

(2017) 03 BOM CK 0178
In the Bombay High Court
Case No : 7 of 2013

Shri Abdul Sattar Shaikh & Ors

APPELLANT

Vs

The State of Goa & Ors

RESPONDENT

Date of Decision : 24-03-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 7 Rule 11](#) -
[Goa Land \(Prohibition On Construction\) Act, 1995](#), [Section 4](#)

Citation : (2017) 03 BOM CK 0178

Hon'ble Judges : F. M. Reis

Bench : SINGLE BENCH

Advocate : Anthony Joe D Silva, N. Kholkar, V. R. Parshekar, Priyanka Kamat, Prachita Kalangutkar, V. Sardessai, N. Kholkar S. Dhargalkar, Susan Linhares

Judgement

1. Heard Mr. Anthony Joe D'Silva, learned counsel appearing for the appellants, Ms. Priyanka Kamat, Ms. N. Kholkar, Ms. Susan Linhares, Ms. P. Kalangutkar, Mr. V. Sardessai, and Mr. S. Dhargalkar, learned Addl. Government Advocates appearing for the respondent nos. 1 and 2 in the respective appeals and Mr. V. R. Parshekar, learned counsel appearing for the respondent no.4.

2. These are the appeals challenging a common judgment passed by the learned District Judge, North Goa, Panaji, whereby the plaint filed by the appellants against the respondents came to be rejected under Order VII Rule 11 of the Civil Procedure Code on the ground that the appellants have no cause of action to file the suit and that the suit is barred under the Code of Communitade.

3. The learned counsel appearing for the appellants has assailed the impugned judgment on the ground that the learned Judge has misconstrued the provisions of the Code of Communitade to come to the conclusion that the suit is barred. The learned counsel further submits that the appellants have challenged the order passed by the Administrator before the learned Tribunal which was

dismissed as not maintainable in view of the objections raised by the respondents. The learned counsel further pointed out that the respondents are again raising diametrically opposite objections to contend that the appeal is maintainable before the Appellate Forum. The learned counsel further pointed out that it is the case of the appellants that the subject residential houses were constructed somewhere in the year 1995 and that they have electricity connection as well as house tax records issued by the concerned authorities and that all of a sudden somewhere in 2010 a final notice was issued directing the eviction and demolition of the subject structures. It is further pointed out that the law is well settled that the plaint cannot be rejected unless the plaintiff does not disclose a cause of action and not on the ground that the plaintiff has no cause of action to file the suit. The learned counsel further submits that the allegations in the plaint to the effect that the impugned order was passed in breach of the principle of natural justice would itself disclose a cause of action to the plaintiff to file such suit. The learned counsel further pointed out that there is no bar under the Code of Communitade to file a suit before the Civil Court and as such the learned Judge was not justified to go into the merits of the claim put forward by the appellants on the basis of the defence raised by the respondents to pass the impugned judgment. The learned counsel as such submits that the impugned judgment be quashed and set aside.

4. On the other hand, learned Addl. Government Advocate appearing for the respondent nos. 1 and 2 has seriously disputed the contention raised by the learned counsel appearing for the appellants. The learned counsel has pointed out that it is the case of the respondents that the occupation of the appellants is unlawful and without any right and as such they are justified to take action impugned in the suit. The learned counsel further pointed out that as the appellants have an efficacious remedy to challenge the order passed by the Administrator, the question of approaching the Civil Court to obtain a relief is totally unjustified. The learned counsel further submits that pursuant to the directions issued by this Court in Writ Petition to take action in accordance with law as against the encroacher in the Communitade land, the Administrator invoked his powers under Section 371 of the Code of Communitade to pass the impugned order. The learned counsel further submits that in terms of Article 372-A of the Code of Communitade, the appellants, if they were otherwise entitled ought to have proceeded to follow the procedure to get the alleged occupation regularised. The learned counsel further submits that there are no specific averments in the plaint as to when the subject constructions have been put up by the appellants and as such the learned Judge was justified to pass the impugned judgment to hold that the appellants have no cause of action to file the present suit.

5. Ms. P. Kamat, learned Addl. Government Advocate has brought to my notice another contention raised by the respondents in their application under Order VII Rule 11 of the Civil Procedure Code that the suit itself was not maintainable in law. The learned counsel further pointed out that this aspect can be considered

by the learned Judge as a preliminary issue based on the defence raised by the respondents in the written statement as well as the material relied upon. The learned counsel further pointed out that in any event, considering that the occupation of the appellants is illegal and unlawful, the Administrator was justified to pass the impugned order and direct the eviction and demolition of the subject structures. The learned Addl. Government Advocate as such points out that the pleadings in the plaint are itself vague and there are no particulars to show as from when the appellants are occupying the subject constructions and as such the learned Judge was justified to pass the impugned judgment.

