(2018)2 SCeJ 1240

SUPREME COURT OF INDIA

Present : Justice A.K. Sikri and Justice Ashok Bhushan

SOUMITRA KUMAR SEN v. SHYAMAL KUMAR SEN & ORS.

CIVIL APPEAL NO. 1513 of 2018

21 February, 2018.

(i) Civil Procedure Code, 1908, Order VII Rule 11 – Application claiming rejection of the plaint on the ground that the suit filed by respondent No.1 was barred by res judicata – Plaint in question did not disclose any cause of action – At this stage, the defense in the written statement cannot be gone into – One has to only look into the plaint for the purpose of deciding application under Order VII Rule 11, CPC – It is possible that in a cleverly drafted plaint, the plaintiff has not given the details about the first Suit which has been decided against him – He has totally omitted to mention about the second Suit, the judgment wherein has attained finality – Plaintiff may be guilty of suppression and concealment, if the averments made by the appellant are ultimately found to be correct – However, as per the established principles of law, such a defense projected in the written statement cannot be looked into while deciding application under Order VII Rule 11, CPC – CPC O. 7 R. 11.

[Para 9]

(ii) Suit maintainability of – Issue may be decided at the first instance – Appellant/ defendant has mentioned about the earlier two cases which were filed by respondent / plaintiff and wherein he failed – These are judicial records – The appellant can easily demonstrate the correctness of his averments by filing certified copies of the pleadings in the earlier two suits as well as copies of the judgments passed by the courts in those proceedings – In a case like this, though recourse to Order VII Rule 11 CPC by the appellant was not appropriate, at the same time, the trial court may, after framing the issues, take up the issues which pertain to the maintainability of the suit and decide the same in the first instance – In this manner the appellant, or for that matter the parties, can be absolved of unnecessary agony of prolonged proceedings, in case the appellant is ultimately found to be correct in his submissions. [Para 12]

JUDGMENT

A.K. SIKRI, J. – In a suit filed by respondent No.1, the appellant herein (defendant No.1 in the said suit) moved an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, 'CPC') claiming rejection of the plaint on the ground that the suit filed by respondent No.1 was barred by res judicata and also under Section 69 of the Indian

Partnership Act, 1932. The Civil Judge dismissed the said application vide orders dated May 03, 2016 with the observations that without taking evidence it would not be proper to reject the plaint on the principles of res judicata as it was not permissible for the Court to look into the statements made in the written submissions while dealing with an application under Order VII Rule 11 CPC. Revision petition preferred by the appellant against the said order also stands dismissed by the High Court vide judgment dated December 12, 2016. Dissatisfied with the outcome, the appellant has approached this Court challenging the aforesaid orders of the courts below. The appellant pleads that the High Court as well as the trial court have failed to appreciate that the plaint in question did not disclose any cause of action and was barred by Order II Rule 2 of the CPC which was writ large on the record and for this no evidence is required. In order to appreciate the issue involved, it would be necessary to traverse through the relevant facts, which are as under:

2) (A) Respondent No.1 was the sole proprietor of M/s. Sen Industries – respondent No.4 herein. A piece of land in an industrial area of District Burdwan was allotted by the Asansol Durgapur Development Authority (ADDA) in the name of respondent No.4 on long term leasehold basis. Subsequently, respondent No.4 was converted into a partnership firm with the appellant, respondent No.1 and respondent No.2 – Anjan Mallick (other partner proforma respondent in these proceedings) as its partners. In the year 1994, a Memorandum of Understanding was entered into between the said partners wherein respondent No.1 agreed to retire from the said company/partnership firm in return for a payment of Rs.2,00,000/- in lieu of his shares in the firm. Accordingly, the payment was duly made and respondent No.1 executed a deed of retirement. The said company continued under the reconstituted partnership between the appellant and respondent No.2, until the latter's retirement after which respondent No.4 continued under the sole proprietorship of the appellant.

