[2023] 16 S.C.R. 872 : 2023 INSC 1043

ELDECO HOUSING AND INDUSTRIES LIMITED
v.
ASHOK VIDYARTHI AND OTHERS

(Civil Appeal No. 7891 of 2023)

NOVEMBER 30, 2023

[VIKRAM NATH AND RAJESH BINDAL*, JJ.]

Issue for consideration:

A suit for specific performance was filed seeking enforcement of MoU dated 31.08.1998. It is in the aforesaid suit that application was filed by respondent No. 1 under Order VII Rule 11(d) CPC for rejection of the plaint on the ground that in terms of Order II Rule 2 C.P.C., the suit was barred by law. In the review application filed by the respondent no.1, an application filed under Order VII Rule 11(d) CPC by the High Court was allowed and the suit filed by the appellant was rejected. Whether the order passed by the High Court in review application be legally sustained.

Code of Civil Procedure, 1908 – Order VII Rule 11(d) – Whether evidence or merits of the controversy can be examined at the stage of decision of the application under Order VII Rule 11 CPC:

Held: If the facts of the case are examined in the light of settled position of law, the order passed by the High Court in review application cannot be legally sustained – The suit for specific performance was filed by the appellant on the basis of MoU dated 31.08.1998 (registered on 01.09.1998) – In terms of the clauses in the agreement, it was pleaded that there was dispute pending amongst the family members of the vendor – After the same is decided and right of the vendor is crystalized, he will get the sale deed registered – The rights of the vendor were finally crystalized when the issue was decided by Supreme Court in Shreya Vidyarthi's case on 16.12.1995 – Suit for specific performance was filed on 03.08.2017 stating that the appellant-plaintiff came to know about the disposal of the litigation amongst the family members just before filing the suit – Earlier suit for injunction was filed on 22.01.2009 pleading that the appellant-vendee came to know that the vendor was trying to create third party rights in the property while agreeing to sell the same to some other parties

* Author

– At that stage cause of act to file suit for specific performance had not arisen – The application for rejection of the plaint was filed by the respondent claiming that prior to MoU registered on 01.09.1998, the MoU was entered into between the parties on 15.04.1998 and subsequent to the aforesaid MoUs, an agreement was executed on 02.09.1998 – In the aforesaid agreement, it was clearly mentioned that in case the litigation of the vendor regarding the property in question is not decided after one year, the vendee will have the right to get his earnest money back along with interest @ 18% p.a. – However, the fact remains that all the aforesaid documents, referred to by the respondent in support of his plea for rejection of the plaint, cannot be considered at this stage as these are not part of the record with the Court filed along with the plaint – No amount of evidence or merits of the controversy can be examined at the stage of decision of the application under Order VII Rule 11 CPC – Thus, the impugned order of the High Court passed in the Review Application is set aside – Trial Court directed to proceed with the suit. [Paras 23, 25, 26 and 27]

Kamala and others v. K.T. Eshwara Sa and others [2008] 7 SCR 39 **: (2008) 12 SCC 661;** *Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) dead through legal representatives and others* **(2020) 7 SCC 366: 2020 INSC 450 :** [2020] 5 SCR 694 **– relied on.**

Shreya Vidyarthi v. Ashok Vidyarthi and others [2015] 14 SCR 1190**: (2015) 16 SCC 46 : 2015 INSC 934;** *Gurbux Singh v. Bhooralal,* [1964] 7 SCR 831**;** *Sidramappa v. Rajeshetty and other* **(1970) SCC 186;** *Inbasegaran and another v. S. Natarajan (dead) through legal representatives* [2014] 10 SCR 1202**: (2015) 11 SCC 12 : 2014 INSC 748, ;** *Jayakantham and others v. Abaykumar* [2017] 2 SCR 355 **: (2017) 5 SCC 178 : 2017 INSC 161;** *Vurimi Pullarao v. Vemari Vyankata Radharani* [2019] 18 SCR 1125 **: (2020) 14 SCC 110: 2019 INSC 1291;** *Shakti Bhog Food Industries Ltd. v. Central Bank of India and another* **(2020) 17 SCC 260 : 2020 INSC 413;** *Srihari Hanumandas Totala v. Hemant Vithal Kamat and others* **(2021) 9 SCC 99 : 2021 INSC 387;** *Kum. Geetha v. Nanjundaswamy and others* **2023 SCC OnLine SC 1407: 2023 INSC 964 – referred to.**

CIVIL APPELLATE JURISDICTION: Civil Appeal No.7891 of 2023.

