

(2009) 10 DEL CK 0031

Delhi High Court

Case No: Regular First Appeal No. 193 of 2000

Ms. Vandana
Gyandhar

APPELLANT

Vs

Shri Pawan Kumar
and Others

RESPONDENT

Date of Decision: Oct. 29, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 10 Rule 2, Order 10 Rule 4, Order 7 Rule 11, Order 7 Rule 13, 9

Citation: (2010) 1 ILR Delhi 431 : (2010) 157 PLR 8

Hon'ble Judges: Hima Kohli, J

Bench: Single Bench

Advocate: C.M. Khanna, for the Appellant; Amitabh Narayan and Avdesh Singh, for the Respondent

Final Decision: Allowed

Judgement

Hima Kohli, J.

Challenge in the present appeal is laid to the judgment dated 30.11.1999 passed in a suit instituted by the appellant (plaintiff in the court below) against the respondents for declaration and mandatory injunction. The aforesaid suit of the appellant was dismissed by the trial court on the ground that the same had been filed by concealing material facts. Before advertng to the pleas raised on behalf of both the parties, it would be appropriate to state in brief the facts of the case,

2. The appellant married respondent No. 1 on 9.2.1992 in New Delhi and both, the parties stayed in Delhi till 12.8.1992, whereafter they left for U.S.A. to pursue higher studies. It is an admitted position that on 29.6.1995, a decree of dissolution of marriage of the appellant and the respondent No. 1 was granted by the Circuit Court of State of Oregon, United States of America. The appellant made an averment to

the said effect in the plaint and stated that she did not join the proceedings and an ex parte decree was obtained by the respondent No. 1.

3. As per the claim of the appellant as narrated in the plaint, prior to the decree of dissolution of marriage obtained by the respondent No. 1 in June, 1995, the issue of settlement of "stridhan property" of the appellant was discussed between her and the respondent No. 1 and also between the parents of the respondent No. 1 and the father of the appellant. However, no settlement could be arrived at between the parties. On 26.6.1997, the appellant sent a legal notice to the respondents demanding return of her stridhan property, which was refuted by the respondents. As a result, on 2.2.1999, the appellant instituted a suit for declaration and mandatory injunction in the trial court against her erstwhile husband, respondent No. 1, and his parents, respondents No. 2 & 3. 4. Summons to the respondents were issued in the suit on 2.2.1999, returnable on 23.4.1999. On 23.4.1999, a statement was made on behalf of the respondents that the appellant and the respondent No. 1 had got their marriage dissolved in U.S.A. After considering the submissions made on behalf of the respondents, the learned ADJ adjourned the matter to 13.9.1999 so as to see, whether the appellant, who was also residing in USA, while seeking divorce in the court in USA, had settled the issue of stridhan, dowry articles and maintenance, etc. and directed for the personal appearance of the appellant to record her statement under the provisions of Order 10 CPC. On 13.9.1999, the Trial Court noted as below:

Case is today fixed for personal appearance of the petitioner. Last hearing was fixed on 23rd April, 99, a date of almost 5 months was given for appearance of the petitioner because petitioner was stated to be in U.S.A. It is also admitted fact that parties i.e. petitioner and erstwhile husband after marriage had migrated to U.S.A. and got their marriage dissolved in U.S.A. This petition has been filed by the father of Ms. Vandana Gyandhar claiming Istridhan etc. The laws of U.S.A. on rights of women are more stringent than in India and petitioner must have made claim for her property etc. in U.S.A. A copy of the judgment of divorce in U.S.A. be filed in the court by the petitioner. Counsel for the petitioner states that petitioner's father had earlier taken some treatment in U.S.A. Now he has gone for check up to U.S.A. so the petitioner is not able to come to India for appearance in this case because her father has gone to U.S.A. for check up. Last opportunity is given to the petitioner for her personal appearance for recording her statement under Order 10 CPC, failing which it will be deemed that petitioner is not interested in prosecuting this petition because this petition has been filed by her only to harass the respondent. To come up for her personal appearance on 18.11.99 and for filing of the copy of the judgment.

5. On 18.11.1999, the matter was reformatified for 30.11.1999. On 30.11.1999, though the appellant was not present, an affidavit sworn by her in the State of Maryland, USA was filed. On the same date, the impugned judgment came to be passed

dismissing the suit of the appellant on the ground that she had filed the same by concealing material facts.

6. Counsel for the appellant submitted that the impugned judgment is erroneous for the reason that the suit of the appellant could not be dismissed on the ground of "concealment of material facts". It was submitted that mere non-appearance of the appellant before the learned ADJ for her examination under Order 10 CPC, could not be a ground for dismissing her suit, particularly, when her father had instituted the suit on her behalf in the capacity of her power of attorney, and he was available to furnish necessary information and answer any questions relating to the suit. It was further stated that dismissal of the suit by invoking the provisions of Order 10 Rule 4 CPC, was unjustified in the facts of the present case as there was no occasion for the power of attorney of the appellant, namely, her father, or the counsel for the appellant being unable to answer any material questions posed by the Trial Court relating to the suit.