(B) Respondent No.1 filed two separate suits prior to the title suit in question. The particulars of these two suits are as under:

(i) Title Suit, being Suit No. 103/1995, was filed by respondent No.1 in the Court of Civil Judge (Junior Division), 1st Court at Durgapur, on May 25, 1995 against the appellant and respondent No.2 praying for the following reliefs:

"a) a decree of declaration that "Sen Industries is a sole proprietorship firm and the plaintiff is the proprietor of the said firm" the Defendants are liable to retire from the firm Sen Industries.

b) A decree of permanent injunction restraining the defendants from claiming the Sen Industries as partnership."

During the pendency of the suit, respondent No.2 also retired from the partnership business of respondent No.4 on June 26, 1996 and the partnership between the appellant and respondent No.2 stood dissolved. As per the appellant, he has been carrying on the business of respondent No. 4 as a sole proprietor ever since. On that basis, he contested the suit filed by respondent No.1.

After the trial, the trial court was pleased to dismiss the said suit vide its judgment and decree dated March 31, 1997. While doing so, a specific finding was arrived at by the Civil Judge that respondent No.4 is a partnership firm and that in view of the Memorandum of Understanding dated March 23, 1994, the suit was barred by the principles of estoppels, waiver and acquiescence. The appeal preferred by respondent No.1 against the said judgment and decree was also dismissed by the Civil Judge.

(ii) Ten years thereafter, i.e. in the year 2008, respondent No.1 filed second title suit being Suit No. 268/2008 before the Civil Judge (Junior Division), Durgapur against the appellant and others claiming as under:

“a) for dissolution of partnership firm “Sen Industries”;

b) for accounts; and

c) appointment of receivers etc. against the appellant and the proforma respondent.”

By order dated July 31, 2014, the Civil Judge dismissed Suit No. 268/2008 observing as under:

“…that the plaintiff was a partner of the firm namely “Sen Industries” but he retired from the firm by executing MOU dated 23.03.1994, in this situation the retired partner cannot claim for dissolution of the firm and as per this MOU, accounts were already settled.”

Aggrieved, respondent No.1 filed an appeal, being Appeal No. 25/2014, before the Civil Judge (Senior Division), Durgapur, challenging the judgment and orders passed by the Civil Judge (Junior Division) in the aforesaid proceedings. This appeal is still pending adjudication.

3) Respondent No.1 has filed the instant suit, being T.S. No. 126 of 2015, in the Court of Civil Judge (Junior Division), 1st Court at Durgapur, which is the subject matter of the present proceedings, claiming to be the alleged lessee of the said leasehold property in question against the appellant and others with the following prayers:

“a) for a decree declaring the every leasehold right of the suit property of suit land of M/s Sen Industries stands in the names of Sri Syamal Kumar Sen, Sri Soumitra Sen and Sri Anjan Mallick and for the purpose of building a factory for M.S. Fabrication Mechanical Jobwork;

b) for a decree of permanent injunction against the defendants from changing the nature and character and use of the suit land;

c) for a decree of mandatory injunction with a direction upon the defendant Nos. 1 and 2 to remove all the unauthorised articles, obstructions, shades, etc. from the suit property at their own cost within a time fixed by the learned court;”

4) The appellant as well as respondent No.2 have filed their respective written submissions

in the aforesaid suit. Thereafter, the appellant filed the application under Order VII Rule 11 CPC, on the averments noted in paragraph 2 above and submitted as under:

"(i) petitioner herein is the exclusive owner of M/s Sen Industries and is entitled to manage and administer the said property without being disturbed by the respondent No.1 herein;

(ii) M/s. Sen Industries was not a registered partnership firm anymore and as such the instant suit was barred under Section 69 of the Indian Partnership Act;

(iii) the suit was barred under Order II Rule 2 of the Code of Civil Procedure;

(iv) the suit was barred under the principles of res judicata and/or constructive res judicata."

5) As mentioned above, this application has been dismissed by the trial court and the order of the trial court has been affirmed by the High Court as well.

