
(2011) 07 GUJ CK 0022
In the Gujarat High Court
Case No : First Appeal No. 1352 of 1982

Chimanlal G. Patel

APPELLANT

Vs

Ganesh Park Coop HSG SOC Ltd. and Others

RESPONDENT

Date of Decision : 08-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 23 Rule 1, Order 23 Rule 1(3)

Gujarat Co-operative Societies Act, 1961 — Section 167

Citation : (2011) 07 GUJ CK 0022

Hon'ble Judges : K. S. Jhaveri, J

Bench : Single Bench

Advocate : B.B. Naik, for the Appellant; Notice Served by DS for Defendants 1 - 4, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J.—By way of this appeal, the Appellant-original Plaintiff has challenged the judgment and decree dated 1.10.1981, passed by the City Civil Court, Court No. 3, Ahmedabad, in Civil Suit No. 422 of 1977, whereby the learned Judge has dismissed the Suit filed by the original Plaintiff -present Appellant.

2. The facts of the case are that the present Respondent No. 1, is a registered Housing Society and present Respondent Nos. 2 to 4 are its office bearers. In pursuance of an agreement between the original Plaintiff and original Defendant No. 1 on 12.04.1973, subsequently amended by further new agreement dated 18.8.1973, the Plaintiff was put into possession of the Defendant No. 1's land. According to the contract the Plaintiff building contractor commenced construction work further from the stage where the earlier contractor had left it. The Plaintiff issued bill Nos. 1 to 3 at various times out of which Bill Nos. 1 and 2 were duly certified, but Defendant did not pay the amount thereof and as a result, Plaintiff stopped the construction work. The Defendant No. 1 served the

Plaintiff with notice dated 23rd March 1976 and terminated the contract and threatened to take possession of the land from the Plaintiff. The Plaintiff apprehended that the Defendant society wanted to get the construction work done from someone else, thus the Defendant No. 1 committed breach of the contract. According to the Plaintiff, the contract is still going on and that as and when the Plaintiff's bill No. 3 is certified and the outstanding amount is paid by the Defendant No. 1 to the Plaintiff, the Plaintiff is ready and willing to continue to abide by his own part of the contract and resume the construction work and in the present circumstances Civil Suit No. 422 of 1977 was filed by the original Plaintiff. The learned Judge, after hearing the parties dismissed the said suit. Hence, this appeal.

3. Heard Mr. B.B. Naik, learned advocate for the Appellant.

4. Learned Advocate for the Appellant submitted that the trial Court has committed error in rejecting the suit inasmuch as for the same cause of action, the Plaintiff has right to file a separate suit for specific performance and compensation for breach of contract. He relied upon the following decisions.

(i) Padma Lochan Chakravartty v. Rustom Khan and Anr., reported in Indian cases, volume XLI, page No. 897.

(ii) Upendra Narain Roy v. Janaki Nath Roy, reported in Calcutta Series, Volume XLV, page 305.

(iii) Ramchandra Adaram Agarwale v. Lodha Gouri Bhadhunji, reported in 1924 BomHC 368.

(iv) Shripad Gopalkrishna Chandavarkar v. Sidram Satappa Dodamani and Ors., reported in 1951, Bombay, page 167.

(v) Deva Ram and Anr. v. Ishwar Chand and Anr., reported in 1996, Supreme Court, page No. 378.

5. In the case of Alka Gupta v. Narendra Kumar Gupta (supra), reported in (2010), 10, SCC, page 141, the Hon'ble Supreme has held in head-note of C as under:

C. CPC Code, 1908 - Or.2 R.2- Bar of second suit under - Determination of applicability of - Questions relevant for - Only question relevant therefor, held, is whether relief claimed in both suits arose from same cause of action - Merits and validity of second claim cannot be considered at this stage - Conduct of Plaintiff is not relevant in determining applicability of said bar.

6. The trial Court while considering the matter has framed following issues:

(I) whether the Plaintiff can claim a right to continue as a contractor under the contract dated April 12, 1973, after receiving the notice of the Defendant No. 1 dated March 23, 1976 ?

(ii) Whether this Court has jurisdiction to entertain the suit ?

(iii) Whether it is proved that the construction made by the Plaintiff is not according to terms and conditions of the Tender and it is defective ?

(iv) Whether it is proved that the Defendant No. 1 has paid the Plaintiff's bills certified by the Engineer ?

(4A.) Whether the Plaintiff process that as a result of breach of the contract by the deft. No. 1, he has suffered damaged to the extent Of Rs. 1,82,998.17 (Rs. One lace eighty thousand nine hundred ninety and seventeen paise) ?

(5) Whether the suit is barred by limitation ?

(5.A)whether the suit suffers from misjoinder of parties ?