6. Mr. V. Parshekar, learned counsel appearing for the Comunidade/respondent no.4 has pointed out that the contention of the appellants that they have not received a show cause notice or that no notice was issued is a false statement as the notice impugned itself shows that the notice was issued. It is pointed out that the appellants are illegally occupying the subject land and as such in terms of Article 371 of Code of Comunidade which clearly provides that summary proceedings can be followed to evict the encroacher of the Comunidade land and as such the Administrator was justified to pass the impugned order. The learned counsel further pointed out that in terms of Section 4, there is a specific bar of jurisdiction under the Goa Land (Prohibition on Construction) Act, 1995 and as such according to him the learned Judge was justified to pass the impugned judgment. The learned counsel further pointed out that giving a hearing to the appellants is not an absolute right and merely because an order was passed in breach of the principle of natural justice by itself does not vitiate such order which has directed the appellants to be evicted from the subject structures which are illegally occupied by them. The learned counsel in support of his submissions has relied upon the judgment of this Court reported in AIR 2002 Bombay 151 in the case of M. V. "Sea Success I" V/s Liverpool and London Steamship Protection and Indemnity Association Ltd. and another, and the judgment of the Apex Court reported in (2015) 8 SCC 519 in the case of Dharampal Satyapal Limited v/s Deputy Commissioner of Central Excise, Gauhati and others. The learned counsel further pointed out that the appellants are illegally occupying the subject structures and as such the Administrator was justified to pass the impugned order. The learned counsel has thereafter taken me through the order passed by the learned Tribunal to show that the appellants have received a show cause notice which is clearly disclosed therein. The learned counsel as such submits that the appeals be accordingly rejected.

7. I have considered the submissions of the learned counsel and I have also gone through the records. The only point for determination is whether the learned Judge was justified to reject the plaint as it does not disclose a cause of action to file a suit and is barred under the Code of Comunidade.

8. Though the learned counsel appearing for the respondents have vehemently disputed the rights of the appellants to get any relief in the suit or to continue in occupation of the subject structures, I propose to examine the present appeals

only whether the learned Judge was justified to reject the plaint under Order VII Rule 11 of the Civil Procedure Code. It is well settled that to examine an application under Order VII Rule 11 of the Civil Procedure Code, the averments in the plaint have only to be considered along with the documents annexed thereto. The defence of the respondents to the dispute raised in the written statement cannot be looked into while considering such application under Order VII Rule 11 of the Civil Procedure Code. In the present case, the learned Judge has come to the conclusion that the appellants have no cause of action to file the suit. The rejection of the plaint on such ground is whether the averment in the plaint disclose a cause of action. Whether the appellants have cause of action or not is a matter which would have to be considered on its own merits after looking into the defence raised in the written statement by the respondents. In this regard, this Court has relied upon the judgment of the Apex Court in the judgment passed in First Appeal No.14 of 2016 dated 24.06.2016 wherein it has been observed at paras 6, 7 and 8 thus : "6. I have considered the submissions of the learned Counsel and I have also gone through the record. Rejection of the plaint in terms of Order VII, Rule 11 of the C.P.C. can be allowed only in cases where the plaint, read as a whole, does not disclose a cause of action. Correctness or otherwise of the averments pleaded in the plaint as the date when the cause of action arose, cannot be the only consideration to examine whether the plaint discloses a cause of action or not. On this count alone, the impugned order passed by the learned Judge cannot be sustained. Instead of examining the plaint as a whole to find out whether it discloses a cause of action, the learned Judge has embarked to examine the truthfulness or otherwise of the averments in the plaint disclosing the date of cause of action. These are not the aspects to be considered at the time of examining the application under Order VII, Rule 11 of the C.P.C.. Whether the appellants have a cause of action or not to file a suit, is a matter which will have to be examined based on defence of the respondents and after an appropriate issue on that count is framed by the Court. The view taken by me in this respect is supported by the Judgment of the Apex Court relied upon by Mr. Nadkarni, learned Counsel appearing for the appellants in the case of P.V. Guru Raj Reddy, represented by GPA Laxmi Narayan Reddy and another (supra), wherein it has been observed at para (5), thus :

"5. Rejection of the plaint under Order 7 Rule 11 of CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order 7 Rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order 7 Rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be

adjudicated in the course of the trial."