From the Judgment and Order dated 27.09.2021 of the High Court of Judicature at Allahabad in CMRA No.192 of 2021.

Shyam Divan, Sr. Adv., Ms. Kanika Agnihotri, Shaurya Rohit, Ms. Niharika Ahluwalia, Advs. for the Appellant.

S. B. Upadhyay, Dr. Adish Aggrawal, Sr. Advs., Ms. Kumud Lata Das, Harsh Ajay Singh, Ms. Pooja Rathore, Advs. for the Respondents.

The Judgment of the Court was delivered by

RAJESH BINDAL, J.

1. Leave granted.

2. Aggrieved against the order[1] passed by the High Court[2] in Review Application[3] in Civil Revision[4], the plaintiff is in appeal before this Court. Vide aforesaid order, the application filed by respondent No. 1- defendant before the Trial Court[5] under Order VII Rule 11(d) C.P.C. was allowed and the suit filed by the appellant was dismissed.

3. Briefly stating, the facts available on record are that a Memorandum of Understanding[6] was entered into between the appellant and respondent No. 1 on 31.08.1998, regarding sale of the property in question. It was specifically mentioned in the MoU that there is a litigation pending between the family members of the respondent No. 1. The sale deed will be got registered immediately after the litigation is over and the right of the vendor is determined. The respondent No. 1 shall inform the appellant when the rights of the parties are finalised. As the appellant came to know that the respondent No. 1 is trying to sell the property to third parties, it filed a suit for injunction[7]. The prayer made in the suit was that the defendant (respondent No. 1 herein) be restrained from transferring, selling or alienating the suit property in favour of anyone else

1 Order dated 27.09.2021.
2 High Court of Judicature at Allahabad
3 Review Application No. 192 of 2021
4 Civil Revision No. 28 of 2020
5 Civil Judge (Senior Division), Kanpur Nagar
6 Hereinafter referred to as 'MoU'
7 Original Suit No. 111 of 2009

except the plaintiff (appellant herein). It was also prayed that he be restrained from creating any encumbrance on the property. In the written statement filed in the aforesaid suit, the stand taken by respondent No. 1 was that he was not selling the property or creating any third-party rights therein. The suit was accordingly dismissed.

4. The appellant was never updated by respondent No. 1 about the status of the litigation between the family members. The petitioner having come to know that respondent No. 1 was again intending to sell the property in question issued two public notices to inform the public at large from not entering into any agreement in respect of the property in question. When it came to the notice of the appellant that respondent No. 1 was again trying to dispose of the property, as the litigation between the family members had been finally resolved by this Court in **Shreya Vidyarthi v. Ashok Vidyarthi and others**[8], a suit[9] for specific performance was filed seeking enforcement of MoU dated 31.08.1998. It is in the aforesaid suit that application was filed by respondent No. 1 under Order VII Rule 11(d) C.P.C. for rejection of the plaint on the ground that in terms of Order II Rule 2 C.P.C., the suit was barred by law. The relief, as claimed in the suit, was available to the appellant when the suit for injunction was filed by it and a fresh suit was not maintainable. The Trial Court, vide order dated 12.02.2020 rejected the application. The revision filed against the aforesaid order was dismissed by the High Court vide order dated 14.07.2021. However, there being no error apparent on the record of the order, which was a detailed and speaking one, the respondent No. 1 filed Review Application, which was allowed by the High Court and consequently the application filed under Order VII Rule 11(d) C.P.C. was allowed and the suit filed by the appellant was rejected.