5.B.) Whether the Plaintiff has served the requisite notice u/s 167 of the Gujarat Cooperative Societies Act ? If not, what is its effect ?

(5.C) Whether the suit is barred by constructive resjudicata, or by the provision of order 23 or order 2 Rule 2 of the CPC code ?

(5.D.) Can it be said that the present suit filed during the pendency of the earlier suit No. 167/76 is with a view to vex the Defendants and is otherwise a misuse of the process of law and therefore, not maintainable ?

(6) What order and decree ?

7. I have heard Mr. Naik, learned Senior advocate for the Appellant. It is evident from the record that firstly the present Appellant had filed Civil suit No. 167 of 1976, against the present Respondents for injunction for restraining the Respondents from disturbing the Appellant in the possession of the suit site. On 1st March, 1977, the said suit was withdrawn by the present Appellant with a permission to file a fresh suit for the same cause of action. However, during the pendency of Civil Suit No. 167 of 1976, the original Plaintiff filed another suit being Civil Suit No. 422 of 1977 on 08.02.1977. In the meantime, the Appellant preferred another suit being Civil Suit No. 84 of 1977 on 01.03.1977, for the same cause of action. On 21st September, 1977, the said suit was dismissed for default.

8. The main controversy in this appeal is whether the suit is maintainable under Order II Rule 2 or Order XXIII or not. The Order II Rule 2 reads as under:.

2 Suit to include the Whole claim:

(1)Every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2.)Relinquishment of part of Claim:

Where a Plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so

omitted, or relinquished.

(3)Omission to sue for one of several reliefs. A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court to sue for all such reliefs, he shall not afterwards sue for any reliefs so omitted."

Explanation: For the purpose of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

9. In view of Order II Rule 2 of CPC Code, it is clear that no prior permission was taken by the Appellant for filing subsequent suit. In that view of the matter, the view taken by the Trial Court is just and proper that for the same cause of action, the Appellant cannot file separate suit. In this regard the findings of the lower court is as under:

104 . There is a contention that the suit is barred by O.2 Rule 2 of CPC Code. To understand it, we shall have to see the history of litigation between these parties and the cause of action in each of the suits being involved, while considering this point.

105. The present Plaintiff filed Civil Suit No. 167 of 1976 on 6th April, 1976, in the Court of Civil Judge (S.D.), Ahmedabad Rural (at Narol) against this very Defendant No. 1 society and its office bearers (that is to say the said suit was between the same parties as in the suit before us). The plaint of that suit which is at Exh.670 states the contracts dated 12th April 1973 and 18th August, 1973 relating to the constructional work entrusted by Defendant No. 1 to the Plaintiff; it is then stated that the Defendant No. 1 society handed over possession of the suit site to the Plaintiff building contractor in pursuance of the contract and Plaintiff contractor commenced construction and issued bills Nos. 1,2 and 3; that Defendant No. 1 society failed to make payments and as a result, the Plaintiff contractor was compelled to suspend work; that on 18th May 1975 Plaintiff contractor informed of this to Defendant No. 1 society; hat despite the letter the Defendant No. 1 society did not pay.

106. It further avers, "BY NOTICE DATED 23RD MARCH 1976 BY ITS ADVOCATE, THE DEFENDANT No. 1 WRONGFULLY TERMINATED THE CONTRACT AND THREATENED TO TAKE POSSESSION OF THE SUIT SITE AND THEREFORE IT HAD BECOME NECESSARY FOR THE PLAINTIFF TO FILE THE SUIT PRAYING FOR INJUNCTION", The relief prayed is for injunction restraining the Defendant No. 1 from ousting the Plaintiff contractor from the building site. Thus, the entire bundle of facts constituting the cause of action for filing the said suit, amongst other things, also consisted of the Defendant No. 1's notice dated 23rd March, 1976, by which the Defendant No. 1(either call it wrongfully or rightly) terminated this suit contract(which is also the same suit contract before us). This suit was withdrawn with permission to file a fresh suit on the same cause of action, because according to the Plaintiff, it was likely to fail on technical ground;

accordingly, it was dismissed on 1st March, 1977. (see Ex.671).

