
(2009) 08 MAD CK 0027

In the Madras High Court

Case No : Application No's. 1836 and 1837 of 2009 in C.S. No. 788 of 2008

Instituto Hispania

APPELLANT

Vs

Mrs. Vinolia Lobo

RESPONDENT

Date of Decision : 04-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 5
Constitution of India, 1950 — Article 226

Citation : (2010) 1 MLJ 1062

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : Hema Sampath, SC for S. Raveekumar, for the Appellant; M.K. Kabir, SC for Rank Associates, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—Heard both sides.

2. A. No. 1836 of 2009 is filed to reject the plaint in C.S.No.788 of 2008. A. No. 1837 of 2009 is filed seeking to revoke the leave granted on

01.08.2008 in A. No. 3500 of 2008 in C.S.No.788 of 2008.

3. The suit is filed by the plaintiff/respondent herein against the defendants (a) for declaration that the licence in favour of the defendants pertaining

to a portion of the first floor of the premises in No. 3, Nimmo Road, Santhome, Chennai-4 stands terminated with effect from 31.10.2007; (b) for

a direction to the defendants to vacate and hand over the possession of that portion in the first floor set out in the schedule and for payment of Rs.

40,000/- per month as damages for unlawful occupation and use of first floor; and also (c) for a permanent injunction, restraining the defendants

from interfering with the possession of the plaintiff in the premises.

4. In the schedule to the plaint, the portion of the first floor of the premises at No. 3, Nimmo Road, Santhome, Chennai-4 is described as the

property involved. It was stated by the plaintiff that the premises set out in the schedule was given to the third defendant to act as the Business

Development Officer and that licence agreement was entered into on 11.3.2006. During the said period, the plaintiff was an Honourary Director of

the institute from 1.3.2006 to 5.10.2007 and during which period, the defendants were given licence and they paid administrative charges.

Thereafter, due to undesirable activities of the defendants and as they made publication in newspapers containing defamatory allegations, the

licence granted to the defendants was terminated on 30.10.2007. When the defendants tried to trespass into the property, a suit came to be filed.

5. Leave was sought for instituting the suit in respect of suing the second defendant, who resides at New Delhi. Therefore, leave was granted in

terms of Clause 12 of the Letters Patent on 1.8.2008. It is this leave, which is sought to be revoked in A. No. 1837 of 2009. Pending the suit, the

defendants have taken out an application in A. No. 1836 of 2009 for rejecting the plaint.

6. It was stated in the affidavit in support of the application that the first defendant has filed a suit in O.S. No. 7125 of 2007 before the XI

Assistant City Civil Judge, seeking for a bare injunction against the plaintiff to evict them only by due process of law. The suit is still pending.

7. It was also stated that the very same plaintiff filed an another suit before this Court and filed an application for leave to sue. The leave to sue

application was withdrawn on 25.7.2008 without liberty to file an another suit. Hence the instant suit is not maintainable. These facts were

suppressed in the plaint. Therefore, because of misrepresentation, leave should be revoked.

8. It was further stated that there was no cause of action for filing the present suit and the suit is barred by law. It was also stated that the

defendants were in possession of the entire first floor ever since it was let out. The City Civil Court, in which the defendants have filed a suit, had

granted an interim injunction in I.A. No. 18452 of 2007 on 26.11.2007. Therefore, the plaintiff cannot proceed with the suit so as to disturb the

peaceful possession and conducting classes in the suit premises. The premises let out included the right over the common pathway. Therefore, the

relief of injunction cannot be granted. It was also stated that the defendants are in possession and classes are being conducted. For the plaintiff's

trespass into the property, a criminal complaint had been given. It is admitted that the plaintiff had locked two rooms, but it was done illegally.

9. A common counter affidavit was filed by the respondent/plaintiff. It was stated that after getting an interim order before the City Civil Court, the

applicants/defendants have entered unlawfully into the premises and it was the applicant, who had told this Court that they will settle the matter.

Leave to sue has been filed only because the second defendant had her address outside the jurisdiction of this Court. Earlier suit was filed only for

damages for defamation, for declaration and also for injunction, whereas since the applicants/defendants have entered into the premises, a fresh suit

was necessitated to seek for vacating and handing over of possession of the property as well as payment of damages for use and occupation of the

premises. The withdrawal of an application for leave to sue will not operate as a bar as there was change in circumstance for filing the second suit.

It is also stated that it is not a fit case for rejecting the plaint at the threshold, since no grounds under Order 7 Rule 11 CPC had arisen for

consideration.