5. The argument raised is that for consideration of an application under Order VII Rule 11 C.P.C., it is only the pleadings in the suit which are to be considered and no other material. A plain reading of the plaint shows that there was a cause of action to file the suit which was not time barred. The MoU entered into between the parties clearly mentioned that there was litigation pending between the

8 (2015) 16 SCC 46: 2015:INSC:934
9 Original Suit No. 751 of 2017

family members; as and when the rights are finally determined by the Court, the appellant will be informed and subsequent thereto the sale deed will be registered. Respondent No. 1 failed to apprise the appellant about the status of the litigation. In the year 2009, when the appellant came to know that respondent No. 1 was trying to create third party rights in the property by selling the same to some other person, immediately a suit for injunction was filed against respondent No. 1. A second injunction suit was also filed impleading Ms. Shreya Vidyarthi from creating any third-party rights qua the property in question. The apprehension was that the respondent no.1 along with Ms. Shreya Vidyarthi was trying to transfer the property to a third party.

6. The stand taken by respondent No. 1 in the written statement was that no third-party rights were being created. The suit was disposed of on 06.10.2010. As was the responsibility of respondent No. 1 to update the appellant about the progress of litigation amongst the family members of respondent No. 1, despite the fact that this Court had disposed of the litigation on 16.12.2015 in **Shreya Vidyarthi's case** (supra), the appellant was not informed about the same. When this came to its notice, suit for specific performance was filed in August 2017. Nothing was withheld from the Court. Filing of the earlier suit for injunction was specifically pleaded and so was the cause of action.

7. It was argued that when the earlier suit for injunction was filed, the cause of action for claiming the relief of specific performance was not ripe as at that stage, the litigation between the family members of respondent No. 1, was still pending. It was merely a suit for injunction filed to protect the rights of the appellant. As respondent No. 1 was trying to create third party rights in the property in question, regarding which MoU had been entered between the appellantand the sale deed was to be executed only after the dispute amongst the family members of respondent No. 1 was resolved.

8. On a plain reading of the plaint, by no stretch of imagination, it could be said that suit for specific performance filed by the appellant was not maintainable under law, but still the application filed by respondent No. 1 for rejection of the plaint was allowed by the High Court in the review application, even though earlier the same was rejected by the Trial Court and even the revision petition was

also dismissed. It is settled position of law that no material except the plaint or the documents annexed with the plaint could be considered at the stage of consideration of application under Order VII Rule 11 C.P.C. None of the documents including the earlier suit for injunction or any communication or agreement was on record, hence the High Court had committed error in allowing the review application and consequently the application under Order VII Rule 11(d) CPC, rejecting the plaint. In support of the arguments, reliance was placed upon **Gurbux Singh v. Bhooralal**[10], **Sidramappa v. Rajashetty and others**[11], and **Inbasegaran and another v. S. Natarajan (dead) through legal representatives**[12].

9. On the other hand, learned counsel for respondent No. 1 submitted that filing of the suit for specific performance by the appellant seeking to enforce the MoU entered on 31.08.1998 was highly belated. In fact, the appellant had not approached the Court with clean hands. In the aforesaid MoU entered into between the parties, it was mentioned that a litigation is pending between the family members of respondent No. 1 in the High Court and the sale deed will be registered in favour of the appellant in case respondent No. 1 succeeds in litigation and absolute title comes in his favour. The consideration will be mutually agreed at that time. The aforesaid MoU was followed by an agreement executed between the parties on 02.09.1998 with reference to the same property, in which all the terms and conditions for sale of property in case it comes to the share of respondent No. 1, were reduced in writing. It is specifically mentioned in Clause (8) of the agreement that pending litigation in the High Court is likely to be decided in favour of respondent No. 1, however, in case it is not decided favourably within one year from the date of first MoU dated 15.04.1998, the second party, namely, the appellant will have right to get the earnest money back along with interest @ 18% per annum. The aforesaid agreement was deliberately concealed by the appellant while filing the civil suit. In terms of the agreement dated 02.09.1998, the only right which was available to the appellant was to get the refund of earnest money along with interest for which the limitation expired long back but no action was taken.

