

Wg Crd Dr Pramod Kumar Tyagi vs Sqd Leader Dr Praveen Kumar Borushetty on 18 December, 2023

Author: S.G.Pandit

Bench: S.G.Pandit

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 18TH DAY OF DECEMBER, 2023

BEFORE

THE HON'BLE MR.JUSTICE S.G.PANDIT

WRIT PETITION NO.16031/2023 (GM-CPC)

C/W

CRP NO.313/2023 (IO)

IN WP NO.16031/2023

BETWEEN:

WG. CRD. DR. PRAMOD KUMAR TYAGI

S/O LATE .J.C. TYAGI

MAJOR

AGED ABOUT 62 YEARS

R/A A-2412,

BRIGADE MEADOWS,

KANAKAPURA ROAD,

BENGALURU - 560 082

...PETITIONER

(BY SMT: S.K. PRATHIMA, ADVOCATE)

AND:

1. SQD. LEADER. DR.PRAVEEN

KUMAR BORUSHETTY

S/O BHADRAIAH BORUSHETTY

MAJOR

AGED ABOUT 44 YEARS

R/A FLAT NO.903,

9TH FLOOR,

BLOCK 'A' NAGARJUNA

MEADOWS APTS,

2

YELAHANKA NEW TOWN,

BENGALURU - 560 064.

2. VINEETHA THOMAS

W/O PRAVEEN KUMAR
BORUSHETTY
MAJOR
R/A FLAT NO.903, 9TH FLOOR,
BLOCK 'A' NAGARJUNA MEADOWS
APTS,
YELAHANKA NEW TOWN,
BENGALURU - 560 064.

....RESPONDENTS

(BY SMT: VINEETHA THOMAS, PARTY-IN-PERSON-R2)

THIS WRIT PETITION IS FILED UNDER ARTICLE 227 OF
THE CONSTITUTION OF INDIA PRAYING TO QUASH THE
ORDER DT. 28.02.2023 IN OS NO. 26942/2012 PASSED BY
THE LEARNED ADDL. CITY CIVIL AND SESSIONS JUDGE,
BANGALORE (CCH.NO.74) AT ANNEX-E AND ETC.,

IN CRP NO.313/2023
BETWEEN:
VINEETHA THOMAS
W/O SQD. LDR. DR. PRAVEEN KUMAR
BORUSHETTY, AGED ABOUT 38 YEARS
R/O FLAT NO.903, A- BLOCK
NAGARJUNA MEADOWS, 1ST PHASE
YELAHANKA NEW TOWN,
BENGALURU - 560 064.

...PETITIONER

(BY SMT: VINEETHA THOMAS, PARTY-IN-PERSON)

3

AND:

1. WG.CRD.DR. PRAMOD KUMAR TYAGI
S/O J.C. TYAGI
AGED 60 YEARS
C/O COMMAND HOSPITAL
AIR FORCE, AGRAM
BENGALURU - 560 007
2. SQUADRON. LEADER. DR. PRAVEEN KUMAR
BORUSHETTY
S/O BHADRAIAH BORUSHETTY
AGED ABOUT 39 YEARS
R/O PLOT NO. 40,
NEW GAYATHRI NAGAR
KARMANGHAT, SHREEDAR COLONY
TELANGANA, HYDERABAD - 79.

...RESPONDENTS

(BY SMT: S.K. PRATHIMA, ADVOCATE FOR R1
SRI: M.V. ANIL KUMAR, ADVOCATE FOR R2 (ABSENT))

THIS CRP IS FILED UNDER SECTION 115 OF CPC
AGAINST THE ORDER DATED 28.02.2023 PASSED ON IA IN
OS NO.26942/2012 ON THE FILE OF THE LXXIII ADDITIONAL
CITY CIVIL AND SESSIONS JUDGE, MAYOHALL UNIT,
BANGALORE (CCH-74) PARTLY ALLOWING IA FILED UNDER
ORDER 7 RULE 11 (A) READ WITH SECTION 151 OF CPC FOR
REJECTION OF PLAINT.