107. Pending the aforesaid suit bearing No. 167 of 1976, the present Plaintiff filed present suit on 8th February 1977, (that is to say he filed his suit before he might withdraw the earlier suit on 1st March 1977). Thereafter again, the Plaintiff filed Civil Suit No. 84 of 1977 in the Court of Civil Judge (S.D.), at Narol on 1st March, 1977 against the same Defendants (that is pending the present suit). He narrated the same story as in the earlier suit viz. the contract between the parties on 12th April and 18th August 1973 and on the basis of the said contracts the Plaintiff building contractor having commenced the constructional work and issued running bill Nos. 1, 2 and 3, and the Defendant No. 1 society failing to pay values thereof; and letter dated 18th May 1975 by the Plaintiff demanding the outstanding and also informing that in that said background, the construction work was suspended. Just as in the earlier suit, in this suit No. 84 of 1977 also more or less verbatim, the Plaintiff proceeds to state that on 23rd March, 1976, the Defendant No. 1 society by its advocate's notice wrongfully terminated the contract and threatened to oust the Plaintiff from the suit site; that Plaintiff has already served statutory notice upon the Defendant. The relief prayed for is for prohibitory injunction against the Defendant No. 1 from ousting the Plaintiff from the suit site except by following due process of law. Thus this third suit is being filed almost in verbatim language and necessarily therefore, on the same grounds and for the same reliefs the earlier suit bearing No. 167 of 1976. The Defendant appeared. Ultimately, the suit was dismissed on 21st September 1977 on the ground, "parties are absent when the matter was called out..... Dismissed for default....."

108. The litigation between the parties by these three suits more or less on the same subject give rise to issue No. 5-c based on O-2, R-2 of CPC and issue No. 5(d) on the ground that the Defendant is being vexed by the Plaintiff and that the process of law is being misused and that the suit should be dismissed on that count too.

109. First dealing with issue No. 5-C on the ground of O-2, R-2 of CPC Code, we may just have a look at that order. It is as under:

2.1. Every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

2.2. Where a Plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted, or relinquished.

3. A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court to sue for all such reliefs, he shall not afterwards sue for any reliefs so omitted."

Explanation: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration "A lets a house to B at a yearly rent of Rs. 1200/- . The rent for the whole of the year 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

110. One of the objects in enacting the above provision, conceivably, is to discourage multifariousness. The idea is that if a Plaintiff has a particular cause arising to him and if he wanted to take a legal proceeding, he will claim each and every relief which is claimable as a result of the aforesaid cause of action; but that he may give up some of the reliefs on the condition that he will not then file a fresh proceeding for claiming such reliefs (as are given up). A deeming provision is also introduced to lay down that if from a given cause of action Plaintiff was entitled to various reliefs and if in a legal proceedings initiated by the Plaintiff on that cause of action, he prays for only some of the reliefs and not for the others, those not prayed for will be deemed to have been given up. The provision also lays down a bar against filing a fresh suit for such reliefs either expressly given up or impliedly given up. O.23, Rule 1 of the CPC deals with withdrawal of a suit Sub-rule (3) provides that where the court is satisfied that the suit must fail by reason of some formal defect, the court may grant the Plaintiff, permission to withdraw from such suit with liberty to institute a fresh suit in respect of the subject of the matter of such suit.

111. We saw that Civil suit No. 167 of 1976 was filed on 6th April 1976 and withdrawn on 1st March 1977; the withdrawal is with permission contemplated under aforesaid O.23, sub rule(3) of Rule 1 of CPC Code, in so far as permission to file a fresh suit on the same cause was expressly sought and given on the ground that the suit was likely to fail on the same cause of action was perfectly permissible after aforesaid permission. However, the present suit before us is filed on 8th February 1977 that is to say, before withdrawal of the earlier suit or for that purpose, before permission to file a fresh suit may be granted in the earlier suit.

112. In the circumstances, the present suit, if it is found to be on the same cause of action, as the one on which the earlier suit Exh.670 is based, it will not be saved by the aforesaid permission granted under O-23, Rule (1)(3) of CPC and will amount to a fresh suit on the same cause of action, to attract provision of O-2 Rule 2 of CPC Code. It is in the above context that now we shall have to see whether the suit before us, attracts squarely or not; if yes, we shall have to hold the suit as not maintainable one and if no, the suit would be a perfectly a good one.

113. Trying to discuss the point, I will, at the outset observe that the provision of O-2, Rule-2 of CPC will have to be very strictly construed, in so far as, it is in a

way taking away right of a citizen to file a fresh suit; to repeat it, we shall not consider the latter suit not maintainable one, unless and until the provision of O-2, Rule 2 with relation to the latter suit stand fully and squarely applicable.

10. I am in complete agreement with the findings recorded by the Trial Court that the Civil suit No. 422 of 1976 was filed before withdrawal of Civil Suit No. 167 of 1976 and during the pendency of Civil Suit No. 422 of 1976, Civil Suit No. 84 of 1976, was filed by the present Appellant for the same cause of action. Therefore, the trial Court has rightly observed that the suit is hit by Order II Rule 2 of Code of Civil Procedure

11. In the premises aforesaid, I do not find any merits in the appeal. The same is therefore, dismissed. No order as to costs.