to a conclusion that Plaintiffs' firm M/s. Gangotri Developers was not existing in the records of Registrar of partnership firms and Plaintiffs did not produce any document to show that Plaintiff No.1 and Plaintiff No.2 were mentioned as partners in the Register of Firms on the date the suit was filed, and hence the suit was barred under the provisions of Section 69 of the Indian Partnership Act, 1932.

2 Appeal was listed for admission today. Since the issue was short, i.e., could trial court summarily reject the plaint under Order VII Rule 11(d) of CPC on the ground of barred by law in force, with the consent of the counsel we decided to take up the Appeal for final hearing, at admission stage.

3 The law on the provisions of Order VII Rule 11 of CPC is quite settled. An

application for rejection of plaint under Order VII Rule 11 of CPC can be entertained only if the plaint on the face of it discloses that the suit is barred by any law in force, and not by referring to materials which are sought to be placed on record by defendant in answer to the plaint. In case, defendant requires to refer to any material other than the plaint, like in this case has happened, certainly such an exercise is permissible by way of leading evidence after framing issues and satisfying the court about non-maintainability of the suit. But the same exercise cannot be done under Order VII Rule 11(d) of CPC. The courts have held on account of any material being available with defendant to prove that the suit being not maintainable, the same cannot be a ground to non-suit Plaintiff by exercise of power under Order VII Rule 11(d) of CPC. In order to get the necessary relief on the basis of such materials defendant will have to lead necessary evidence by producing such materials on record in accordance with the provisions of law and only thereupon the court can take appropriate decision as regards the objection sought to be raised by Respondents regarding non-maintainability of the suit.

4 Plaintiff had filed the suit on the basis that Plaintiff No.1 and Plaintiff No.2 are partners of Gangotri Developers a registered partnership firm. In paragraph 4 of the plaint, there are averments to the effect how Plaintiffs' claim to be admitted as partners, and there are positive averments that Registrar of Firms has been informed about the same and presently, i.e., when the suit was filed, Plaintiff No. 1 and Plaintiff No. 2 were the existing partners of the firm. There is also an averment in the plaint that from 31.12.2009 Plaintiff firm was continuing with two partners, namely, Plaintiff No.1 and Plaintiff No.2, and after Plaintiff No.2 died, Plaintiff No.2A came to be added as partner. The dispute relates to accounts and declaration.

It is Plaintiffs' case that the erstwhile partner of the firm, Defendant No.1 in collusion with Defendant No.2 to Defendant No.4 had filed a suit behind Plaintiffs' back and though the firm was shown as Defendant No.1 in the suit, the summons was never served upon the firm and a consent decree was obtained by which Defendants herein grabbed properties of the firm.

5 Hence, the Special Civil Suit No. 607 of 2014 was filed for declaration and cancellation or setting aside the fraudulent decree and suit is also for permanent injunction against defendants.

6 While considering the application taken out under Order VII Rule 11 of CPC, the Trial Court has not just considered the plaint, but also has gone into various material that defendants produced. The Trial Court has also, while hearing the application under Order VII Rule 11 of CPC, called upon Plaintiffs to prove that Plaintiff No.1 and 2A are partners of Gangotri Developers. The Trial Court has proceeded on the basis that Plaintiffs have not produced any documents to show that they are partners of the registered partnership firm and their name appears in the Registrar of Firms. The Apex Court in Pawan Kumar vs. Babulal since deceased to legal representatives and others (2019) 4 SCC 367 , relied upon by

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Ms. Ayyappa has held that unless it appears on the face of the plaint that it was barred by any Act, no court should reject the plaint applying provisions of Order VII Rule 11 of CPC. The Apex Court held that the approach of courts must be to proceed on a demurrer and see whether accepting the averments in the plaint the suit is barred by any law or not. Disputed questions cannot be decided at the time of considering an application under Order VII Rule 11 of CPC, and it would apply only in those cases where the statement made by Plaintiffs in the plaint without any doubt or dispute shows that the suit is barred by any law in force. In Ujwalaben Mahindra Shah and another vs. M/s Kesharchand Gulabchand and Others 2002 (1) Mh.L.J. 378 , relied upon by Ms. Ayyappa, a learned single judge of this court while considering a matter similar to the case at hand, held that the controversy as to whether a firm is registered partnership firm with the Registrar of Firms or not, is not a pure question of law but is a mixed question of law and fact. Whether a firm is registered or not is to be established by adducing necessary evidence in that regard. It is not a question of jurisdiction but maintainability of the suit.

