
(2000) 05 CAL CK 0006
In the Calcutta High Court
Case No : F.M.A. No. 1075 of 1989

Govinda Dhara and Others	Vs	APPELLANT
Ramkrishna Bera and Others		RESPONDENT

Date of Decision : 19-05-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 2(3), 11
Specific Relief Act, 1963 — Section 34

Citation : 107 CWN 270

Hon'ble Judges : S.B. Sinha, J;M.H.S. Ansari, J

Bench : Division Bench

Advocate : Jyotirmoy Bhattacharya, Goutam Pathak Banerjee and Soumik Ganguli, for the Appellant; S. Bhunia, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, J.—This appeal at the instance of the defendant is directed against a judgment and order dated 24th February, 1989 passed by Shri D. K. Bhattacharya. Assistant District Judge, Ghatal in Title Suit No. 17/88 whereby and whereunder while allowing appeal preferred from a judgment and decree dated 29th June, 1988 passed by Sri T. K. Gupta. Munsif at Ghatal in Title Suit No. 413 of 1976 it was held that the suit of the plaintiff is not barred under Order 2 Rule 2 of the CPC and remitting the matter back to the learned trial court for hearing the suit on merits.

The fact of the matter lies in a very narrow compass.

The respondent herein had filed a suit which was registered as T. S. No. 210 of 1970 for declaration that the transactions between him and the appellants were loans in substance and not a sale out and out. He in the said suit prayed for redemption as also other relief set out in the plaint and the transaction was held to be a loan in substance.

In the said suit, however, no order on the prayer of redemption was passed by

the Court. Relying on or on the basis of the said decree another suit was filed by the respondent for accounts, release of security and restoration of possession. The said suit was registered as Title Suit No, 413 of 1976. Apart from the merit the defendant-appellant took a plea that as the reliefs prayed for in Title Suit No. 413 of 1976 having not been taken in the original suit filed by him. i.e. Title Suit No. 217 of 1970 although cause of action for both the suits was the same, the suit was barred under Order 2 Rule 2 of the Code of Civil Procedure. Having regard to the aforementioned plea, an additional issue was framed by the learned trial court which is to the following effect:

"Is the suit barred under Order 2 Rule 2 of the CPC ?"

2. The learned trial Court traced the history of both the suits. He also perused the plaints of both the suits and held that cause of action of both the suits was same and the plaintiff having not prayed for any relief as regard accounting, redemption and possession in the earlier suit, the same was barred under Order 2 Rule 2 of the Code of Civil Procedure.

3. The learned trial Court noticed that in the plaint of the earlier suit, a leave under Order 2 Rule 2 of the CPC was prayed for but from the order sheet it did not appear that at any point of time the said relief was pressed. Having regard to the provisions of Order 2 Rule 2 (3) of the CPC and the principles underlying the said provisions, the issue was answered in favour of the defendant by the learned trial court.

4. The learned Court of Appeal below, however, in his impugned judgment posed a question to the effect that when no order either allowing the prayer for permission or rejecting the same was passed by the learned Munsif in the earlier suit, can the plaintiff be blamed therefore.

5. The Court of Appeal below held that in a situation of this nature, leave would be deemed to have been granted.

6. Mr. Jyotirmay Bhattacharjee, the learned Counsel appearing on behalf of the defendant-appellant, inter alia, submitted that the learned Court of Appeal went wrong in holding that the suit was not barred under Order 2 Rule 2 of the Code of Civil Procedure, although a bare reading of Order 2 Rule 2(3) of the CPC would clearly indicate that an expressed leave has to be prayed for and granted.

7. Mr. S. Bhunia, the learned Counsel appearing on behalf of the plaintiff.-respondent, on the other hand, submitted that although Order 2 Rule 2(3) of the CPC stipulates that an order has to be passed granting leave to the plaintiff, inference of grant of such leave can be drawn in the facts and circumstances of a particular case. Strong reliance in this connection has been placed on a full bench judgment of the Patna High Court in Hare Krishna Sen Vs. Umesh Chandra Dutt and Others, The learned Counsel also relied upon a decision of the Apex Court in Gurbux Singh Vs. Bhooralal, . According to the learned Counsel, the courts are not only courts of law but also courts of equity and in that view of the matter the

procedures being hand maid of justice, a suit filed by the plaintiff should not be thrown out on the ground that it is barred under Order 2 Rule 2 of the Code of Civil Procedure. Strong reliance in this connection has been placed on Ramankutty Vs. Avara, , New India Assurance Co. Ltd. Vs. R. Srinivasan, and United India Insurance Company Ltd. Vs. Smt. Smritikona Mistri and Others, .

8. Sub-rule (3) of Rule 2 of Order 2 of the CPC reads thus:

"R2 Suit to include the whole claim.

(1)

(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 as 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. It appears that In the plaint of Title Suit No. 217/70, merely a statement was made in paragraph 5 to the effect that they are seeking leave for redemption and has possession for future in respect of the properties described in Schedule "B" of the plaint. No reason had been assigned as to why all the reliefs prayed for in the instant suit could not be prayed for in the said suit.

10. The object of enacting Order 2 Rule 2 is based on the principle that the defendant should not be twice vexed for one and the same cause of action. By reason of the said rule the remedy is only barred and not the right of the parties.

11. In AIR 1949 78 (Privy Council) it has been held that the rule is directed against two evils, the splitting of claims and the splitting of remedies.

12. As noted hereinbefore, the suit was one for mortgage. In Bhau Daji Khade Vs. Patlu Malu Sable, , it has been held that the mortgagee suing for recovery of a portion of the property cannot sue again. In the instant case, the plaintiff was aware that he having prayed for declaration that the transaction in question although termed as "sale" was merely a transaction of mortgage as thereby a loan had been advanced, he did not pray for the consequential relief, he on his own showing, was further aware that he had to pray for redemption of the mortgage as also recovery of possession and accounts from the mortgage.