THESE PETITIONS HAVING BEEN HEARD AND
RESERVED ON 02/11/2023 COMING ON FOR
PRONOUNCEMENT THIS DAY, THE COURT MADE THE
FOLLOWING:

4

ORDER

Since W.P.No.16031/2023 and CRP.No.313/2023 arise from order dated 28.02.2023 on I.A filed under Order VII Rule 11(a) read with Section 151 of CPC in O.S.No.26942/2012 on the file of the Additional City Civil and Sessions Judge, Bengaluru (for short, 'Trial Court'), both the petitions are taken up together, heard on maintainability of writ petition and on merits in both the petitions and disposed of by this common order.

2. Petitioner in W.P.No.16031/2023 is plaintiff before the Trial Court and has challenged impugned order rejecting plaint insofar as defendant No.2. Petitioner in CRP.No.313/2023 who is defendant No.2 in the suit is before this Court, challenging the same impugned order which is under challenge in the writ petition, rejecting the application filed under Order VII Rule 11(a) read with Section 151 of CPC insofar as defendant No.1 and to allow IA in its entirety.

3. Parties to the present proceedings would be referred to as they stand before the Trial Court i.e., petitioner in W.P.No.16031/2023 as plaintiff and petitioner in CRP.No.313/2023 as second defendant.

4. Plaintiff filed O.S.No.26942/2012 on the file of the learned City Civil Judge at Bengaluru against defendant No.1, husband of second defendant praying for a judgment and decree directing the defendant to vacate and handover vacant possession of the suit schedule premises to the plaintiff and also for a direction to the defendant to pay arrears of rent from June-2012 to August-2012 for a sum of Rs.45,000/- and direct the defendant to continue to pay damages at the rate of Rs.15,000/- till he vacate and handover vacant possession of the suit schedule premises. Initially, the suit was filed only against defendant No.1. Defendant No.2 on her own filed application for impleading under Order I Rule 10(2) of CPC and got herself impleaded by order dated 06.03.2014 in the suit on the ground that she is legally wedded wife of defendant No.1 and there is matrimonial case pending between defendant No.1 and defendant No.2. Thereafter, second defendant filed her written

statement as well as amended written statement contending that defendant No.2 is in occupation and enjoyment of the suit schedule property. Only to evict defendant No.2, plaintiff and defendant No.1 in collusion instituted suit for eviction. Further, it is contended that first defendant is the real owner of the suit schedule property and using plaintiff only as a proxy to evict second defendant, since first defendant cannot evict second defendant from the suit schedule property as she is legally wedded wife of first defendant.

5. After commencement of recording of evidence, second defendant filed application under Order VII Rule 11(a) read with Section 151 of CPC praying to reject the plaint, as the plaint does not disclose real cause of action and the clever drafting has created something purely illusory cause of action. Affidavit accompanying the application would state that the suit as filed by plaintiff is highly collusive in nature, without setting out any real cause of action in the plaint, the plaintiff and first defendant in collusion filed the suit. Further, it is stated that as the suit is highly collusive lacks maintainability and is continued only to harass and evict second defendant as the first defendant cannot legally evict second defendant from the suit schedule property, as she is legally wedded wife. With regard to cause of action stated in the plaint i.e., rental agreement dated 30.03.2011 is nothing but a highly concocted and fraudulently created instrument, which was not sufficiently stamped. Insofar as cause of action stated with regard to default in payment of monthly rent, second defendant stated that the date on which first defendant had committed default is conveniently omitted to mention. With regard to issuance of notice dated 12.04.2012, second defendant stated that the counsel for the plaintiff is the counsel for defendant No.1 which establishes the collusiveness. Therefore, it is contended that there is no cause of action and cause of action mentioned is illusory and is the result of clever drafting. As there is no real cause of action, the suit requires to be rejected.