7. The same view was also taken by the Apex Court in the earlier Judgment in the case of Mayar (H.K.) Ltd., & ors. (supra), wherein it has been observed at para 11, thus :

"11. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order VII Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants."

Taking note of the said observations of the Apex Court, I find that the impugned Order passed by the learned Judge, rejecting the plaint under Order VII, Rule 11 of the C.P.C., cannot be sustained and deserves to be quashed and set aside for the reasons stated herein below.

8. On perusal of the plaint, I find that the appellants have in the initial paragraphs pointed out the ground on which they are raising the claim to the copy rights and their locus to file such a suit. The plaint also discloses how it protects the individual copyrights owners from making unnecessary demands. It is further claimed that the appellants are entitled for a declaration that the respondents No.1 and 2 by holding and organizing an event on 27/2/2012, at Kala Academy have infringed the Copy Rights Act. It is further alleged that the appellants also are entitled for a permanent injunction. It is further alleged that the appellants had raised a demand asking the respondents No.1 and 2 to pay the outstanding amount of Rs.36,750/- as per invoice towards royalty for playing musical works to the public. It is further contended that the respondents No.1 and 2 have refused to pay such amount payable to the appellants. The appellants have also disclosed that they have a right to claim damages which have been specified at para 27 of the plaint. It is further alleged at para 34 that the cause of action to file the suit arose on 27/2/2012 when the respondents No.1 and 2 refused to comply with the terms of the legal notice."

9. Taking note of the said observations, I find that the learned Judge has wrongly considered whether the appellants have a cause of action though what was expected of the learned Judge was to examine whether the plaint itself discloses a cause of action. The truthfulness or otherwise of the allegations in the plaint cannot be examined while considering the application under Order VII Rule 11 of the Civil Procedure Code. In case any averments in the plaint are false, the consequence in law would follow. But however, on going through the plaint, it is the case of the appellants that they are occupying the structures in the subject property before the year 2000 and further that the applications for regularization of such structures are pending based on the amendment to the Code of Comunidade before the learned Collector. It is also pointed out that the orders impugned are in breach of the principle of natural justice. It is further contended that based on such erroneous orders, the appellants cannot be evicted from the subject structures. Whether these averments would be a cause of action to the appellants to file a suit is not a matter which the learned Judge can consider after examining the defence of the respondents. In such circumstances, I find that the learned Judge was not justified to pass the impugned judgment and reject the plaint. Needless to say, all the contentions of the parties on merits are left open.

10. Mr. Parsekar, learned counsel appearing for the respondent no.4/ Comunidade however submits that the impugned action was also in terms of Section 4 of the Goa Land (Prohibition on Construction) Act, 1995 wherein there is a specific bar for filing a suit. On perusal of the show cause notice, I find that the powers invoked by the respondents were under Article 371 of the Code of Comunidade. The powers under the said Act were not invoked by the concerned authority while passing the impugned order. In such circumstances, the contention of the learned counsel appearing for the respondent no.4/ Comunidade on this count cannot be accepted at this stage. The learned Addl. Government Advocates have also pointed out that the appellants ought to have filed appeals before the Administrative Tribunal and in fact according to them the suit was not maintainable as the appellants have an alternate remedy to challenge the impugned order. Merely having an alternate remedy may not justify exercising discretion in favour of the party but it does not by itself bar the filing of the suit. In the present case, as pointed out herein above, the case of the appellants is that the impugned direction to demolish the subject structures stands vitiated as such orders were passed in breach of the principle of natural justice. As such, the said contention of the learned Addl. Government Advocate on this count cannot be accepted at this stage while examining an application under Order VII Rule 11 of the Civil Procedure Code.

11. In view of the above, I pass the following : O R D E R

(i) The impugned judgment dated 29.09.2012 passed by the learned Judge is quashed and set aside.

(ii) All the civil suits are restored to the files of the learned Judge.

(iii) The learned Judge is directed to try and dispose of the suits as expeditiously as possible and preferably within six months from the date of the receipt of this order.

(iv) It is made clear that the observations herein are tentative observations only for the purpose of considering the application under Order VII Rule 11 of the Civil Procedure Code.

(v) All contentions of both the parties on merits as well as the maintainability of the suit are left open.

(vi) Parties are directed to appear before the learned Judge on 17.04.2017 at 10.00 a.m.

(vii) All the appeals stand disposed of accordingly.