10 (1964)7 SCR 831
11 (1970) SCC 186
12 (2015) 11 SCC 12: 2014: INSC:748

10. It was further argued that the appellant had even issued a notice dated 22.03.2001 for refund of earnest money. Even at the stage of filing suit for injunction, the relief of specific performance could very well be sought but the appellant failed to seek the same. The suit was not prosecuted by the appellant as the same was dismissed on 06.10.2010 and not disposed of, as claimed by the appellant. A separate suit on a part of cause of action which was already available to the appellant in a suit for injunction, was barred in terms of Order II Rule 2 C.P.C. The application filed by respondent No. 1 was rightly allowed by the High Court. The facts, as have been stated by respondent No. 1, have not been disputed by the appellant. He further submitted that though respondent No. 1 expected that 3/4th part of the property will come to his share, however finally he got only 1/10th share on which house is constructed and he is living there. In support of his plea, reliance was placed upon **Jayakantham and others v. Abaykumar**[13] and **Vurimi Pullarao v. Vemari Vyankata Radharani.**[14]

11. Heard learned counsel for the parties and perused the relevant referred record.

12. Even from the documents placed on record by the appellant, it is evident that MoU was entered into between the parties on 15.04.1998 with reference to House No.7/89, Tilak Nagar, Kanpur. It was mentioned therein that the aforesaid property is in dispute and the respondent No. 1 has 3/4th share in the property. Though the Trial Court had decided against respondent No. 1, however, the appeal is pending in the High Court. Though sale consideration of ₹4,000/- per square yard was mentioned, however, the same was to be finally determined after decision of appeal by the High Court. The sale deed was to be registered only after the litigation is decided in favour of respondent No. 1. The earnest money of ₹10,00,000/- was proposed to be paid in instalments. It was followed by a subsequent MoU signed between the parties on 31.08.1998 (registered on 01.09.1998) pertaining to the same property. This agreement did not provide for any details except that consideration

13 (2017) 5 SCC 178: 2017: INSC:161
14 (2020) 14 SCC 110: 2019: INSCC:1291

for transfer of the property shall be mutually agreed between the parties at the time of registration of the sale deed, if the litigation is decided in favour of respondent No. 1. This MoU was followed by a registered agreement signed between the parties on 02.09.1998. It referred to an earlier MoU entered between the parties. Clause (4) of the agreement refers to the details of ₹10,00,000/- paid by the appellant to respondent No. 1. Besides other terms and conditions, which are not relevant for the decision of the controversy in issue, one of the clause in the agreement was that respondent No. 1 had assured the appellant that litigation pending in the High Court is likely to be decided shortly in his favour. However, in case it is not decided after one year from the date of execution of first MoU on 15.04.1998, the appellant will have right to get the earnest money returned along with interest @ 18% per annum. Even the appellant had issued notice dated 22.03.2001 to respondent No. 1 for refund of earnest money.

13. A suit for injunction was filed by the appellant against respondent No. 1 in January 2009. In the aforesaid civil suit, the appellant referred to the MoU entered into between the parties on 31.08.1998 (as registered on 01.09.1998). No reference was made to the subsequent agreement dated 02.09.1998. It was pleaded that the appellant (plaintiff therein) came to know that respondent No. 1 was intending to sell the property to some other person as the prices of the property had increased manifold during the interregnum. It was pleaded that respondent No. 1 had not informed the appellant (plaintiff therein) about the final result of the pending litigation and the appellant is still ready and willing to purchase the property at the rate which is mutually settled between the parties. An application was filed by respondent No. 1 under Order VII Rule 11(d) C.P.C. for rejection of the plaint.

14. From the paper book it is evident that another suit was filed by the appellant praying for permanent injunction with reference to the same property referring to MoU dated 31.08.1998. The pleadings in the aforesaid suit were replied to by respondent No. 1 stating that the earlier suit No. 111 of 2009 pertaining to the same property and claiming the same relief was already pending between the parties. An application under Order VII Rule 11(d) C.P.C. was also filed

pleading the same. It was further pleaded that the suit was barred by Section 41(h) of the Specific Relief Act, 1963. Vide two orders of even date i.e., 06.10.2009 (in Suit No. 111 of 2009 and Suit No. 269 of 2009) the cases were dismissed as the counsel for the plaintiff therein had failed to appear.