6. The above application for rejection of plaint was opposed by plaintiff by filing objections. It is stated that first defendant approached the plaintiff to rent out the schedule premises and in terms of the lease agreement dated 30.03.2011 plaintiff rented out the premises to first defendant. Further, it is stated that the second defendant admitted the ownership of plaintiff at paragraph 3 of her written statement. Further, plaintiff denied the allegation of collusion. It is also contended that when the second defendant has admitted the jural relationship of landlord and tenant in her written statement, second defendant cannot thereafter dispute the ownership of plaintiff. Thus, plaintiff prayed for dismissal of the application filed to reject the plaint.

7. The trial Court, under impugned order allowed the application of the second defendant partially and rejected the suit against defendant No.2. Aggrieved by the same, both plaintiff and defendant No.2 are before this Court in W.P.No.16031/2023 and CRP.No.313/2023. In writ petition, plaintiff has prayed to set aside the impugned order, whereas the second defendant in CRP has prayed for setting aside impugned order and to reject the plaint.

8. Registry has raised objection as to maintainability of the writ petition against the impugned order rejecting plaint against defendant No.2.

9. Heard party-in-person, second defendant Smt.Vineetha Thomas and learned counsel Smt.S.K.Prathima for plaintiff (respondent No.1) on maintainability of writ petition as well as on the main petitions. There was no representation for respondent No.2. Perused petition papers.

10.. Learned counsel for the plaintiff would submit that writ petition as against partial rejection of plaint would be maintainable as there is no other remedy available. Learned counsel referring to definition of decree under Section 2(2) of CPC would submit that partial rejection of plaint as against one of the defendants would not be a decree since there is no final adjudication of the controversy or rights of the parties. As such, no appeal could be filed and moreover there is no decree to prefer appeal under Section 96 of CPC. Further, learned counsel would submit that revision under Section 115 of CPC is also not available to the plaintiff since proceedings is not terminated. Revision under Section 115 of CPC would be maintainable on an order on application, if it results in termination of the proceedings. It is submitted that in the instant case since impugned order has not terminated, the proceedings revision is also not available to the plaintiff. When no remedy is available, writ petition under Articles 226 and 227 of the Constitution of India would be maintainable. In that regard, learned counsel for the plaintiff places reliance on the decision of a Co-ordinate Bench of this Court in CRP.No.276/2012 dated 06.11.2012 (PURAVANKARA PROJECTS LIMITED VS. M.RP.DAYANANDA PAI AND ANOTHER) wherein this Court held that, against partial rejection of plaint, no appeal could be filed and remedy of revision is also not available to the petitioner. Thus, it is submitted that writ petition would be maintainable against partial rejection of plaint and prayed to overrule the office objection.

11. Party-in-person Smt.Vineetha Thomas, on the question of maintainability of writ petition would submit that writ petition under Article 227 of the Constitution of India would not be maintainable challenging order partially allowing the application under Order VII Rule 11(a) of CPC and appropriate remedy for the plaintiff is to avail remedy of revision under Section 115 of CPC. Written submission with regard to maintainability as well as main writ petition is filed on 31.10.2023. Further, party-in-person submitted that as the suit is dismissed against defendant No.2, there is termination of proceedings against defendant No.2, hence the plaintiff ought to have filed revision petition under Section 115 of CPC. Party-in-person would also refer to Section 115 of CPC and submits that if the order on interlocutory application results in termination of proceedings, then only remedy available is to file revision. Thus, party-in- person prays for dismissal of the writ petition as not maintainable.

12. Having heard the party-in-person/defendant No.2, as well as learned counsel for the plaintiff, I am of the view that writ petition under Article 227 of the Constitution of India would be maintainable against partial rejection of plaint against one of the defendants, that too, in the peculiar facts of the present case for the following reasons:

(i) Defendant No.2 filed application under Order VII Rule 11(a) of CPC to reject the plaint alleging no cause of action to file the suit for eviction. The trial Court under impugned order allowed the said application in part and rejected the suit as against defendant No.2.

