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(2007) 04 DEL CK 0114

In the Delhi High Court

Case No : FAO (OS) No.: 362 of 2002

Hari Om Maheshwari APPELLANT

Vs

The Delhi Stock Exchange Asso. Ltd. and Another RESPONDENT

Date of Decision : 26-04-2007

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 2(3)

Citation : (2007) 2 ILR Delhi 434

Hon'ble Judges : Dr. M.K. Sharma, C.J;Sanjiv Khanna, J

Bench : Division Bench

Advocate : N.S. Vashist, for the Appellant; V.K. Chaudhary with Mr. Sandeep Arya and Mr. Pervinder, for the Respondent

Final Decision : Dismissed

Judgement

Mukundakam Shrama, C.J.—This appeal is directed against the judgment and order dated 23rd August, 2002 passed by the learned Single Judge holding that the suit instituted by the appellant/plaintiff is barred under Order II, Rule 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code for short). Consequently, the suit filed by the appellant/plaintiff was dismissed. The findings recorded by the learned Single Judge for coming to the conclusion that the suit is barred under the provisions of Order II, Rule 2 CPC are under challenge in this appeal, on which we have heard the learned counsel appearing for the parties. We have also perused the records and also the decisions, which are referred to and relied upon by the counsel for the parties.

2. The appellant/plaintiff had filed the said suit seeking for a decree of recovery of damages of a sum of Rs. 1,60,00,000/- as against defendants No. 1 and 2, jointly and severally. It was stated by the appellant/plaintiff that the cause of action for the aforesaid suit arose on various dates including 30.6.1995 when the appellant/plaintiff was compelled to resign from the membership of defendant No. 1, and also on 1.8.1995, when the resignation of the appellant/plaintiff was accepted by the defendant No. 1.

3. The appellant had earlier filed three suits against respondent No. 1. The first suit for permanent injunction was filed in the year 1993. It was prayed that the respondent No. 1 should be restrained from interfering with the legal business of the appellant herein as share broker and he should be permitted to enter trading hall. The second suit was filed by the appellant herein on 8.2.1996 for recovery of Rs. 10,000/- with costs. It was claimed that penalty of Rs. 10,000/- was wrongly imposed by the respondent No. 1. The third suit being suit No. 2173/1996 was filed by the appellant herein on 19.8.1996 for recovery of Rs. 7.50 lacs from the defendant therein, i.e. respondent No. 1 in the present appeal, with interest and costs. Paragraphs 11, 13 and 15 of the said plaint read as under:

11. That due to continued restriction by the direction dt. 7.10.1993 which resulted in complete ban on trading of the plaintiff by the defendant and acts of hostility and partisan attitude in the settlement of claims for and against the plaintiff, detention of plaintiffs Margin Money, the plaintiff resigned from the membership of the defendant on 30.6.1995 which was accepted and the membership share of the plaintiff in the defendant company which was worth Rs. 25 lacs, upon which the Defendant had paramount, continuing and floating lien of the defendant in terms of Article 86, was transferred by the defendant at its Board Meeting held on 1.8.1995. The defendant also released the other securities worth Rs. 1,50,000/- to the plaintiff. However, the Margin Money Deposit of Rs. 4,40,000/- has not been released. The plaintiff is entitled for recovery of Margin Money Deposit of Rs. 4,40,000/- which has been illegally and unauthorisedly withheld by the defendant since 8.10.1993.

13. That the plaintiff is also entitled to recover damages for wrongful detention of his money, equivalent to interest @ 2% p.m., from the Defendant, the minimum rate of interest that prevails in the Stock Market, which works to Rs. 3,10,000/- from 8.10.1993 till the date of filing of the present suit.

15. That the cause of action for this suit first arose on 8.10.1993 when the defendant did not refund the Margin Money Deposit of Rs.4 lacs demanded by the plaintiff. The cause of action again arose on 8.11.1993 when the plaintiff demanded refund of total amount of Rs. 4,40,000/-. The cause of action further arose on 9.11.1993 when the defendant exercised his ''lien'' on the Margin Money of Rs. 4,40,000/-. The cause of action arose on 15.11.1993, 20.12.1993, 10.1.1994, 5.10.1995, 31.10.1995, 9.11.1995, 21.12.1995 when the plaintiff demanded refund of Margin Money but the defendant neglected to pay the same. The cause of action further arose on 31.1.1996 when legal demand was made by issue of notice by the Advocate of the plaintiff and also on 6.8.1996 when the plaintiff gave a final notice to the defendant demanding refund of Rs. 4,40,000/- alongwith interest of Rs. 3.10,000/-. The cause of action is continuing as the defendant has not paid the money to the plaintiff till the presentation of the present suit.