15. The order passed by this Court has been placed on record, in terms of which the share of family members of respondent No. 1 in the property in dispute was finally decided on 16.12.2015. Notice dated 14.09.2016 was issued by the appellant to respondent No. 1 calling upon him to get the sale deed of the property in question registered in favour of the appellant. It referred to MoU executed on 15.04.1998, 01.09.1998and also agreement dated 02.09.1998. This was replied to by respondent No. 1 stating that there was no valid registered agreement to sell executed between the parties. *Vide* letter dated 22.03.2001, the appellant had backed out from the deal and sought refund of the earnest money which respondent No. 1 was ready and willing to give. Two suits filed earlier by the appellant were dismissed. Another notice was issued by the appellant to respondent No. 1 on 27.12.2016 and 10.03.2017 calling upon him to get the sale deed registered. The Civil Suit was filed in August 2017 by the appellant for specific performance on the basis of MoU dated 31.08.1998. It is in the aforesaid suit that respondent No. 1 by filing the written statement and also filed his counter claim. It was specifically pleaded that the appellant had already withdrawn an earlier agreement and issued a notice in that regard to respondent No. 1 on 22.03.2001 seeking refund of the earnest money. The written statement also referred to two suits filed by the appellant for injunction. It was claimed that the present suit was barred under Order II Rule 2 C.P.C. Along with the written statement, an application was filed under Order VII Rule 11(d) C.P.C. for rejection of the plaint. The Trial Court, *vide* order dated 12.02.2020 dismissed the application. The High Court in the revision filed by respondent No. 1, *vide* order dated 14.07.2021 upheld the order passed by the Trial Court. The review application was filed by respondent No. 1 which was allowed vide order dated 29.7.2021.

16. It was not disputed at the time of hearing that pleadings in the earlier suits or documents which are sought to be referred to by respondent No.1, i.e., MoU dated 15.04.1998 and the agreement dated 02.09.1998 are not part of the record before the Trial Court.

17. In **Kamala and others v. K. T. Eshwara Sa and others**,[15] this Court opined that for invoking clause (d) of Order VII Rule 11 C.P.C., only the averments in the plaint would be relevant. For this purpose, there cannot be any addition or substraction. No amount of evidence can be looked into. The issue on merits of the matter would not be within the realm of the Court at that stage. The Court at that stage would not consider any evidence or enter a disputed question of fact of law. Relevant paragraphs thereof are extracted below:

"21. 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.

22. 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.

23. 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.

24. It is one thing to say that the averments made in the plaint on their face discloses 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.

15 (2008) 12 SCC 661

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained."

(emphasis supplied)

18. Similar was the view expressed in **Shakti Bhog Food Industries Ltd. v. Central Bank of India and another**[16] and **Srihari Hanumandas Totala v. Hemant Vithal Kamat and others**[17].

19. The law applicable for deciding an application under Order VII Rule 11 C.P.C. was summed up by this Court in **Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) dead through legal representatives and others**18**.** Relevant parts of paragraph 23 thereof are extracted below:

"**23 to 23.1** × × ×

23.2. The remedy under Order 7 Rule 11 is an independent and special remedy, wherein the court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision.

23.3. The underlying object of Order 7 Rule 11(*a*) is that if in a suit, no cause of action is disclosed, or the suit is barred by limitation under Rule 11(*d*), the court would not permit the plaintiff to unnecessarily protract the proceedings in the suit. In such a case, it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted.

23.4. In *Azhar Hussain v. Rajiv Gandhi* 1986 Supp SCC 315, this Court held that the whole purpose of conferment of powers under this provision is to ensure that a litigation which is meaningless, and bound to prove abortive, should not be permitted to waste judicial time of the court, in the following words :

16 (2020) 17 SCC 260: 2020: INSC:413
17 (2021) 9 SCC 99: 2011: INSC:387
18 (2020) 7 SCC 366: 2020:INSC:450

> "*12.* … The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless, and bound to prove abortive should not be permitted to occupy the time of the court, and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation, the court readily exercises the power to reject a plaint, if it does not disclose any cause of action."