The rejection of plaint as against one of the defendants in the present fact situation would not amount to a decree. "Decree" is defined under Section 2(2) of CPC which reads as follows:

"2. Definitions.-- In this Act, unless there is anything repugnant in the subject or context,--

(1)

(2) "decree" means the formal

expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include--

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.-- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

In terms of the above definition, to call it as a decree, there must be formal expression of an adjudication or conclusive determination of the rights of the parties. It also includes rejection of plaint. The rejection of plaint would mean rejection of plaint in its entirety and it would not include partial rejection of plaint, since partial rejection of plaint would not terminate the proceedings or determines controversy or rights of the parties. If the plaint is rejected in its entirety, it would amount to a decree and appeal under Section 96 of CPC is the remedy against such rejection of plaint. Partial rejection of plaint would not amount to passing of any decree and it would also not result in termination of the proceedings.

(ii) Section 115 of CPC reads as follows:

"115. Revision.-- [(1)] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears--

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation.-- In this section, the expression "any case which has been

decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding."

A careful reading of above provision makes it abundantly clear that in terms of Sub-rule (3), if the order under revision, if it had been made in favour of a party applying for revision, results in final disposal of the suit or proceedings, revision would be maintainable. In the case on hand, revision by plaintiff would not be maintainable since order on the application if made in his favour would not result in final disposal of the suit or proceedings, but order in his favour, suit or proceedings would continue.

(iii) A Co-ordinate Bench of this Court had an occasion to consider as to whether CRP would be maintainable under Section 115 of CPC against partial rejection of plaint and has held that order of partial rejection of plaint cannot be challenged in an appeal under Section 96 of CPC. The remedy of revision is also not available. Relevant portion of the order reads as follows:

"Therefore, words "rejection of plaint"

occurring under provisions of section 2(2) CPC cannot be read as "partial rejection of plaint".

Order VII Rule 11 CPC provides for rejection of plaint if any one of the conditions enumerated therein is satisfied. The object of Order VII Rule 11 CPC is to reject frivolous litigations at the

inception. The partial rejection of plaint does not terminate the proceedings. Therefore, submission of learned counsel for II-respondent that partial rejection of plaint is appealable under section 96 CPC cannot be accepted.

The learned counsel for II-respondent, placing reliance on various decisions of the Supreme Court would submit that order made by this court in W.P.No.10552/2012, permitting the petitioner to convert writ petition into civil revision petition cannot confer jurisdiction.

In the discussion made supra, I have held that petitioner cannot take shelter under the order made in W.P.No.10552/2012.

Therefore, it is not necessary to refer to various decisions relied upon by learned counsel for il-respondent on this aspect.

This court has jurisdiction to entertain either an appeal, or revision application or writ petition under article 226 or 227 of the Constitution of India. There is no lack of inherent jurisdiction or territorial jurisdiction.

22. In a decision reported in (2009) 5 SCC 162 (in the case of Nawab Shagajath Ali Khan & Others Vs. Nawab Imdad Jah Bahadur & Others and connected matters), the Supreme Court has held:-

"45. It is not correct to contend that even if the revisional jurisdiction is not available, a remedy in terms of Articles 226 and 227 of the Constitution of India would also not be available in law. This aspect of the matter has been considered by this Court in Surya Dev Rai v. Ram Chander Rap opining that not only the High Court can exercise its supervisory jurisdiction for the purpose of keeping the subordinate courts within the bounds of its jurisdiction as envisaged under Article 227 of the Constitution of India; even a writ of certiorari can be issued wherefor the subordinate or inferior courts would be amenable to the superior courts exercising power of judicial review in terms of Article 226 thereof."