4. Similarly in paragraph 7 of the said suit No. 2173/1996, it has been averred as

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under:

.... Though, the defendant, in terms of the order dt. 16.8.1993 allowed the entry of the plaintiff to its Trading Hall, however, to circumvent and negate the said order and to ruin the plaintiff, the defendant directed its all other members not to deal with the plaintiff by issuing the following direction on 7.10.1993:-

Members are advised that henceforth and till further notice Stock Exchange will not accept the transaction list after trading, pertaining to M/s H. Maheshwari & Co. Any member doing business with the above firm shall settle his dues directly at their risk and responsibility and Stock Exchange shall not accept any responsibility for settlement of their dues. This action has been necessitated in view of the fact that the above firm has been violated the Bye-laws of the Exchange.

After the aforesaid direction, the plaintiff could not trade as no member was prepared to trade with the plaintiff to avoid displeasure of the Defendant.

5. Paragraph 11 of the plaint quoted above states that the appellant had submitted resignation from membership of the respondent No. 1 on 30.6.1995 due to continued restriction given by the direction dated 7.10.1993 by respondent No. 1 which resulted in complete ban on trading by the appellant. It was also stated that the said acts of the respondent No. 1 were acts of hostility and partisan attitude in the settlement of claims which had resulted in detention of the Margin Money of the appellant herein. It was accordingly submitted that due to the wrongful, illegal acts and harassment caused, the appellant herein was forced to resign from the membership of the respondent No. 1. Due to these circumstances, the membership share of the appellant in the respondent No. 1, which was worth Rs. 25 lacs, was transferred. In paragraph 13 of the plaint, the appellant herein specifically claimed damages for detention of his money with interest @ 2% p.m., which works out to Rs. 3,10,000/- from 8.10.1993 and accordingly a decree for a sum of Rs. 7.50 lacs was claimed by adding the Margin Money of Rs. 4.40 lacs.

6. The forth suit filed by the appellant herein is for recovery of Rs. 1.60 crores. The present appeal arises out of this suit. The said suit has been filed against the Delhi Stock Exchange Association Ltd. (respondent No. 1) and Shri R.K. Pandey, the Executive Director, who is the signatory to the letter dated 7th October, 1993, which had barred members of the Delhi Stock Exchange from accepting transactions with the appellant till he settles his dues. A reading of the plaint shows that the suit is based upon mala fide, unwarranted and illegal acts of the respondent No. 1, which resulted in issuance of a letter dated 7.10.1993. It is further alleged that due to the illegal act by which he could not transact business, the appellant had suffered untold mental agony and financial losses and is, therefore, entitled to damages of Rs. 1,60,00,000/-. Paragraphs 3 and 4 of the suit are as under:

3. That, however, on account of malafide, unwarranted, unauthorised, unlawful,

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arbitrary, without jurisdiction, unjust, unreasonable and ultravires acts of commission and/or omission on the part of the defendants and constant harassment caused by them to the plaintiff for at least about twenty months, resulting, inter alia, in loss of business - goodwill and reputation of the plaintiff and untold mental agony and heavy pecuniary losses to the plaintiff, the plaintiff was compelled by the oppressive circumstances created by the defendants, to resign from the membership of defendant No. 1 on 30.6.1995, which resignation was accepted by defendant No. 1 on 1.8.1995, from which date the plaintiff finally ceased to be a member of defendant No. 1.

4. That the cause of action for the present suit arose on various dates, including 30.6.1995 when the plaintiff was compelled to resign from the membership of defendant No. 1, as aforesaid, and on 1.8.1995 when the resignation of the plaintiff was accepted by defendant No. 1 and the same is a recurring one and is still continuing.

7. The aforesaid suit was contested by the respondent No. 1 on various grounds including that the suit was barred and not maintainable on account of Order II, Rule 2 of the Code. On the basis of the pleadings of the parties, three preliminary issues were framed by the learned Single Judge in the following manner:

1. Whether the suit is barred by principles of res judicata?

2. Whether the suit is barred by the provisions of Order 2 Rule 2 CPC?

3. Whether the suit is liable to be stayed for the reasons stated in the written statement of defendant No. 2?

8. So far the first issue is concerned, the learned Single Judge after hearing the parties decided the said issue in favour of the appellant. On the second issue, the learned Single Judge returned findings against the appellant and on this basis the suit was dismissed.

9. We have reproduced various paragraphs of the plaint in the two suits. The said paragraphs give gist of the cause of action and the foundation of the two suits. According to us it is clear that the two suits are based upon the same cause of action. The first suit was a suit for recovery of money and was based on the illegal acts of the respondent No. 1 in issuing a direction dated 7.10.1993 as a result of which the appellant could not trade with other members of the Stock Exchange. The averments made in suit No. 2373/1996 also show that on account of directive dated 7.10.1993 and for the acts of the respondent No. 1, the appellant was forced to resign from the membership. Accordingly, the appellant had asked for payment of the Margin Money, which was wrongly denied to him. He had also alleged that he was forced to resign and sell off his membership in the respondent No. 1 contrary to the articles of the respondent No. 1. Accordingly, he claimed damages for wrongful detention of the Margin Money.