23.5. The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order 7 Rule 11 are required to be strictly adhered to.

23.6. Under Order 7 Rule 11, a duty is cast on the court to determine whether the plaint discloses a cause of action by scrutinising the averments in the plaint [*Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I*, (2004) 9 SCC 512], read in conjunction with the documents relied upon, or whether the suit is barred by any law.

×× ×× ××

23.9. In exercise of power under this provision, the court would determine if the assertions made in the plaint are contrary to statutory law, or judicial dicta, for deciding whether a case for rejecting the plaint at the threshold is made out.

23.10. At this stage, the pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and cannot be adverted to, or taken into consideration. [*Sopan Sukhdeo Sable v. Charity Commr.,* (2004) 3 SCC 137]

23.11. The test for exercising the power under Order 7 Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. This test was laid down in *Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I* [*Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I,* (2004) 9 SCC 512] which reads as : (SCC p. 562, para 139)

> *"139.* Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said

purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed."

23.12. In *Hardesh Ores (P) Ltd. v. Hede & Co.* [*Hardesh Ores (P) Ltd. v. Hede & Co.*, (2007) 5 SCC 614] the Court further held that it is not permissible to cull out a sentence or a passage, and to read it in isolation. It is the substance, and not merely the form, which has to be looked into. The plaint has to be construed as it stands, without addition or subtraction of words. If the allegations in the plaint prima facie show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact. *D. Ramachandran v. R.V.Janakiraman*, (1999) 3 SCC 267; See also *Vijay Pratap Singh v. Dukh Haran Nath Singh*, AIR 1962 SC 941].

23.13. If on a meaningful reading of the plaint, it is found that the suit is manifestly vexatious and without any merit, and does not disclose a right to sue, the court would be justified in exercising the power under Order 7 Rule 11 CPC.

23.14. The power under Order 7 Rule 11 CPC may be exercised by the court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial, as held by this Court in the judgment of *Saleem Bhai v. State of Maharashtra*, (2003) 1 SCC 557. The plea that once issues are framed, the matter must necessarily go to trial was repelled by this Court in *Azhar Hussain v. Rajiv Gandhi*, *1986 Supp SCC 315. Followed in Manvendrasinhji Ranjitsinhji Jadeja v. Vijaykunverba, 1998 SCC OnLine Guj 281 : (1998) 2 GLH 823.*

23.15. The provision of Order 7 Rule 11 is mandatory in nature. It states that the plaint "shall" be rejected if any of the grounds specified in clauses (*a*) to (*e*) are made out. If the court finds that the plaint does not disclose a cause of action, or that the suit is barred by any law, the court has no option, but to reject the plaint."

20. The same view was reiterated in **Kum. Geetha v. Nanjundaswamy and others**[19].

19 2023 SCC OnLine SC 1407: 2023 INSC 964.

21. The facts in **Inbasegaran's** case (supra) are similar to the case in hand. In the above case, initially a suit for injunction was filed by the vendee restraining the vendor from interfering with the possession and enjoyment of the property. It was pleaded that in pursuance of the agreement, the vendee was delivered possession of the property. Subsequently, suit was filed seeking decree for specific performance of agreement to sell. This Court found that cause of action in both the suits were different, hence the subsequent suit was not held to be barred in terms of Order II Rule 2 C.P.C.

22. The judgment of this Court in **Vurimi Pullarao's** case (supra), relied upon by learned counsel for the respondent is distinguishable as in that case the cause of action to pray for relief of specific performance had arisen at the stage when the suit for injunction was filed, however, the relief was not claimed. To notice certain dates, agreement to sell was executed on 26.10.1995; the time for completion of sale deed was upto 25.10.1996; notice for specific performance was issued on 13.10.1996 which was replied to by the vendor therein on 13.10.1996 denying execution of sale deed; the suit for injunction was filed on 30.10.1998 pleading that the plaintiff is going to file a suit for specific performance of agreement to sell. Hence at the time of filing of the suit for injunction on 30.10.1996, the cause of action for seeking specific performance of agreement to sell had arisen. The relief, which was due to the plaintiff therein, when the suit for injunction was filed was omitted without leave of the Court, hence, barred under Order II Rule 2(3) C.P.C. was attracted.