"48. If the High Court had the jurisdiction to entertain either an appeal or a revision application or a writ petition under Articles 226 and 227 of the Constitution of India, in a given case it, subject to fulfillment of other conditions, could even convert a revision application or a writ petition into an appeal or vice versa in exercise of its inherent power.

Indisputably, however, for the said purpose, an appropriate case for exercise of such jurisdiction must be made out."

23. In the discussion made supra, I have held that petitioner cannot avail remedy under section 115 CPC. I have also held that an order of partial rejection of plaint is not appealable under section 96 CPC. The question whether the trial court was justified in partially rejecting the plaint, still remains at large. The law is fairly well settled that endeavour of the court shall be to decide the case on

merits and not to foreclose remedies on technical grounds. Therefore, it is necessary to decide the remedy available to petitioner to challenge the order of partial rejection of plaint.

24. In the case of Naumb Shaqafath Ali Khan, the Supreme Court has held that if revisional jurisdiction is not available, a remedy in terms of articles 226 and 227 of the Constitution of India would be available in law. In paragraph 48 of the judgment, reported in (2009) 5 SCC 162 (in the case of Nawab Shaqafath Ali Khan & Others Vs. Nawab Imdad Jan Bahadur & Others and connected matters), the Supreme Court has held that in a given case, subject to fulfillment of other conditions, the High Court in exercise of its inherent power could even convert a revision application or a writ petition into an appeal or vice versa, however, for the said purpose, an appropriate case for exercise of such jurisdiction must be made out.

In the case on hand, the impugned order of partial rejection of plaint cannot be challenged in an appeal under section 96 CPC. The remedy of revision is also not available to petitioner.

25. In a decision reported in (2009) 5 SCC 162 (in the case of Nawab Shagafath Ali Khan & Others Vs. Nawab Imdad Jah Bahadur & Others and connected matters), the Supreme Court has held:-

"45. It is not correct to contend that even if the revisional jurisdiction is not available, a remedy in terms of Articles 226 and 227 of the Constitution of India would also not be available in law...."

If the revisional jurisdiction is not available, a remedy in terms of articles 226 and 227 of the Constitution of India would be available. Therefore, I am of the considered opinion that petitioner can challenge the impugned order of partial rejection of plaint under articles 226 and 227 of the Constitution of India. Having regard to the background of litigation, I am of the considered opinion that this is an appropriate case for exercise of inherent power of this court to direct petitioner to convert this civil revision petition into a writ petition."

13. For the reasons recorded above, maintainability of writ petition is held in favour of plaintiff and against defendant No.2.

14. The suit of the plaintiff as originally filed is for eviction and handing over vacant possession of the suit schedule property against defendant No.1. The plaint averment would disclose that suit schedule property was leased to the first defendant under Agreement dated 30.03.2011 entered into between the plaintiff and first defendant. Defendant No.2 (petitioner in CRP No.313/2023) filed I.A.No.1 under Order I Rule 10(2) of CPC to come on record as defendant No.2. In the application filed for impleading, defendant No.2 stated that she is residing in the suit schedule property since 30th March 2011 as she is lawfully wedded wife of first defendant. It is also stated that there is matrimonial dispute between the first defendant and second defendant and second defendant is staying alone in the suit schedule property since her husband i.e., defendant No.1, deserted her. It is also stated that M.C.No.824/2012 and M.C.No.1256/2012 are pending between the first defendant and second defendant. In the affidavit accompanying the application, the second defendant averred that it is necessary for defendant No.2 to get impleaded herself to protect her interest in the suit