10. The second suit, namely, Suit No. 2625/1996 is also a suit for damages, which as already stated are on account of illegal and wrongful acts of the

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respondent No. 1 including notification dated 7.10.1993. The illegal and wrongful acts complained of and made subject matter of the cause of action in the two suits are same. The cause of action of the two suits is identical. The appellant could have claimed the same relief as claimed in the subsequent suit in the first suit on the basis of the pleadings therein. It cannot be said that the cause of action in the two suits is different. The subsequent suit is based on same cause of action as the first suit and, therefore, bar of Order II, Rule 2 is attracted.

11. In our considered opinion, the reliance placed by the learned counsel for the appellant on the decision of the Supreme Court in M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another, is misplaced as the said decision instead of helping the appellant/plaintiff goes against him, for in that case the Supreme Court has held that if causes of action in the two suits are different, then bar under Order II, Rule 2 of the Code is not applicable. It was also held by the Supreme Court in the said decision that if in the earlier suit, the plaintiff had not sued for any of the reliefs available to him on the basis of that cause of action, the reliefs which he had failed to press in service in that suit cannot be subsequently prayed for except with the leave of the court. When the aforesaid principles of law settled by the Supreme Court are applied to the facts of the present case, it is clearly established that in the earlier suit on the facts and the cause of action as alleged, the appellant/plaintiff could have sued for award of damages also. What is sought to be claimed now would have been sought for on basis of the cause of action which formed basis of the first suit. In that view of the matter, the reliefs which the appellant failed to press in service in the earlier suit cannot be now subsequently prayed for unless leave was sought for by the appellant. Therefore, the said case helps the respondents rather than helping the appellant.

12. Reliance was also placed by the appellant/plaintiff in the decision of the Supreme Court in State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, . In the said decision, the Supreme Court has held that the bar of Order II, Rule 2 of the Code will not apply when the first suit was filed to enforce a bank guarantee, whereas the second suit was filed to claim damages for breach of the underlying contract. The said decision, therefore, was rendered in respect of facts which are clearly distinguishable, for there were two different contracts in respect of which it was said that the bar under Order II, Rule 2 of the Code will not be applicable. In the aforesaid decision in State of Maharashtra (supra), the Supreme Court has held that the principles of Order II, Rule 2 of the Code is based on the rule of law that a man shall not be vexed twice for one and the same cause, and that one of the tests for determining whether Order II, Rule 2 of the Code would apply in a particular situation, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit". It was held that if the answer is in the affirmative, the rule will not apply. The cause of action for a suit comprises all those facts which the plaintiff must aver and, if traversed, prove to support his right to the judgment. If the aforesaid principle is

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applied to the facts of the present case, it is clearly established that the claim in the suit out of which the present appeal arises is similar to the facts on which the earlier suit was founded and it cannot be said that the cause made in the two suits are distinct from each other. They are founded on the same set of facts and the same cause of action and, therefore, the aforesaid decision instead of helping the plaintiff/appellant, helps the respondents. Basic foundation of the two suits is same. In this connection, we may also refer to the pleadings in the first suit. When the pleadings made in the two suits are compared, it would be clearly established that the basis of the claim and the relief sought for is identical. The issues raised are identical and, therefore, identity of both the suits is established.

13. Counsel appearing for the respondent relies upon the decision of the Supreme Court in Gurbux Singh Vs. Bhooralal, , wherein the Supreme Court has held that the provisions of Order II, Rule 2 of the Code would be applicable if it is proved that there is identity of the causes of action of the two suits. It was also held that plea of bar under Order II, Rule 2(3) of the Code should succeed when the defendant who raises the plea make out that (i) the second suit was in respect of the same cause of action as that on which the previous suit was based; (ii) on the cause of action, the plaintiff was entitled to more than one relief; (iii) the plaintiff, without leave obtained of the Court, omitted to sue for the relief sought for in the second suit.

14. In our considered opinion, the aforesaid principles of law laid down by the Supreme Court in the said decision are clearly applicable to the facts of the present case. Counsel appearing for the appellant at this stage sought to submit that in the subsequent suit the Director of the respondent No. 1 was also made a party and, therefore, there is a distinct cause of action. We are unable to accept the aforesaid contention solely because the Director of the respondent No. 1 is sought to be added in the present case. We are also of the considered opinion that the provisions of Order II, Rule 2 of the Code are applicable to the facts of the present case. There is no infirmity in the findings recorded by the learned Single Judge. The appeal has no merit and the same is dismissed with costs.

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