$~7 (original)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

I.A.7168/2019 in

\+ CS(OS) 262/2019

TAJUNISSA & ANR. ..... Plaintiffs

Through: Mr. Anupam Lal Das, Sr.Adv. with Mr. Abhey Narula, Adv.

versus

MR. VISHAL SHARMA & ORS. ..... Defendants

Through: Mr.Ravi Gupta, Sr. Adv. with Mr.Mahip Datta Parashar, Mr.Sachin Jain and Ms.Sanya Lamba, Advs. for Defendant No. 3 (Kotak Mahindra Bank Ltd.)

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

O R D E R (O R A L)

% 23.07.2021

(Video-Conferencing)

1. Mr. Ravi Gputa, learned Senior Counsel for the Defendant No.3 submitted, at the outset of these proceedings, that this suit was liable to be rejected under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 (CPC) and that, therefore, summons were not required to be issued.

2. Mr. Anupam Lal Das, learned Senior Counsel for the plaintiff advances two submissions, reacting to the submission of Mr. Gupta. His first submission is that Mr. Gupta does not have any right of audience at this stage, as the defendant, under the CPC, cannot be

heard unless summons are issued to the defendant or the defendant has filed a caveat. As Mr. Das's submission was that this position flows from a reading of the CPC, the Court queried, to Mr. Das, regarding the provisions of the CPC on which he sought to place reliance to support the submission that the Court could not grant an audience to Mr. Ravi Gupta at this stage. Mr. Das cites, in his support, Sections 26, 27, 148A and Order V Rule 1 of the CPC. These provisions, for ready reference, may be reproduced thus:

> "**26. Institution of suits. —**
>
> (1) Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.
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> (2) In every plaint, facts shall be proved by affidavit.
>
> Provided that such an affidavit shall be in the form and manner as prescribed under Order VI of Rule 15A.
>
> **27. Summons to defendants**.—Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed on such day not beyond thirty days from date of the institution of the suit.
>
> **148A. Right to lodge a caveat**.—
>
> (1) Where an application is expected to be made, or has been made, in a suit or proceeding instituted, or about to be instituted, in a Court , any person claiming a right to appear before the Court on the hearing of such application may lodge a caveat in respect thereof.

(2) Where a caveat has been lodged under sub-section (*1*), the person by whom the caveat has been lodged (hereinafter referred to as the caveator) shall serve a notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been, or is expected to be, made, under sub-section (1).

(3) Where, after a caveat has been lodged under sub-section (*1*), any application is filed in any suit or proceeding, the Court, shall serve a notice of the application on the caveator.

(4) Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveator at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.

(5) Where a caveat has been lodged under sub-section (*1*), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the application referred to in sub-section (*1*) has been made before the expiry of the said period.

ORDER V - Issue and service of summons

Issue of Summons

1. Summons

(1) When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of service of summons on that defendant:

> Provided that no such summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the plaintiff's claim:
>
> Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day as may be specified by the Court, for reasons to be

recorded in writing, but which shall not be later than ninety days from the date of service of summons.

Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record."

3. Mr. Das further submits that summons have necessarily to be issued by the Court in every case in which a suit is "duly instituted" and that all other objections to the maintainability of the suit would have to be relegated to a stage after the defendant responds to the summons, at which stage the defendant may raise objections regarding maintainability or other legitimate objections available to it. He submits, however, that, so long as the suit is "duly instituted", the Court has no option but to issue summons.

4. Mr. Das has relied, for this purpose, on a decision of the Division Bench of this Court in ***Bright Enterprises Pvt. Ltd. v. MJ Bizcraft LLP***[1] authored by Hon'ble Mr. Justice Badar Durrez Ahmed (as he then was). He has drawn my attention, in particular, to paras 18, 19 and 20 of the said decision which read thus:

[1] **2017 SCC OnLine Del 6394**

"**18.** From the above and particularly upon examining the provisions of Section 27 and Order 5 Rule 1(1) CPC, it is evident that when a suit is regarded as having been "duly instituted", a summons may be issued to the defendant. The use of the expression "duly instituted" has to be seen in the context of the provisions of Orders 6 and 7 CPC. In the present matter, it is nobody's case that the suit had not been duly instituted in the sense that it did not comply with the requirements of Orders 6 and 7 CPC. *It is neither a case of return of a plaint under Order 7 Rule 10 nor a case of rejection of a plaint under Order 7 Rule 11 CPC.* The present case is one of dismissal of the suit itself on merits. Therefore, the only thing that needs to be examined is whether the Court had a discretion to issue or not to issue summons given that the suit had been duly instituted. In our view, the use of the word "may" does not give discretion to the Court and does not make it optional for it to issue summons or not. This is further fortified by the fact that the first proviso to Order 5 Rule 1(1) itself gives a situation where summons must not be issued and that happens when a defendant appears at the presentation of the plaint and admits the plaintiff's claim. Therefore, in such a situation, there is no requirement for issuance of summons and that is why the word "may" has been used in Order 5 Rule 1(1). In all other cases, when a suit has been "duly instituted" *and is not hit by either Order 7 Rule 10 or Order 7 Rule 11 CPC*, summons has to be issued to the defendant.

19. *In the present case, the learned Single Judge has neither returned the plaint under Order 7 Rule 10 nor rejected the plaint under Order 7 Rule 11 CPC.* Therefore, it was incumbent upon the learned Single Judge to have issued summons to the respondent-defendants, particularly because the respondent-defendants had not appeared at the time of presentation of the plaint and did not admit the claim of the appellant-plaintiffs. The Rule of *audi alteram partem* is embedded in Order 5 Rule 1 sub-rule (1) read with Section 27 CPC.

20. We may also point out that there is a clear distinction between "return of a plaint", "rejection of a plaint" and

"dismissal of a suit". These three concepts have different consequences. A dismissal of a suit would necessarily result in a subsequent suit being barred by the principles of res judicata, whereas this would not be the case involving "return of a plaint" or "rejection of a plaint". What the learned Single Judge has done is to have dismissed the suit of the appellant-plaintiffs at the admission stage itself without issuance of summons and this, we are afraid, is contrary to the provisions of the statute."

(Emphasis supplied)

5. Mr. Das also relies on the decision of a Coordinate Single Bench of this Court in ***Avneet Singh Bedi v. Inder Pal Singh***[2], particularly on paras 9, 11 and 12 thereof, which read as under:

"**9.** A perusal of the facts here does not show that the plaint fails to disclose any cause of action. It does not also show that it is barred by any provision of law. It may be a weak case and may not ultimately result in a decree in favour of the plaintiffs. At the stage of issuing summons, this court would not have to go into the merits of the case or the merits of the submissions being made.

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11. As noted above, these are disputed questions of fact which cannot be answered at the stage when the consideration is as to whether the plaint has to be registered as a suit and summons have to be issued to the defendants. As to whether the plaintiff has approbated or reprobated and if so, its effect is an exercise which can only be carried out after due consideration when the written statement/defence of the defendants are on record.

12. In my opinion, at this stage, it cannot be said that the plaint does not disclose a cause of action or is barred by law. Summons have to be issued to the defendants."

[2] **2019 SCC OnLine Del 9905**

6. Two issues, therefore, arise, for this Court to consider at this incipient stage; firstly, whether summons have to be issued in every suit which is "duly instituted", and, secondly, whether the Court can hear Mr. Ravi Gupta, learned Senior Counsel for the Defendant No. 3 at this stage.

7. The first issue, in my considered opinion, stands squarely answered by paras 18 to 20 of ***Bright Enterprises***[1], on which Mr. Das himself places reliance. These paragraphs clearly hold that summons are required to be issued in every suit duly instituted *except where the suit is returned under Order VII Rule 10 or rejected under Order VII Rule 11*. Clearly, therefore, it is open to a Court to examine, even before issuing summons, whether the suit is required to be returned under Order VII Rule 10 or rejected for any of the grounds contained in Order VII Rule 11. The submission, of Mr. Das, that summons have to be issued in every suit which is "duly instituted" is, therefore, without substance and is accordingly rejected. It is open to the Court to examine, even at this stage, whether the suit is barred by Order VII Rule 10 or Order VII Rule 11.

