

## RAJASTHAN HIGH COURT

Rohitash Singh

Vs.

Prithvi Singh

S.B. Civil Revision Petition No. 273 of 2003

(Narendra Kumar Jain, J.)

12.08.2008

### JUDGMENT

**Narendra Kumar Jain, J.**

1. Heard learned counsel for the parties.
2. The plaintiff-respondents No. 1 and 2 filed a suit for recovery of a sum of Rs. 30,000/- as compensation for their alleged malicious prosecution in the trial court. The summons was issued to the defendants. The defendant No. 1/respondent No. 3 Kawal Singh filed his written-statement. So far as defendant No. 2/petitioner is concerned, he did not file any written- statement; he filed an application under Order 7 Rule 11 Civil Procedure Code for dismissal of the suit on the ground that he is a public servant and the act, alleged to have been done by him, was so done by him in the official capacity, hence, as per the provisions of Section 80 of the Civil Procedure Code, a notice was necessary to be served upon him but the plaintiffs did not serve any notice upon him.
3. The learned trial court, vide its order dated 31st October, 2002, rejected the application only on the ground that without filing written-statement on behalf of the defendant No. 2/petitioner, his application under Order 7 Rule 11 Civil Procedure Code is not maintainable in view of the judgment of the Bombay High Court reported in - *Nishit M. Prabhu Verlekar v. Chandranath*, <sup>1</sup> and of this Court in the case reported in 1995 DNJ Rajasthan 703. Being aggrieved with the same, the defendant No. 1/petitioner preferred this revision petition.
4. The revision petition was admitted by this Court on 26th February, 2003 and further proceedings of the court below were stayed.
5. The plaintiff-respondents No. 1 and 2 are not present in spite of service of notice.

6. The learned counsel for the petitioner contended that as per the provisions of Order 7 Rule 11 Civil Procedure Code there is no requirement that a written-statement must be filed by the defendant before filing the application under Order 7 Rule 11 Civil Procedure Code. He contended that the learned trial court committed an illegality in not exercising its jurisdiction in entertaining and deciding the application on the basis of averments made therein, therefore, the trial court committed an illegality in rejecting the application and, therefore, the order of the trial court is liable to be set-aside.

7. The Hon'ble Supreme Court in *Saleem Bhai & Others v. State of Maharashtra*,<sup>2</sup> considered the provisions of the Order 7 Rule 11 Civil Procedure Code, and held that filing of written-statement is not necessary to decide the application for rejection of the plaint. Para Nos. 7 to 10 of the aforesaid judgment are reproduced as under:-

"7. The short common question that arises for consideration in these appeals is, whether an application under order 7 Rule 11 Civil Procedure Code ought to be decided on the allegations in the plaint and filing of the written statement by the contesting defendant is irrelevant and unnecessary.

8. Order 7 Rule 11 Civil Procedure Code reads as under :-

"11. *Rejection of plaint.* - The plaint shall be rejected in the following cases. -

(a) Where it does not disclose a cause of action;

(b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued by the plaintiff is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, failed to do so;

(d) Where the suit appears from the statement in the plaint to be barred by any law;

(e) Where it is not filed in duplicate;

(f) Where the plaintiff fails to comply with the provisions of Rule 9 :

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite, stamp paper, as the case may be, within the time fixed by the Court

and that refusal to extend such time would cause great injustice to the plaintiff."

9. A perusal of Order 7 Rule 11 Civil Procedure Code makes it clear that the relevant facts which need to be looked into for deciding an application there under are the averments in the plaint. The trial Court can exercise the power under order 7 Rule 11 Civil Procedure Code at any stage of the suit - before registering the plaint or after issuing summons to be defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) of Rule 11 of Order 7 Civil Procedure Code, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at this stage, therefore, a direction to file the written statement without deciding the application under order 7 Rule 11 Civil Procedure Code cannot but be procedural irregularity touching the exercise of jurisdiction by the trial Court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the Court as well as procedural irregularity. The High Court, however, did not advert to these aspects.

10. We are, therefore, of the view that for the afore-mentioned reasons, the common order under challenge is liable to be set aside and we, accordingly, do so. We remit the cases to the trial Court for deciding the application under order 7 Rule 11 Civil Procedure Code on the basis of the averments in the plaint, after affording an opportunity of being heard to the parties in accordance with law."

8. The Hon'ble Apex Court in Saleem Bhai's case (supra) has categorically held that *filing of written-statement is not necessary to decide the application under Order 7 Rule 11 Civil Procedure Code for rejection of the plaint.*

9. In view of the authoritative pronouncement by Hon'ble the Apex Court in Saleem Bhai's case (supra), it is clear that the order passed by the learned trial court is absolutely contrary to the judgment of the Hon'ble Apex Court. The present case is fully covered by the decision of the Hon'ble Apex Court in Saleem Bhai's case (supra).

10. Consequently, the revision petition is allowed. The impugned order dated 31st October, 2002 passed by the trial court is set-aside. The case is remanded back to the trial court with a direction to decide the application of the defendant-petitioner under Order 7 Rule 11 Civil Procedure Code in accordance with the law.

11. A copy of this order may be sent to the Civil Judge (Sr.Div.), Kishangarhbas, *District Alwar.*

Cases Referred.

1. AIR 1986 Bom 46
2. 2003(1) DNJ (SC) 107

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