

(2006) 07 BOM CK 0099
In the Bombay High Court
Case No : Second Appeal No. 298 of 1993

Chhabutai Ingole and Others	Vs	APPELLANT
Bakulabai Ingole dead through LRs. Baby " Prabha Shamraoji Rajurkar and Others		RESPONDENT

Date of Decision : 14-07-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9, Order 9 Rule 9
Provincial Small Cause Courts Act, 1887 — Section 26A
Transfer of Property Act, 1882 — Section 106

Citation : (2006) 4 CivCC 509 : (2006) 5 MhLj 732 : (2007) 5 RCR(Civil) 277

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : R.R. Johrapurkar, for the Appellant; A.M. Bapat, for the Respondent

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J.—By this appeal the appellants/original plaintiffs have challenged the judgment and decree dated 16-6-1993, delivered by the 2nd Additional District Judge, Yavatmal in Regular Civil Appeal No. 75/1991, and also the judgment and decree dated 30-3-1991 delivered by the 2nd Joint Civil Judge, Junior Division, Yavatmal in Regular Civil Suit No. 35/1985. The Courts below have concurrently held that the suit for ejectment and possession of present respondents filed by the appellant was barred in view of the provisions of Order 22, Rule 9 of Civil Procedure Code.

2. The admitted position is that the appellants/plaintiffs are the landlords and defendants are tenants. The predecessor in title of the present appellants obtained permission from Rent Controller, and thereafter served a notice u/s 106 of the Transfer of Property Act, dated 11-2-1974 terminating the tenancy of respondents. He thereafter filed Regular Civil Suit No. 190/1974 on 20-9-1974 for ejectment, recovery of rent etc. The order of Rent Controller granting permission, in the meanwhile reached this Court in Writ Petition No. 1885/1975

and proceeding in Regular Civil Suit No. 190/1974 were stayed by this Court. During the pendency of the said suit, Rajaram the original landlord expired on 25-7-1977. An application was presented in the Regular Civil Suit No. 190/1974 for bringing on record the legal heirs of the deceased Rajaram, but as the said application was not traceable on record, the trial Court ultimately held that the Suit No. 190/1974 had abated. The legal heirs of Rajaram thereafter, by way of abundant precaution issued another notice dated 7-3-1984 and claimed possession and damages. After serving that notice the legal heirs i.e. the present appellants filed Regular Civil Suit No. 35/1985. The said Civil Suit was opposed by the original defendant No. 2 i.e. the present respondent by filing Written Statement. The grounds raised was that, permission granted by the Rent Controller, terminating tenancy of the defendant stood exhausted after issuing notice dated 11-2-1974 by the deceased landlord, and as the Regular Civil Suit No. 190/1974 had abated, there was no question of filing second suit for the same cause of action. The provisions of Order 22, Rule 9 were pressed into service.

3. The trial Court as also the Appellate Court found that the subsequent suit i.e. Suit No. 35/1985 was based upon the same cause of action and therefore, the suit was not tenable in view of the bar under Order 22, Rule 9, Civil Procedure Code. It was also held that because of the dismissal of Regular Civil Suit No. 190/1974, the permission granted by the Rent Controller also stood exhausted, and fresh notice could not have been given without obtaining fresh permission from the Rent Controller. The Appellate Court has maintained this judgment.

4. Advocate Johrapurkar, appearing for appellant/plaintiff has contended that the suit was not based upon the same cause of action and Regular Civil Suit No. 190/1974, was not decided on merits. He therefore argues that the reasoning given by the Courts below are erroneous and perverse. In support he has placed reliance upon the judgment of Calcutta High Court reported at Mrs. L.A. Saunders Vs. Land Corporation of Bengal Ltd., , to state that when second such notice is given suit cannot be treated as based on same cause of action. He has also relied upon the judgment of Nagpur High Court reported at 1951 N.L.J. 122 V.P. Thatte v. Vithaldas. He has further stated that as the Civil Suit was not decided on merits, and was dismissed as abated, fresh notice was given by way of abundant precaution on the strength of very same permission and the Courts below have erroneously held that the permission granted by the Rent Controller stood exhausted.

5. Advocate Bapat, on the other hand contends that as the suit was between landlord and tenant, in view of the provisions of Section 26A of the Provincial Small Causes Courts Act, the suit ought to have been filed before the Small Causes Court. He further contends that even though the suit has been tried by the Civil Judge, Junior Division, Yavatmal still it should be treated as suit tried by Small Causes Court, and therefore, Second Appeal should not be entertained. He argues that, if it is a small cause suit, the remedy of appeal was before the

District Court as provided, and thereafter no second appeal is maintainable. In the alternative he argues that in the facts of the present case, admittedly the second notice is again given to the present respondent by the plaintiff and provisions of Clause 13 of the C.P. and Berar Letting of Houses and Rent Control Order, 1949 specifically bar it. As such, such fresh notice has also to be preceded by fresh permission of Rent Controller. He further argues that the permission granted was implemented by issuing notice by the deceased landlord on 11-2-1974 and thereafter a suit was filed for ejectment and possession, and as the suit has been dismissed the permission has lapsed and stands exhausted. According to him unless and until again fresh permission is obtained, the second suit could not have been filed by the present appellant.