8. Adverting, now, to the second objection of Mr. Das regarding grant of audience to Mr. Gupta. Mr. Das' contention is that, even if this Court were to examine whether the suit is required to be rejected under Order VII Rule 11 prior to issuance of summons, that exercise has to be conducted in the absence of the defendant and, even if the defendant is physically present, he cannot be heard in the matter.

Essentially, therefore, what Mr. Das contends is that Mr. Gupta cannot be extended the courtesy of an audience by the Court at this stage.

9. Sections 26, 27 and 148A, and Order V Rule 1 of the CPC, which have been cited by Mr. Das in this regard, do not, in my considered opinion, support such a submission. Section 26 deals with the manner in which suits are to be instituted, and does not deal with grant of audience to either of the parties. Section 27 states that, once a suit is duly instituted, summons would be issued to the defendant to appear and answer the claim and may be served in the manner prescribed. This does not mean, in my opinion, that if the defendant is present even before issuing summons, and desires to contend that the suit is required to be rejected under Order VII Rule 11, the Court is barred from hearing him in the matter.

10. Section 148A of the CPC deals with the right to lodge a caveat. The provision opens with the words "where an application is expected to be made, or has been made, in a suit or proceeding instituted, or about to be instituted". The provision goes on to say that before any such application, in a suit which stands instituted or is about to be instituted, is heard, a person affected by the outcome of the application may claim a right of hearing in a caveat. We are not concerned with any such application. Even otherwise, this provision, in my view, cannot, expressly or by necessary implication, deny the defendant a right of audience, to urge objections under Order VII Rule 11 even prior to the issuance of summons in a suit.

11. Order V Rule 1 deals with the procedure for issuance of

summons. Without going into the intricacies of the provision, it is clear that this petition, too, does not deny the defendant the right of audience, if the defendant is present and seeks to urge that the plaint should be rejected under Order VII Rule 11 even before summons are issued.

12. Though, initially, Mr. Das sought to urge – as noted above – that every "duly instituted suit" had necessarily to invite issuance of summons, he modified his stance, during arguments, to concede that the Court *does* have the power to reject a suit under Order VII Rule 11(d), without issuing summons, should grounds for such rejection be made out.

13. Given this position, it appears a trifle incongruous to deny the Court the opportunity of hearing the defendant in that regard, even if the defendant is present. This appears, to me, to be straining the CPC to breaking point, and far beyond its legitimate limits. Order VII Rule 11 enumerates grounds on which the maintainability of a suit can be questioned and its rejection sought. No doubt, it is open to a defendant to raise such an objection after summons are issued in a matter. However, when the Court has in categorical terms held that, even prior to issuing summons, a suit may be rejected on the grounds envisaged in Order VII Rule 11 (which position Mr. Das, too, acknowledges), there cannot, in my view, be any bar to the Court hearing the defendant in that regard, if the defendant is present. If the submission of Mr. Das were to be accepted, it would mean that, despite the presence of the defendant, the Court has to decide the

maintainability of the suit under Order VII Rule 11 without hearing the defendant and only by hearing the plaintiff. This, in my view, is not a position which flows from any provision of the CPC to which Mr. Das has invited my attention. Even more empirically, it would also deny the right of the Court to competent legal assistance, despite its availability, which is fundamental to administration of justice.

14. Mr. Das, learned Senior Counsel candidly acknowledges that though, in his perception, the defendant's right of audience at the present stage stands discountenanced by the aforesaid provisions of the CPC, he is not in possession of any judicial authority which can support such a stand.

15. In view thereof, the submission of Mr. Das, that Mr. Ravi Gupta cannot be granted an audience at this stage of the proceedings to justify his request for pre-summons rejection of the suit under Order VII Rule 11, is rejected.

16. The Court, therefore, proceeds to hear the parties, including Mr. Ravi Gupta, on the objection of the defendant to the maintainability of the suit under Order VII Rule 11.

17. Mr. Das and Mr. Gupta have been heard in part on the objection of Mr. Gupta regarding the suit being barred by Order VII Rule 11(d) of the CPC.

18. As it is now 4.30 p.m. and there are still matters left in the list,

it is not possible to continue this hearing today.

19. Re-notify as part-head on 29th July, 2021.

C. HARI SHANKAR, J

JULY 23, 2021/kr