6) The trial court while dismissing the said application gave the following reasons:

"Considering the rival submissions of both the parties, it appears that all the pleas taken by the defendant at the time of hearing of petition under Order 7 Rule 11 of *C.P.C. has been stated in his written statement. Perusal of the plaint did not reveal anything from which it could be concluded that the instant suit is barred under any provision of law. It is a settled principle of law that in order to consider the rejection of the plaint under Order 7 Rule 11 of C.P.C. the averments in the plaint has to be considered. It is totally immaterial what has been stated in the written statement at the time of considering a petition under Order 7 Rule 11 C.P.C. I am of further view that without taking evidence this Court cannot dispose of the plea that the instant suit is barred under Order 2 Rule 2 of C.P.C. It would not be proper to reject the suit on that ground at this stage. Even the plea that the suit is barred by the principle of res judicata cannot be effectively determined without taking any evidence. Considering the entire facts and circumstances, I am of view that the petition under Order 7 Rule 11 of C.P.C. filed by the defendant is liable to be rejected at this stage."*

7) The High Court has, likewise, affirmed the order with the following observations:

"In the instant case, the plaintiff/opposite party filed a suit for declaration of his leasehold right acquired in the name of M/s. Sen Industries and permanent injunction restraining the other persons, who name are recorded in the register maintained by the appropriate authority, from removing articles and/or from changing the nature and character of the same. By taking out the application under Order VII Rule 11(d) of the Code, the defendant nos. 1 and 2 tried to invite the attention of the trial court that previous to the said suit there was another suit being Title Suit no. 103 of 1995 filed by the plain tiff against the 2 defendant/petitioner herein, which was ultimately dismissed by the trial court and an appeal was preferred against the said judgment and decree, w3hich could not yield favourable result in favour of the plaintiff/opposite party. It is further stated that the second suit was filed being Title Suit No. 268 of 2008 for declaration of dissolution of partnership ad accounts, which was against dismissed by the trial court and the said judgment and

decree has been carried to the appellant court, who is still in seisin thereof. Purely relying upon the aforesaid statement, the application for rejection of the plaint has been taken out. As indicated above, though there is a reflection of the second suit in the plaint of the said case but the court should not venture to look into the document surfaced for the first time at the behest of the defendant for the purpose of nipping the plaint in bud under Order VII Rule 11(d) of the Code. Furthermore, the court has to consider whether the subject disputes in earlier suits are identical and similar to the disputes involved in the instant suit. Even if such point has a relevance, the principle of res judicata being the mix question of facts and law, it would not be proper for the court to reject the plaint on such score in this regard. There appears to be some confusion on the nature of relief claimed in the earlier suits and the relief claimed in the preset suit. This court, therefore, cannot accept the contention of the petitioner that the instant suit is hit by the provisions of law. This Court does not fine any infirmity and/or illegality in the impugned order passed by the trial court. The revisional application, therefore, fails. There shall, however, be no order as to costs.

8) The approach of the courts below, in the given facts, appears to be correct. On going through the plaint, one finds that it is founded on the averments that in the year 1982 the plaintiff (respondent no. 1) was a proprietor of M/s. Sen Industries and at that time the land in-question was allotted on July 28, 1982 by Asansol Durgapur Development Authority (Defendant no. 3) for setting up a works job. Respondent no. 1 has admitted the fact that said property was converted into partnership in the year 1995 by taking appellant as well as respondent no. 2 as partners. It is also admitted that thereafter defendant no. 3 granted the lease and leasehold rights to the partnership firm in respect of the land in question on which the partnership firm started doing M.S. Fabrication Mechanical Jobworks. Respondent no. 1 has further stated that some disputes arose between the parties in respect of said partnership deed and has blamed the appellant as well as respondent no. 2 in denying and depriving him as a partner from his rights, illegally and unlawfully. Though, there is a reference to filing of suit by him in the year 2008, i.e., T.S. No. 268 of 2008 which was filed for dissolution of partnership and for accounts of the partnership firm and it is accepted that the said suit was dismissed on contest and thereagainst the appeal is filed by respondent no. 1 which is still pending. However, nothing mentioned in the plaint as to what prevailed with the trial court in dismissing the suit. Instead it is only stated that the subject matter of the said suit is totally different from the subject matter of the suit which is now filed. Insofar as the suit in question is concerned it is alleged that though the lease is given for doing M.S. Fabrication Mechanical Jobwork, contrary thereto, the appellant as well as Respondent no. 2 are trying to set up a lime factory and plastic and PVC pipe factory which according to respondent no. 1 is unlawful. On that basis, decree of permanent injunction is sought against the defendant from changing the nature, character and use of the suit. Decree of mandatory injunction is also prayed for directing them to remove all the unauthorised articles, obstruction, sheds etc. of the suit premises. In addition to first relief, which is sought is the decree of declaration to the effect that M/s. Sen Industries stands in the names of the appellant; respondent no. 2 as well as respondent no. 1, i.e., plaintiff and for the purpose of building a factory for M.S. Fabrication Mechanical Jobworks.