schedule property as it is her matrimonial house and to contest the suit along with her husband, defendant No.1. The trial Court, by order dated 06.03.2014 allowed second defendant's application filed under Order I Rule 10(2) of CPC and permitted second defendant to come on record as defendant No.2 in the suit. While allowing the application, the trial Court referred to a decision of the Hon'ble Apex Court reported in AIR 2005 SC 986 in the case of B.P.ACHALA ANAND v/s S.APPI REDDY AND ANOTHER. In the above said decision, the Hon'ble Apex Court held that a deserted wife who has been or is entitled to be in occupation of the matrimonial home is entitled to contest the suit for eviction filed against her husband in his capacity as tenant subject to satisfying two conditions: first, that the tenant has given up contest or is not interested in contesting the suit and such giving up by tenant-husband shall prejudice deserted wife who is residing in the premises; and secondly, the scope and ambit of contest or defence by the wife would not be on a footing higher or larger than that of tenant himself. In other words, such a wife would be entitled to raise all such pleas and claim trial thereon, as would have been available to the tenant himself and no more.

15. During the course of trial, when the suit was at the stage of cross-examination of plaintiff, the second defendant filed application under Order VII Rule 11(a) of CPC to reject the plaint as it would not disclose real cause of action and clever drafting has created something illusory cause of action. The party-in- person/defendant No.2 would contend that there is no cause of action to maintain the suit and the suit is liable to be rejected in its entirety. It is submitted that the trial Court committed an error in rejecting the plaint only against defendant No.2. It is submitted that when the trial Court has come to the conclusion that cause of action is collusive and illusory, ought to have rejected the plaint in its entirety. Further, learned counsel would submit that the trial Court has failed to exercise its power or jurisdiction under Order VII Rule 11(a) of CPC. It is submitted that there is no cause of action for the plaintiff to file the said suit and the plaintiff presented the plaint on behalf of defendant No.1 only to see that defendant No.2 is evicted or thrown out from the suit schedule property. It is submitted that the suit is collusive suit by the plaintiff and defendant No.1. It is further submitted that cause of action stated in the plaint are all false. With regard to cause of action stated by the plaintiff, that cause of action arose on 30.03.2011 when the agreement Ex.P1 was entered into between the plaintiff and defendant No.1. The second defendant would submit that Ex.P1/agreement dated 30.03.2011 is nothing but a highly concocted and fraudulently created instrument and on the said date, it cannot be said that cause of action has arisen to the plaintiff. Secondly, it is stated that the plaintiff has failed to mention the date on which, first defendant committed default in payment of rent. Thirdly, it is stated that the cause of action arose on 12.04.2012, when the plaintiff got issued legal notice, calling upon defendant No.1 to vacate and hand over vacant possession of the schedule premises. It is submitted that the same counsel who issued legal notice on behalf of plaintiff is representing defendant No.1 in the suit also. Therefore, defendant No.2 would submit that there is no cause of action and the suit is liable to be rejected in its entirety.

16. Per contra, learned counsel for the plaintiff would submit that the trial Court committed an error in rejecting the plaint against defendant No.2 without noticing the fact that defendant No.2 had come on record on her own. Further, learned counsel would submit that when defendant No.2 claims that she is the legally wedded wife of first defendant and when it is her specific statement that the first defendant has deserted her and he is not residing in the said schedule premises, the trial

Court could not have rejected the plaint against defendant No.2. Further, learned counsel would submit that while considering the application filed under Order VII Rule 11 of CPC, the trial Court shall look into only plaint averments and nothing else. The trial Court, while considering the application for rejection of plaint could not have looked into the application averments or written statement averments or evidence already recorded. Thus, it is submitted that the trial Court committed an error in looking into the other materials, including application averments and written statement averments. Thus, learned counsel would pray for allowing the writ petition and to set aside the impugned order directing the trial Court to proceed with the suit for ejectment against both defendants.

17. Having heard the learned counsel for the parties and on perusal of the writ petition papers as well as Civil Revision Petition papers, I am of the view that the trial Court is not justified in rejecting the plaint against defendant No.2.