7 The Apex Court in Hajinder Pal Singh vs. Narendra Kumar Nangia 2018 SCC Online SC 1537 , relied upon by Ms. Ayyappa, has held that where issue is a mixed question of law and fact would require evidence, and in such situations no Order VII Rule 11 of CPC application would lie.

In R.K. Roja vs. U.S. Rayudu (2016) 14 SCC 275 relied upon by Ms. Ayyappa, the Apex Court in paragraph 4 has held as under :

“We are afraid that the stand taken by the High Court in the impugned order cannot be appreciated. An application under Order 7 Rule 11 CPC can be filed at any stage, as held by this Court in Sopan Sukhdeo Sable v. Charity Commr. : (SCC p.146, para 10)

10….. The trail court can exercise the power 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.

The only restriction is that the consideration of the application for rejection should not be on the basis of the allegations made by the defendant in his written statement or on the basis of the allegations in the application for rejection of the plaint. The court has to consider only the plaint as a whole, and in case, the entire plaint comes under the situations covered by Order 7 Rules 11(a) to (f) CPC, the same has to be rejected.

(Emphasis supplied)”

8 In Shivrudra Shivling Pailwan vs. Prakash Maharudhra Pailwan (2003) 1 Mh.L.J. 299 relied upon by Ms. Ayyappa, a learned single judge of this court has held that in order to enable the court to arrive at the conclusion that the suit is barred, the pleadings in the plaint should apparently disclose the facts prevailing the bar to the suit instituted by Plaintiff. The conclusion regarding bar to the suit

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cannot be arrived at on the basis of materials extraneous to the pleadings in the plaint. The court went on to hold that the jurisdiction of the court to take action under Order VII Rule 11 (d) of the CPC can arise only in case where the pleadings in the plaint are sufficient to disclose the bar to the suit and not otherwise.

9 Mr. Sakhare for Respondents, relying upon Shreeram Finance Corporation vs. Yasin Khan and Others 1989 Mh.L.J. 849 , submitted that suit was not maintainable in view of provisions of Section 69 (2) of the Partnership Act. We are afraid this judgment is not applicable to the facts of this case for two reasons, namely, a) the Trial Court has applied the provisions of Section 69 (1) of the Partnership Act because it is a dispute inter-se partners / erstwhile partners, and b) that was not a case where an application under Order VII Rule 11 of CPC was considered.

10 In Altaf Fakir Baig and Ors. vs. Goel Ganga Deve. (Ind) Pvt. Ltd.7, we should note, the court, in paragraph Nos. 12 and 13, has held that Order VII Rule 11 of CPC is a drastic power confirmed on the court, the conditions precedent on exercise of powers are stringent, especially when rejection of plaint is also on the ground of barred by law. Therefore, when Plaintiff claims that it is a registered partnership firm, the same has to be accepted at this stage considering the application under Order VII Rule 11 of CPC.

11 In the case at hand the Trial Court has not proceeded on a demurrer but concluded the suit was barred on the basis of materials extraneous to the pleadings in the plaint. The issue as to whether the firm was registered or not is a mixed question of law and fact to be established by adducing necessary evidence in that regard. In the circumstances, we set aside the impugned order passed by the Trial Court rejecting the plaint. Appeal allowed and disposed.

12 The suit is restored to file of the Trial Court. The suit has been pending since 2014. Hence, we direct the Trial Court to expedite the matter and dispose the pending suit, as early as possible and in any case within six months.

13 The Trial Court would go into the merits of the matter independently and dispose the suit.

14 Ms. Ayyappa is pressing for costs. She is justified. Respondents to pay a sum of Rs. 1,00,000/- as costs of this Appeal. Costs shall be paid to Appellants' Advocate within four weeks from today. If the amount is not paid, the Trial Court to strike off the defence of Respondents.

15 Consequently, Interim Application also stands disposed.

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