9) In the first instance, it can be seen that insofar as relief of permanent and mandatory injunction is concerned that is based on a different cause of action. At the same time that

kind of relief can be considered by the trial court only if the plaintiff is able to establish his locus standi to bring such a suit. If the averments made by the appellant in their written statement are correct, such a suit may not be maintainable inasmuch as, as per the appellant it has already been decided in the previous two suits that respondent no. 1/plaintiff retired from the partnership firm much earlier, after taking his share and it is the appellant (or appellant and respondent no. 2) who are entitled to manage the affairs of M/s. Sen Industries. However, at this stage, as rightly pointed out by the High Court, the defense in the written statement cannot be gone into. One has to only look into the plaint for the purpose of deciding application under Order VII Rule 11, CPC. It is possible that in a cleverly drafted plaint, the plaintiff has not given the details about Suit No. 268 of 2008 which has been decided against him. He has totally omitted to mention about Suit No. 103 of 1995, the judgment wherein has attained finality. In that sense, the plaintiff/respondent no. 1 may be guilty of suppression and concealment, if the averments made by the appellant are ultimately found to be correct. However, as per the established principles of law, such a defense projected in the written statement cannot be looked into while deciding application under Order VII Rule 11, CPC.

10) Therefore, insofar as trial court dismissing the said application of the appellant, which is upheld by the High Court, cannot be faulted with.

11) We may usefully refer to the judgment of this Court in **Kamala & Ors. v. K.T. Eshwara Sa & Ors**. (2008) 12 SCC 661. That was a case wherein the trial judge allowed an application for rejection of the plaint in a suit for partition of family properties and the same was affirmed by the High Court as well. An appeal against the order of the High Court was filed before this Court. While examining the scope, ambit and exercise of power under Order VII Rule 11 of CPC, this Court held as under:

"*Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.*

It was further observed:

For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision.

The principles of res judicata, when attracted, would bar another suit in view of Section 12

of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

It is one thing to say that the averments made in the plaint on their face disclose no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law."

12) Before we part with, it is necessary to make certain comments. The appellant has mentioned about the earlier two cases which were filed by respondent no. 1 and wherein he failed. These are judicial records. The appellant can easily demonstrate the correctness of his averments by filing certified copies of the pleadings in the earlier two suits as well as copies of the judgments passed by the courts in those proceedings. In fact, copies of the orders passed in judgement and decree dated March 31, 1997 passed by the Civil Judge (Junior Division), copy of the judgment dated March 31, 1998 passed by the Civil Judge (Senior Division) upholding the decree passed by the Civil Judge (Junior Division) as well as copy of the judgment and decree dated July 31, 2014 passed by Civil Judge, Junior Division in Suit No. 268 of 2008 are placed on record by the appellant. While deciding the first suit, the trial court gave a categorical finding that as per MoU signed between the parties, respondent no. 1 had accepted a sum of Rs. 2,00,000/- and, therefore, the said suit was barred by principles of estoppel, waiver and acquiescence. In a case like this, though recourse to Order VII Rule 11 CPC by the appellant was not appropriate, at the same time, the trial court may, after framing the issues, take up the issues which pertain to the maintainability of the suit and decide the same in the first instance. In this manner the appellant, or for that matter the parties, can be absolved of unnecessary agony of prolonged proceedings, in case the appellant is ultimately found to be correct in his submissions.

13) Resultantly, subject to the aforesaid observations, this appeal fails and is hereby dismissed.

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