23. If the facts of the case are examined in the light of settled position of law, in our opinion, the order passed by the High Court in review application cannot be legally sustained. The suit for specific performance was filed by the appellant on the basis of MoU dated 31.08.1998. In terms of the clauses in the agreement, it was pleaded that there was dispute pending amongst the family members of the vendor. After the same is decided and right of the vendor is crystalized, he will get the sale deed registered. The rights of the vendor were finally crystalized when the issue was decided by this Court in **Shreya Vidyarthi's** case (supra) on 16.12.1995. Suit for specific performance was filed on 03.08.2017 stating that the appellant-plaintiff came to know about the disposal of the litigation amongst the family members just before filing the suit. Earlier suit for injunction was filed on 22.01.2009 pleading that the appellant-vendee came to know that the vendor was trying to create third party

rights in the property while agreeing to sell the same to same to some other parties. At that stage cause of act to file suit for specific performance had not arisen.

24. The cause of action as contained in paragraph No. 9 of the plaint in question is extracted below:

"9. That the cause of action for the present suit arose on 13.1.2009 when the plaintiff came to know that the defendant is intending to sell the property to others and in this connection, he is negotiating with the interested parties and on coming to know about the said news, the plaintiff made contact to the defendant and refrained the defendant from transferring, selling or alienating the property in suit in favour of any other person except to the plaintiff as there is an agreement in between the parties and the parties are bound by the said agreement and the plaintiff further said to the defendant that the plaintiff was ever ready and willing to perform their part of contract and is still ready and willing to perform their part of the contract and the plaintiff are having money of sale consideration to pay the same to the defendant and to meet out the registry expenses and they are ready to purchase the property at the price and sale consideration, as may be mutually agreed between the parties but the defendant did not pay any heed on the plaintiff's request and said to the plaintiff that he will sell the property to others for a high price and will not sell the property to the plaintiff and further given threat to the plaintiff that he will execute the document in favour of others within a day or two and whatever action the plaintiff want to take, they are free to take and continues to every day within the jurisdiction of this learned court and this learned court has got jurisdiction to try the present suit."

25. The application for rejection of the plaint was filed by the respondent claiming that prior to MoU dated 31.8.1995 (registered on 01.09.1998), the MoU was entered into between the parties on 15.04.1998 and subsequent to the aforesaid MoUs, an agreement was executed on 02.09.1998. In the aforesaid agreement, it was clearly mentioned that in case the litigation of the vendor regarding the property in question is not decided after one year, the vendee will have the right to get his earnest money back along with interest @ 18% per annum. In fact, the vendee had issued a notice on 22.03.2001 seeking refund of the earnest money. In the light of the aforesaid facts, the suit for specific performance filed after dismissal of the suit for injunction was barred under Orde II Rule 2 CPC and deserved to be rejected.

26. However, the fact remains that all the aforesaid documents, referred to by the respondent in support of his plea for rejection of the plaint, cannot be considered at this stage as these are not part of the record with the Court filed along with the plaint. This is the stand taken by the respondent-defendant in the application filed under Order VII Rule 11 C.P.C. As noticed above, no amount of evidence or merits of the controversy can be examined at the stage of decision of the application under Order VII Rule 11 C.P.C. Hence, in our view, the impugned order of the High Court passed in the Review Application deserves to be set aside. Ordered accordingly.

27. The Trial Court shall proceed with the suit. However, if considered appropriate, after pleadings are complete, the issue regarding maintainability of the suit can be treated preliminary.

28. The appeal is allowed in the manner indicated above.

Headnotes prepared by: Ankit Gyan

Result of the case:
Appeal allowed.