

(2013) 04 BOM CK 0162

In the Bombay High Court

Case No : Civil Revision Application No. 14 of 2013

The Commissioner, Akola Municipal Corporation, Akola

APPELLANT

Vs

Bhalchandra

RESPONDENT

Date of Decision : 29-04-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, Order 7 Rule 11(a)

Citation : (2013) 5 ABR 105 : (2013) 5 ALLMR 190 : (2013) 5 BomCR 124 :
(2013) 4 MhLj 45

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Advocate : A.R. Deshpande, for the Appellant; S.S. Sarda, for the Respondent

Final Decision : Allowed

Judgement

R.K. Deshpande, J.—In Regular Civil Suit No. 902 of 2012 challenging the communication dated 3-10-2012 and the notice dated 29-10-2012 issued by the applicant/defendant Akola Municipal Corporation under Sections 260 and 267 of the Maharashtra Municipal Corporation Act, calling upon the non-applicant/plaintiff to furnish an explanation as to why an unauthorized construction carried out by him should not be pulled down, the Trial Court, on 4-1-2013, has rejected the application under Order VII, Rule 11 of the CPC by an order dated 4-1-2013, claiming dismissal of suit on the ground that there is a bar of jurisdiction of the Civil Court u/s of the said Act to entertain, try and decide the suit. Hence, the original defendant Akola Municipal Corporation has preferred this civil revision application. Though the provisions of the Bombay Provincial Municipal Corporation Act are referred to in the communication and the notice challenged in the suit, the learned counsels appearing for the parties admit that it is a notice u/s 260 of the Maharashtra Municipal Corporation Act. The Trial Court has held that the plaint-allegations are not sufficient to draw an inference that the suit is barred by particular provisions of the said Act. It has further been held that the suit is barred by the provision of Section 433A of the Maharashtra Municipal

Corporations Act can be a defence of the applicant/defendant and such a defence and the defences disclosed in the application cannot be taken into consideration for the purpose of rejection of the plaint under Order VII, Rule 11 of the Civil Procedure Code.

2. The questions of law, which arise for consideration of this Court, are--(i) Whether a suit challenging the notice of pulling down unauthorized construction, issued u/s 260 of the Maharashtra Municipal Corporations Act, is barred under the provision of Section 433A of the said Act?, and (ii) Whether a suit is liable to be dismissed under Order VII, Rule 11(a) and (b) of the Civil Procedure Code? Before dealing with such questions, the law laid down by the Apex Court and this Court need to be seen.

3. The learned counsels appearing for the parties have relied upon the decision of the Apex Court in the case of Dhruv Green Field Ltd. Vs. Hukam Singh and Others, , and the decision of this Court in Qari Mohammed Zakir Hussain and Others Vs. Municipal Corporation of Greater Mumbai and Others, .

4. In the decision of the Apex Court in the case of Dhruv Green Field Ltd., cited supra, the Apex Court has laid down that the question as to whether the jurisdiction of Civil Court is barred, must be answered on the basis of the following principles:

(1) If there is express provision in any special Act barring the jurisdiction of a civil court to deal with matters specified thereunder the jurisdiction of an ordinary civil court shall stand excluded.

(2) If there is no express provision in the Act but an examination of the provisions contained therein leads to a conclusion in regard to exclusion of jurisdiction of a civil court, the court would then inquire whether any adequate and efficacious alternative remedy is provided under the Act; if the answer is in the affirmative, it can safely be concluded that the jurisdiction of the civil court is barred. If, however, no such adequate and effective alternative remedy is provided then exclusion of the jurisdiction of the civil court cannot be inferred.

(3) Even in cases where the jurisdiction of a civil court is barred expressly or impliedly, the court would nonetheless retain its jurisdiction to entertain and adjudicate the suit provided the order complained of is a nullity.

It is thus apparent that if there is express provision in any special Act barring the jurisdiction of the Civil Court to deal with the matters specified thereunder, the jurisdiction of the ordinary Civil Court shall stand excluded. It has been held that even in cases where the jurisdiction of the Civil Court is barred expressly or impliedly, the Court would nonetheless retain its jurisdiction to entertain and adjudicate the suit; provided the order complained of is a nullity.