7. It was further submitted on behalf of the appellant that after entering appearance, the respondents had not been called upon to file their written statement, the stage of framing of issues had yet to arise and that till the said stage arose, the physical absence of the appellant before the court could not be so fatal as to dismiss her suit.

It was further urged that without framing issues on law and facts, the issue with regard to the claim of the appellant for return of her stridhan could not be decided on a bare reading of the decree of the Circuit Court of State of Oregon, United States of America and that the court ought to have directed completion of pleadings, filing of documents and framing of issues before returning a finding on maintainability of the suit.

8. The main plank of the arguments urged by the counsel for the respondents was that the decree of divorce dated 29.6.1995 passed by the Circuit Court of State of Oregon, United States of America was a composite decree which also provided for distribution of properties of both parties and which was binding on both the parties. He stated that the appellant having accepted the aforesaid divorce decree and having acted thereupon by re-marrying in the USA, cannot be permitted to challenge a part thereof by preferring a suit. He also submitted that apart from the operative para of the impugned judgment, whereby the suit of the appellant was dismissed for concealment of material facts, mention was made of the judgment of the US Court and the learned ADJ rightly took notice of the fact that the parties were bound by the decision of the US Court with regard to the divorce and settlement of property and thus dismiss the suit of the appellant in limine. He sought to support the impugned judgment by urging that though it was not specifically mentioned, the trial court had in fact invoked the provisions of Order 7 Rule 11(d)CPC, which empowers the court to reject a plaint where the suit appears from the statement in the plaint, to be barred by any law.

9. In rejoinder, counsel for the appellant reiterated that while the divorce decree passed by the US Court was not under challenge, the relief sought by the appellant in the suit for return of her stridhan could not be governed by the courts in USA, who did not have any jurisdiction over the said property, and that in any case, whether stridhan was a part of the properties, as mentioned in the decree dated 29.6.1995 passed by the Circuit Court of State of Oregon, United States of America, or not, was an arguable point on which issues ought to have been framed and parties ought to have been permitted to lead evidence.

10. The short question which engages the Court in the present appeal is whether the trial court was justified in dismissing the suit of the appellant on the ground of concealment of material facts or not?

11. The provisions of Section 9 of the CPC provide that the civil court shall have jurisdiction to try all suits of a civil nature except such suits cognizance of which is either expressly or impliedly barred. Thus, there is an inherent right in every person to institute a suit of a civil nature and to maintain such a suit, he does not require any authority of law as long as there is no statutory bar to the suit. Reference in this regard may be made to the case entitled [Smt. Ganga Bai Vs. Vijay Kumar and Others](#), wherein the court held as below:

There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at once peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit.

12. Similarly, in the case of [Dhannalal Vs. Kalawatibai and Others](#), while adverting to the aforesaid observation made in the case of Smt. Ganga Bai (supra), the Supreme Court observed as below:

plaintiff is dominus lit is that is, master of, or having dominion over, the case. He is the person who has carriage and control of an action. In case of conflict of jurisdiction the choice ought to lie with the plaintiff to choose the forum best suited to him unless there be a rule of law excluding access to a forum of plaintiff's choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of the process of law.

13. In the case of [Abdul Gafur and Another Vs. State of Uttarakhand and Others](#), while taking note of the aforesaid two judgments, the Supreme Court observed as below:

16. It is trite that the rule of pleadings postulate that a plaint must contain material facts. When the plaint read as a whole does not disclose material facts giving rise to a cause of action which can be entertained by a civil court, it may be rejected in terms of Order 7, Rule 11 of the Code. Similarly, a plea of bar to jurisdiction of a civil

court has to be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety and the court would not be justified in determining the question, one way or the other, only having regard to the reliefs claimed de "hors the factual averments made in the plaint.

14. Coming to the case in hand, after summons in the suit were issued, appearance had been entered on behalf of the respondents. In the complete absence of any pleadings and relevant documents, apart from a certified copy of decree of dissolution of marriage passed by the Circuit Court of State of Oregon, United States of America, and a couple of documents filed by the appellant, dismissing the suit in limine on the ground of non-furnishing of the correct addresses of the appellant and the respondent No. 1, both of who were living in USA, is rather harsh and not a consequence envisaged in the Code of Civil Procedure. Strictly speaking, the trial court did not. invoke the provisions of Order X, Rule 2 CPC, while pronouncing the judgment. Instead, it dismissed the suit on grounds of concealment of material facts.

15. The argument urged by the counsel for the respondents that the suit was actually dismissed by applying the provisions of Order 7 Rule 11(d) CPC, is fallacious. If such was the case, then the trial court ought to have rejected the plaint and not dismissed the suit. The clear distinction between "rejection of a plaint" and "dismissal of a suit", cannot be lost sight of.