13. The purport and object of Order 2 Rule 2 is absolutely clear. If a leave is not obtained, a subsequent suit is barred. The purport and object of the said provision is somewhat analogous to the principles underlying Section 11 of the Code of Civil Procedure.

14. There cannot be any doubt that where a leave is sought for and granted, the suit would not be barred. Although a full bench of the Patna High Court in

Nandkishore Singh and others Vs. Mathura Sahu and others has held that grant of such leave may be Inferred by necessary implication. The said principle was rendered in the peculiar facts of that case. Therein the plaintiff's right to 8 annas share in an estate was recorded in a settlement under the Santhal Parganas Settlement Regulation. Thereafter he filed a suit for partition of his share. He had stated that he had claimed entire estate which was then pending in appeal and prayed that a temporary partition should be made upon the terms that it should be annulled if the appeal resulted in plaintiffs favour but should become permanent if the appeal should be dismissed. The court decreed the claim for partition without stating whether it was to be temporary or permanent.

15. Dawson Miller, C.J. with whom Bucknill, J. agreed that having regard to the manner in which the partition suit was framed and the relief there claimed, it must be assumed that the court had granted leave under Order 2 Rule 2(3) of the Code of Civil Procedure. It was observed:

"In the peculiar circumstances of this case I do not think it can be successfully contended that Order II, Rule 2, has any application, and, even if it should be held that the rule applies in a case where a suit for partition is brought and a subsequent claim is put forward in another suit claimed the whole of the property, nevertheless, have regard to the manner in which the partition suit was framed and the relief there claimed. I think it must be assumed in the absence of any evidence to the contrary that the court treated the case as one in which all questions relating to the plaintiffs claim for a declaration of title to the whole property were to be decided hereafter, and that was what was done by the leave of the court under Clause (3) of Rule 2."

16. The said decision has been distinguished by a division bench of Patna High Court itself in Phulchand Sah and Others Vs. Dinkar Prasad and Others, wherein in a mortgage suit, it was held:

"The appellant court, whose attention was drawn to the provisions of Order 2, Rule 2, Civil Procedure Code, made an observation that any future claim for recovery of the mortgage money might be barred under Order 2, Rule 2, Civil Procedure Code. Such an observation could not have been made by the appellant court in relation to the first suit, if the court had granted leave by necessary implication."

17. In State of M.P. Vs. Mangilal Sharma, . the Apex Court held that where merely a declaratory relief was claimed u/s 34 of the Specific Relief Act, 1963 that he continued in the service under the appellant and without claiming arrears salary and other consequential reliefs, the subsequent suit claiming such relief was barred. However, it was held so far as the employee of State is concerned, keeping in view the fact that he is entitled to status, no such relief was required to be claimed.

18. The contention of Mr. Bhunia to the effect that the procedure being hand maid of justice, technicalities would not stand in the way of substantive justice as

has been held in Ramankutty Vs. Avara, cannot be said to have any application in the facts and circumstances of this case.

19. In New India Assurance Co. Ltd. Vs. R. Srinivasan, the Apex Court was dealing with a case under Consumer Protection Act, 1986. It was held :

The interest of justice, in our opinion, cannot be defeated by this rule of technicality. The rules of procedure, as has been laid down by this Court a number of times, are intended to serve the ends of justice and not to defeat the dispensation of justice."

20. In United India Insurance Company Ltd. Vs. Smt. Smritikona Mistri and Others, , this Court has held that the High Court is not only a court of appeal but also a court of justice. The said decisions cannot be said to have any application in the instant case inasmuch as Order 2 Rule 2 of the CPC does not deal with a procedural or technical matter but thereby the right to claim relief in subsequent suit has been taken away. It, therefore, deals with the rights and obligations of the parties and cannot be said to be a provision containing a procedural matter.

21. In Canning Mitra Phoenix Ltd. vs. M/s. Popular Construction & Anr., reported in 1994 (3) Current Civil Cases, Pendse, J. speaking for a division bench relying on the decisions of Madras High Court, Calcutta High Court and Bombay High Court in Edara Venkayya Vs. Edara Venkata Rao, Upendra Narain Roy vs. Janaki Nath Roy & Ors., reported in AIR 1919 Cal. 904 and Krishnaji Ramchandra Vs. Raghunath Shankar and Another, held :

"Accordingly, we hold that the plaintiff can seek leave of the court under sub-rule (3) of Rule 2 of Order II of the CPC at any time before the date of decree in the first suit and the jurisdiction of the Court is not ousted because the leave is not sought before the institution of the first suit. The leave to institute second suit can be sought at any time during the pendency of the first suit but such leave must be obtained prior to the date of institution of the second suit. The question as to whether leave should be granted under sub-rule (3) of Rule 2 will depend upon the facts and circumstances of each case and the Court will exercise jurisdiction after considering all the circumstances including whether the application is bona fide and whether it is likely to cause any prejudice to the defendants. The court would grant leave provided the plaintiff is seeking leave for any relief omitted and not in respect of any portion of the claim which was omitted or intentionally relinquished at the time of the institution of the first suit."

(Emphasis supplied)

22. We may not agree with the entire statement of law made therein to the effect that such leave must be take prior to institution of suit but the said decision is at least a pointer to the fact that such relief should be prayed for as in the case in the event such leave is refused the plaintiff can either amend his plaint or question the same in revision before the High Court. For the reasons aforementioned we have no other option but to hold that the learned court of

Appeal below erred in law in passing the impugned order which is set aside. The appeal is allowed. However, in the facts and circumstances of this case there will be no order as to costs.

M.H.S. Ansari, J.

I agree.