18. It is well settled legal position, that while considering the application filed under Order VII Rule 11 of CPC, the Court shall look into only averments contained in the plaint and shall examine to find out whether the plaint averments would disclose cause of action. The Hon'ble Apex Court in the case of MADANURI SRI RAMA CHANDRA MURTHY v/s SYED JALAL reported in (2017)13 SCC 174 has held as follows:

"Averments contained in plaint must be read as a whole to find out whether same disclosed cause of action."

The only contention urged by defendant No.2 is that cause of action stated is illusory and is the result of clever drafting.

19. A reading of the plaint averment particularly paragraph 9 with regard to cause of action reads as follows:

"9. The cause of action for the suit arose on 30.03.2011 being the date of the rental agreement thereafter at the time when the defendant committed default in payment of monthly rents and 12.04.2012 when the plaintiff got issued a legal notice calling upon the defendant to vacate and handover the vacant possession of the schedule premises. The schedule premise is situated within the jurisdiction of this Hon'ble court and hence this Hon'ble court has jurisdiction to file the suit."

20. It is pertinent to note that originally, defendant No.2 was not a party to the suit. On her own, she has come on record as defendant No.2. While coming on record, defendant No.2 stated that she is legally wedded wife of first defendant and she is residing in the suit schedule premises. Defendant No.2 also placing reliance on B.P.ACHALA ANAND (supra) wherein the Hon'ble Apex Court has made it clear that deserted wife would be entitled to raise all such pleas and claim trial thereon as would have been available to the tenant himself, requested for impleadment. Admittedly, the suit document is Lease Agreement dated 30.03.2011 entered into between the plaintiff and defendant No.1, husband of defendant No.2. In a suit for ejectment, it is for the plaintiff to prove landlord and

tenant relationship between the parties. In terms of B.P.ACHALA ANAND case (supra) a deserted wife also could claim as tenant being deserted wife of tenant. Where it is alleged that the suit document i.e., Lease Agreement dated 30.03.2011 is a concocted document; when it is contended that the rent is to be paid on or before 7th of every month or January month becomes due in next month i.e., February, are all matters for trial. The cause of action as held by trial Court is not illusory as held by the trial court. When suit is filed based on the lease/rental agreement dated 30.03.2011, the suit needs trial, including question raised by defendant No.2 with regard to validity of agreement.

21. Defendant No.2 claims that she is in possession of suit schedule property and first defendant/husband has deserted her. If ultimately, in the absence of defendant No.2, the suit were to be decreed, it would have adverse effect on defendant No.2. The trial Court is not right in rejecting the plaint against defendant No.2. The trial Court has come to the conclusion that cause of action agitated by defendant No.2 is not proper and genuine one. The trial Court fails to notice that defendant No.2 was not originally party to the suit and defendant No.2 on her own has come on record as defendant No.2 under Order dated 06.03.2014. Moreover, without trial, the trial Court could not have come to the conclusion that "Thereby collusive nature between the plaintiff and defendant No.1 has eclipsed genuineness of the rental agreement" Such a serious allegation of creation of document or fabrication of document needs full-fledged trial.

22. The Hon'ble Apex Court in a recent decision in Civil Appeal No.7413/1012 (Kum.Geetha D/o. V/S Nanjundaswamy and others) on examination of earlier decision of the Hon'ble Apex Court has held that the plaint cannot be rejected in part and has held that the approach of the courts in rejecting plaint in part while considering an application under Order VII Rule 11 is impermissible.

22. Defendant No.2, petitioner in the present Civil Revision Petition has placed reliance on the following decisions:

(1) (1977) 4 SCC 467 (D.Arivandandam V/S T.D. Sathyapal and Another);

(2) (1998) 2 SCC 70 (ITC Limited V/S Debts Recovery Appellate Tribunal and others)

(3) (2004)3 SCC 137 (Sopan Sukhdeo Sable and others V/S Assistant Charity Commissioner and others) (4) AIR 2020 SC 3310 (Dahiben V/S Arvinbhai Kalyanji Bhanusali (Gajra) D Thr LRs and Ors.