5. In the decision of this Court in the case of Qari Mohammed Zakir Hussain, cited supra, it has been held that even if the jurisdiction of the Civil Court is specifically excluded, the Civil Court shall have jurisdiction to examine into the

issues where the provisions of the Act have not been complied with, or statutory Tribunal has not acted in conformity with the fundamental judicial procedure. It has further been held that if the suit proceeds on the premises that the offending act has been done not in good faith, then there is no bar for such a suit. The suit complaining that the offending action is mala fide and in transgression of authority, would not be barred.

6. Now, Section 433A of the Maharashtra Municipal Corporations Act creating a bar of jurisdiction of the Civil Court, being relevant, is reproduced below:

433A. Bar of jurisdiction--Save as otherwise provided in this Act, any notice issued, order passed or direction issued by the Designated Officer, under sections 260, 261, 264, 267 or 478 shall not be questioned in any suit or other legal proceedings.

Undoubtedly, if the plaintiff comes before the Civil Court alleging that a notice issued u/s 260 of the said Act is illegal in any manner and seeks a declaration to that effect, then the bar of jurisdiction to try such a suit u/s 433A of the said Act shall operate. However, nonetheless, the inherent jurisdiction of a Civil Court in a suit challenging the notice u/s 260 of the said Act, on the limited grounds, viz. that the act of issuance of such notice is nullity, or that while issuing such notice, the mandatory provisions of the said Act have not been complied with, or that the Authority issuing such a notice has not acted in conformity with the fundamental judicial procedure, or that it is an abuse of exercise of power, or that the offending act has not been done in good faith, remains intact, in view of the aforesaid law laid down in judicial pronouncement. The Civil Court is not precluded of its inherent jurisdiction to entertain and decide such challenge to a notice u/s 260 of the said Act, on such limited grounds, particularly when there is no forum available under the said Act to ventilate such grievances in respect of it. Hence, the question of law at Serial No. (i) is answered accordingly.

7. Now coming to the question of law at Serial No. (ii), the principles of law laid down by the Apex Court in the case of *Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others*, need to be seen. The Apex Court has considered the question of compliance of clauses (a) and (d) of Rule 11 under Order VII of the Civil Procedure Code, in para 8 of the said decision. In paras 10 to 14, the principles underlying the said provisions enunciated by several decisions of the Apex Court, are discussed. Hence, the same are reproduced below:

10. In *Saleem Bhai v. State of Maharashtra* it was held with reference to Order 7 Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial 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. For the purposes of deciding an application under clauses (a) and (d) of Order 7 Rule 11 of the Code, the averments in the plaint are

germane: the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.

11. In *I.T.C. Ltd. v. Debts Recovery Appellate Tribunal* it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.

12. The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See *T. Arivandandam v. T.V. Satyapal*).

13. It is trite law that not any particular plea has to be considered, and the whole plaint has to be read. As was observed by this Court in *Roop Lal Sathi v. Nachhattar Singh Gill* only a part of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected.

14. In *Raptakos Brett & Co. Ltd. v. Ganesh Property* it was observed that the averments in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 was applicable.

It is thus apparent that the relevant facts, which need to be looked into for deciding an application under Order VII, Rule 11 of the Civil Procedure Code, are the averments in the plaint, which are germane, and the pleas taken by the defendant in the written statement would be wholly irrelevant. The basic question to be decided is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order VII, Rule 11 of the Code. If on meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, the power under Order VII, Rule 11 can be exercised; provided the grounds mentioned therein subsist. The averments in the plaint have to be considered as a whole to find out whether clause (d) of Rule 11 under Order VII is attracted or not.

8. Para 20 in the decision of *Sopan Sable's* case, cited supra, discussing the distinction between the material facts and particulars, is also relevant and the same is reproduced below:

20. There is distinction between "material facts" and "particulars". The words "material facts" show that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement or plaint becomes bad. The distinction which has been made between "material facts" and "particulars" was brought by Scott,

L.J. in *Bruce v. Odhams Press Ltd.* in the following passage: (All ER p. 294)

The cardinal provision in Rule 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" statement is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under R.S.C. Order 25 Rule 4 (see *Philipps v. Philipps*); or "a further and better statement of claim" may be ordered under Rule 7.

The function of "particulars" under Rule 6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim--gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he had to meet and to enable him to prepare for trial.

The dictum of Scott, L.J. in *Bruce* case has been quoted with approval by this Court in *Samant N. Balkrishna v. George Fernandez* and the distinction between "material facts" and "particulars" was brought out in the following terms: (SCC p. 250, para 29)

The word "material" shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet.

Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13.

In order to formulate a complete cause of action, all material facts need to be pleaded. Omission to plead a single material fact would lead to an incomplete cause of action, and the statement or the plaint becomes bad. In such a situation, the provision casts a duty on the Court to perform its obligations in rejecting the plaint.

9. A plea of bar to jurisdiction of the Civil Court to entertain and decide the challenge to a notice u/s 260 of the said Act on the limited grounds, has to be considered having regard to the contentions raised in the plaint, the averments disclosing the cause of action, and the reliefs sought for therein. All such averments must be considered as a whole and not in isolation. The plaint must contain all such statements of material facts, as are necessary to invest such jurisdiction with the Civil Court. The statements of facts must be very clear and specific and not vague. The absence of a single material fact of jurisdiction, would entail the consequences of dismissal of suit, as barred by Section 433A of the said Act.

10. In the light of the aforesaid law laid down by the Apex Court, I have gone through the averments made in the plaint. In para 4 of the plaint, it is admitted that the show-cause notice was issued u/s 260 of the said Act on 3-10-2012, which is the subject-matter of challenge. It is averred that the applicant/defendant has passed the said order without granting any opportunity of hearing to the non-applicant/plaintiff. Hence, the order is null and void. In para 6, it is averred that in fact there is no unauthorized construction made by the non-applicant/plaintiff on the suit property, and the perusal of the notice will show that the said notice is absolutely vague. In para 9 of the plaint, it is averred that the applicant/defendant has not given any prior notice to the non-applicant/plaintiff for taking such an action, and hence it is against the well-settled principles of law and natural justice. In para 11, it is averred that the act of the applicant/defendant is illegal, unauthorized and against the provisions of the Bombay Provincial Municipal Corporation Act, and there is no necessity of any notice u/s 487 of the said Act. The relief claimed is that the notice dated 29-10-2012 be declared as void, illegal and without substance. The relief of permanent injunction is claimed restraining the applicant/defendant from acting on the basis of such a notice.

11. Perusal of the communication dated 3-10-2012, placed by the non-applicant/plaintiff on record along with the plaint and challenged as being null and void, shows that the non-applicant/plaintiff is merely called upon to stop the alleged unauthorized construction carried out without permission of the applicant/defendant and to submit the papers regarding ownership of the property and sanctioned plan. The notice dated 29-10-2012 issued u/s 260 of the Bombay Provincial Corporation Act clearly discloses the specific area of unauthorized construction. The notice is absolutely clear and without any ambiguity. It calls upon the non-applicant/plaintiff to show cause as to why such an unauthorized construction should not be pulled down within a period of fifteen days.

12. The averments in the plaint nowhere disclose as to how and in what manner the action of the applicant/defendant in issuing the notice u/s 260 of the said Act is null and void. The material facts showing as to how the action impugned is in breach or contrary to any specific statutory provisions of the said Act, are absent. It is not stated anywhere in the plaint as to how the action proposed to

be taken is not in good faith. The averment that the notice issued u/s 260 of the said Act is without granting any opportunity of hearing to the non-applicant/plaintiff is futile and illusory, for the reason that the notice itself provides the non-applicant/plaintiff an opportunity to furnish an explanation in respect of an unauthorized construction. Perusal/reading of the notice also makes the averment that the notice is absolutely vague, as futile and illusory. The plaint averments nowhere disclose as to how the proposed demolition is without following due procedure of law. The averments in the plaint fail to disclose the material facts as to how the conduct of the applicant/defendant is mala fide, high-handed or disclose colourable exercise of power. The entire reading of plaint as a whole makes it absolutely clear that the material facts investing the Civil Court with the jurisdiction to entertain, try and decide the suit are totally absent and hence the suit is liable to be dismissed under Order VII, Rule 11(a) and (d) of the Civil Procedure Code. The Trial Court has, therefore, committed an error of law in holding that such questions can be gone into in the suit. For the reasons stated above, the civil revision application is allowed. The order dated 4-1-2013 passed below Exhibit 12 in Regular Civil Suit No. 902 of 2012, by the learned 2nd Joint Civil Judge, Junior Division, Akola, is hereby quashed and set aside, and Regular Civil Suit No. 902 of 2012 is dismissed under Order VII, Rule 11(a) and (d) of the Civil Procedure Code, being barred by the provisions of Section 433A of the Maharashtra Municipal Corporations Act. No order as to costs.