6. The substantial question of law framed by this Court for consideration is - Whether it could be said that permission granted by the Rent Controller has been exhausted on account of dismissal of the suit as abated? After hearing both the counsel, I find that apart from this question the other question which falls for consideration is - Whether the suit 35/1985 filed by the present appellants was hit by bar prescribed under Order 22, Rule 9?

7. The facts are not in dispute. The Civil Suit No. 190/1974, filed by the earlier landlord Rajaram was stayed by this Court in writ petition, and during the pendency of the said Civil Suit Rajaram expired. It appears that his legal heirs could not be brought on record and it also appears that there was some dispute as to whether the application for bringing legal heirs was filed on record or not. It appears that his legal heirs were brought on record in writ petition before this Court. The trial Court has stated that, if any such application was filed the same was not traceable on record of the Regular Civil Suit No. 190/1974. It is in this background that the trial Court dismissed the suit filed by Rajaram as abated. It is therefore, clear that the suit was not adjudicated upon merits of the matter and has been actually dismissed for want of prosecution. The issues involved have not been answered by the Court on merit. The permission granted by the Rent Controller was for eviction of the present respondent and the issue in connection with that permission or the question about the validity or otherwise of notice u/s 106 then issued on 11-2-1974 by the deceased Rajaram are also not gone into by the Court below. In this view of the matter, it is difficult to hold that the permission granted by the Rent Controller expires because of dismissal of the suit for want of prosecution.

8. The bar under Order 22, Rule 9 is applicable only when the suit is based on the same cause of action. Here as has been demonstrated, the present appellants have after abatement of the suit on 30-9-1983, by way of abundant precaution issued a fresh notice on 7-3-1984. In this fresh notice reference of the facts mentioned above has been made and based upon this fresh notice, the present Civil Suit i.e. Regular Civil Suit No. 35/1985 has been filed. Paragraph No. 8 of this notice states that, without prejudice to the facts that the tenancy of respondent has already been terminated and therefore, he was not a tenant, if it

was established that the respondent still remained a tenant, therefore, by way of abundant precaution the tenancy was terminated w.e.f. midnight of 30-4-1984. On the basis of this notice as already stated the above second suit has been filed. The Courts below without appreciating the validity of this notice, have only found that the second suit as filed is barred by the provisions of Order 22, Rule 9.

9. Issue whether such suit can be termed as a suit based upon the same cause of action, has been considered by the Calcutta High Court in the judgment reported at Anil Pahar Vs. Subhas Mahato and Others, . Perusal of paragraph Nos. 13, 14 and 15 of that judgment reveals that the Hon"ble High Court has held that notice to quit issued in the month of March, in that case was an essential part of the cause of action of the earlier ejectment suit and second such notice issued in the month of December was essential part of cause of action for later suit for ejectment. The High Court has held that therefore these two notices were not the same and therefore the cause of action in two different suits was different. It has been further observed that same evidence would not have supported the plaintiffs case in these two suits. The High Court has observed that in the earlier suit the plaintiff there was required to led evidence to prove sufficiency and validity of the March notice and due service thereof. While to succeed in later suit he has to establish these facts in relation to December notice. It is also observed further that the December notice to quit was in express terms clearly recognising the continuation of defendant before the Calcutta High Court, as tenant upto December, 1949, It is in view of this finding that the suit based upon the subsequent notice to quit has been treated to be the suit not based upon the same cause of action, and therefore, not barred under Order 9, Rule 9, Civil Procedure Code. The same analogy will apply with full force in the facts of this case. No other judgment taking a view to the contrary is pointed out.

10. The learned Counsel for appellant has also relied upon the judgment reported at 7957 N.L.J. 722 (supra). There the High Court has examined the necessity of fresh permission for issuing second notice, and it was found that after permission granted by the Rent Controller, notice was issued, that notice was found to be invalid and therefore, second notice in accordance with law was served. It has been laid down that no fresh permission from Rent Controller was necessary to serve such second notice.

11. As already observed above, here the fresh notice has been issued only by way of abundant precaution and it's validity has not been adjudicated upon by the Courts below. In such circumstances, I find that when the first notice and first suit has not been adjudicated upon merits and the suit has been dismissed for want of prosecution only, the logic applied for in the judgment reported at 1951N. L. J. 122 (supra), will also support appellants" stand. It is therefore held that the fresh permission would not be required to serve second notice dated 7-3-1984, on the basis of which Regular Civil Suit No. 35/1985 has been filed. It is therefore also clear that the permission granted earlier by the Rent Controller

did not lapse and did not exhaust itself because the dismissal of the suit was for want of prosecution.

12. Thus the impugned judgment and decree are hereby quashed and set aside. Regular Civil Suit No. 35 of 1985 is restored back to the file 2nd Joint Civil Judge, Junior Division, Yavatmal. The objection raised by Advocate Bapat, about jurisdiction of the said Court in that respect, as also the objection if any in relation to the legality and validity of the second notice for termination dated 7-3-1984, are kept alive for adjudication by the Competent Court in this respect. Subject to above, Rule is made absolute. Second appeal is allowed, however, in the circumstances of the case, there shall be no order as to cost.

13. At this stage, the learned Counsel for appellants/plaintiffs states that as the matter is going on since 1974, the suit should be made time bound. Advocate Bapat, states that he has no objection if a reasonable time limit is fixed in this respect. In these circumstances, the Lower Court to dispose of the suit finally as early as possible and in any case with a period of one year from the date of communication of this order to it.