(5) 2021 (2) KCCR 1309 (Smt.Kaisar Jehan V/S Abdul Wajid Ali) (22.1) In T.ARIVANDAM (supra), the Hon'ble Supreme Court has observed while considering Order VII Rule 11 of CPC, held that the trial Court must remember that if on a meaningful 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 power under Order VII Rule 11 of CPC.

(22.2) In ITC Limited case (supra), the Hon'ble Apex Court has held that while considering the application under Order VII Rule 11(a) of CPC, the Court has to ascertain whether the plaint created

an illusion or cause of action by clever drafting.

This Court respectfully accepts the principles laid down in the above decisions, but the same would not assist the defendant No.2 in any manner, since she on her own has come on record as defendant No.2 on the ground that she is legally wedded wife of defendant No.1, who has deserted her. Moreover deserted wife who has been in occupation of matrimonial home is entitled to contest the suit for eviction filed against her husband.

(22.3) In *Sopan Sukhdeo* case (supra), the Hon'ble Apex Court has held that Order VII Rule 11 of CPC lays down an independent remedy made available to the defendant to challenge maintainability of the suit itself, irrespective of his right to contest the same on merits. And further it observed that while dealing with the said application, the question to be examined is whether real cause of action has been set out in the plaint or something purely illusory has been stated. (22.4) In *Dahiben* (supra) also, the Hon'ble Apex Court explained the cause of action and also held that a reading of the plaint averments should disclose cause of action.

(22.5) The second defendant, party-in-person would place reliance on *Smt. Kaisar Jehan* (supra) to state that the writ petition would not be maintainable as filed by the plaintiff and the plaintiff ought to have filed Civil Revision Petition. It is true that if application filed under Order VII Rule 11 of CPC is dismissed in its entirety, then revision under Section 115 of CPC would be maintainable. But, when the suit is partly allowed, the writ petition would be maintainable as held above.

23. For the reasons recorded above, CRP No.313/2023 is dismissed and W.P.No.16031/2022 is allowed. The impugned order dated 28.02.2023 on I.A filed under Order VII Rule 11(a) read with Section 151 of CPC in O.S.No.26942/2012 on the file of the Additional City Civil and Sessions Judge, Bengaluru is set aside.

The trial Court shall proceed with the suit. In W.P.No.16031/2023, I.A.No.1/2023 is filed by party-in-person i.e., defendant No.2 seeking dismissal of writ petition as not maintainable in law. Since the question of maintainability is answered above, I.A.No.1/2023 would no more survive for consideration. Accordingly, I.A.No.1/2023 is disposed of.

In C.R.P.No.313/2023, I.A.No.2/2023 is filed under Order VI Rule 17 of CPC seeking leave to amend the Civil Revision Petition to add Section 115 of CPC below the cause title along with Section 151 of CPC. The party- in-person would submit that by typographical error instead of Section 115 of CPC, it is typed as Section 151 of CPC which the petitioner seeks for correction. The revision is always filed under Section 115 of CPC. Though the petition states that it is filed under Section 151 of CPC, it is taken as Section 115 of CPC. Thus, I.A.No.2/2023 is disposed of.

I.A.No.3/2023 is filed under Section 151 of CPC to recall order dated 07.08.2023. Under Order dated 07.08.2023, this Court taking note of the fact that W.P.No.16031/2023 also arises out of the same order which is under challenge in CRP directed the office to post the W.P.No.16031/2023 along with CRP No.313/2023.

Since, in CRP and WP the same impugned order dated 28.02.2023 in OS No.26942/2012 passed on I.A. filed by defendant No.2 under Order VII Rule 11(a) of CPC is under challenge, rightly both petitions are directed to be posted together to avoid conflicting decision. Therefore, the question of recalling the said order would not arise. Accordingly, I.A.No.3/2023 stands disposed of.

Sd/-

JUDGE NC/mpk/-* CT:bms