16. While passing the impugned judgment, the trial court lost sight of the fact that the effect of dismissal of a suit is entirely different and distinct from the effect of rejection of the plaint. In the case of *Inspiration Clothes & U. v. Colby International Ltd.* 88 (2000) D.L.T. 769, a Division Bench of this Court while examining the order of a Single Judge, dismissing the suit of the appellant therein, on an application preferred by the respondent under Order 7 Rule 11 CPC holding that the suit was not maintainable as the appellant did not have a cause of action, observed as below:

Para 10: ...Learned Single Judge fell in error in placing reliance upon the material supplied by the defendant, which alone is sufficient to set aside the impugned order. Learned Single Judge instead of proceeding to reject the plaint, dismissed the suit, which approach is also erroneous. The effect of dismissal of suit is altogether different and distinct from the effect of rejection of the plaint. In case plaint is rejected under Order 7 Rule 11, CPC, filing of a fresh plaint in respect of the same cause of action is specifically, permitted under Rule 13 of Order 7, CPC. Altogether different consequence follows in the event of dismissal of suit, which has the effect of precluding the plaintiff to file a fresh suit on the same cause of action. Rejection of plaint takes away the very basis of the suit rendering as if there was no suit at all or that no suit was instituted. Order of dismissal of suit while recognizing the existence of a suit indicates its termination. While deciding the application under Order 7 Rule 11, CPC, learned Single Judge ought not and could not have dismissed

the suit. Even in the decision of the Supreme Court in [T. Arivandandam Vs. T.V. Satyapal and Another](#), relied upon by learned Counsel for the appellant, it was held that if on a meaningful-not formal-reading of the plaint it is manifestly vexatious and merit-less, in the sense of not disclosing a clear right to sue, the Trial Court should exercise his power under Order 7 Rule 11, CPC taking care to see that the ground mentioned therein is fulfilled. In order to fulfill that ground bare allegation made in the plaint and documents filed therewith were required to be looked into, which in the instant case clearly disclosed at least a cause of action against the defendant that defendant was liable for damages for its acts of omission and commission. It would be an altogether different situation that the plaintiff might not ultimately succeed in obtaining a decree against the defendant or that Court might come to the conclusion that suit would not be maintainable against the defendant and that plaintiff had a cause of action only against defendant's principal and its parent unit in Hong Kong, but such aspect could not have been gone into at this stage. Three paragraphs of the plaint quoted above in our view do clearly disclose cause of action for the plaintiff to claim damages.

(emphasis added)

17. If the trial court was convinced that the plaint read as a whole, did not disclose any cause of action and/or was barred by any law, and was therefore liable to be rejected as vexatious or meritless, the court ought to have exercised its powers Order 7 Rule 11 CPC. Fact remains that a suit once instituted by a litigant, has to be disposed of strictly as per the procedure prescribed in the Code and not in a cursory or summary fashion. The plea of the respondents that the suit of the appellant was barred by any law, could be considered after having regard to the pleas taken in the plaint. In the present case, the appellant having taken a categorical stand that the issue with regard to return of her stridhan remained alive despite the decree of dissolution of marriage dated 29.6.1995 of the US Court, the matter required to be put to trial. The trial court was not justified in determining the said question at the admission stage itself, and dismissing the suit without affording an opportunity to the parties to complete the pleadings, file documents in support of their stand and without framing any issues.

18. If after framing of issues, including an issue with regard to the maintainability of the suit, the court was of the opinion that no evidence was required on certain issues, the said issues could have been treated as preliminary issues and decided. It is not as if the suit could not have been dismissed after the issues were framed, both on law and facts and certain issues were treated as preliminary issues. At that stage, the court would have had the benefit of looking carefully into the defence of the defendants as well, and could well have upheld their objections as to the maintainability of the suit.

19. For the aforesaid reasons, this Court is of the opinion that the dismissal of the suit, preferred by the appellant, at the very threshold, on the ground of

"concealment of material facts", without affording any opportunity to the parties to complete the pleadings, file documents and without framing any issues has caused grave injustice to the appellant. The appropriate course in such circumstances would have been to frame the issues and treat some of the issues as preliminary issues which could be decided even without evidence, instead of dismissing the suit in limine, without putting it to trial. If such preliminary issues, as framed by the trial court, are ultimately decided in favour of the respondents, the same would result in the dismissal of the suit, which has entirely different consequences under the provisions of Order 7 Rule 13 CPC, and would preclude the appellant from filing a fresh suit on the same cause of action.

20. In view of the foregoing discussion, the appeal is allowed and the impugned judgment dated 30.11.1999 is set aside. The suit of the appellant is restored to the file of the trial court, for fresh adjudication and disposal in accordance with law. After the pleadings are completed between the parties and issues are framed, the trial court shall be at liberty to treat certain issues as preliminary issues and decide the same in accordance with law.

21. The trial court record be released forthwith. The parties are directed to appear before the District Judge for further proceedings on 16th November, 2009, when the matter shall be directed to be placed before the appropriate court for further proceedings. Considering the fact that the suit is of the year 1999, the Trial Court is requested to try the same as expeditiously as possible.

22. Parties are left to bear their own costs.