10. Mrs. Hema Sampath, learned Senior Counsel representing Mr. S. Raveekumar, Counsel for applicants/defendants submitted that the plaint will

have to be rejected both on the ground of Order 23 Rule 1 CPC and also on grounds of suppression of material facts. In this context, the learned

Senior Counsel relied upon a Division Bench judgment of Karnataka High Court in Papinayakanahalli Venkanna and Others Vs. Janadri Venkanna

Setty (by Lrs.), . She stated that permission to withdraw the suit with liberty to institute a fresh suit must be sought for and that should be

specifically granted in terms of Order 23 Rule 1(4) CPC by the Court. If the earlier suit and the present suit are based upon the same cause of

action and founded on same set of facts, then withdrawal will have to be permitted in terms of Order 23 Rule 1(4) CPC.

11. In the present case, it was not withdrawal of a suit. It was an application for withdrawal of leave to sue application and technically, the suit had

not been registered with this Court and the question of withdrawal of a suit did not arise. Secondly, in the present case, the second suit is based

upon broader cause of action. Therefore, the earlier withdrawal of leave to sue application cannot operate as a bar in instituting the present suit.

12. The learned Senior Counsel also placed reliance upon the judgment of the Supreme Court in K.S. Bhoopathy and Others Vs. Kokila and

Others, . Reliance was placed upon paragraph 17 of the said judgment. In that case, after a contest before the trial court and the first appellate

court, the plaintiffs realising their weakness in their claim and to get over the finding rendered by the first appellate court, took recourse to Order

23 Rule 1(3) CPC and filed an application for withdrawal of the suit with leave to file a fresh suit. In that case, withdrawal was permitted without

safeguarding the interest of the defendant. In that context, the Supreme Court held that it was the duty of the Court to feel satisfied that there

existed proper grounds for the grant of permission for withdrawal of the suit with leave to file a fresh suit by the plaintiff. If the statutory mandate is

not complied with, then such permission can be revoked.

13. The learned Senior Counsel further placed reliance upon the judgment of the Supreme Court in M/s. Upadhyay and Co. Vs. State of U.P. and

Others, . Reliance was placed upon the passages found in paragraphs 11 to 15. In that case, the Supreme Court dealt with the public policy

behind the incorporation of Order 23 Rule 1 CPC. Since that case arose under Article 226 of the Constitution, the public policy behind the

incorporation of Order 23 Rule 1 was made applicable even to proceedings under Article 226 of the Constitution. That decision has no bearing on

the present case.

14. The learned Senior Counsel also referred to the judgment of the Delhi High Court in S. Jaswant Singh (deceased by L. Rs.) Vs. S. Darshan

Singh (deceased by L. R.) and others, for the proposition that withdrawal of the suit without permission to file a fresh suit and the consequent bar

of filing subsequent suit on the same subject matter did not depend upon whether summons was issued to opposite party or not. The said judgment

was relied upon by the Senior Counsel little realising that the Delhi High Court had dissented from the judgment of this Court in Keesari Santamma

Vs. Kanumathareddi Venkatramireddi and Others, , wherein this Court had held that it was very doubtful that prohibition contained in Order 23

Rule 1 CPC will apply to cases when both the parties are not before the court. It

is not known as to why the learned Senior Counsel relied upon the judgment of an another High Court when that High Court has disagreed with the decision of this Court.

15. The learned Senior Counsel in support of her second contention placed reliance upon the judgment of this Court in Registrar, Manonmaniam

Sundaranar University Vs. Suhura Beevi Educational Trust and others, for the purpose of contending that though liberty may lie on the plaintiff to

withdraw the suit at any time or abandon at any time after the institution of the suit, either the whole suit or part of his claim, yet that cannot be

considered as absolute as to permit or encourage or ratify an abuse of process of court. If such withdrawal was done to the detriment of the

legitimate right of the party defendant behind his back and with ulterior motive and oblique purpose, the courts are not powerless to prevent such

onslaught on the institute of administration of justice. It is not clear as to how this judgment has any relevance to the facts of the present case. In

that case, two suits were filed by the same plaintiff and in one suit, the contesting party was given up without notice so as to have the second suit

deciding ex parte. It is in this context, the court came down heavily upon the plaintiff as the plaintiff was clearly abuse the process of court by giving

up the parties in order to taking advantage of an ex parte decree.

16. The learned Senior Counsel also placed reliance upon the judgment of this Court in Ranipet Municipality Vs. M. Shamsheerkhan, . Reliance

was placed upon paragraph 11 of the said judgment, wherein this Court after referring and approving to the decision of the Kerala High Court,

dealt with the aspect of what is the meaning assigned to the term "abuse of process of court". The abuse of process of court is a malicious and

improper use of some regular legal proceeding to obtain some advantage over an opponent. In this context, this Court held that when a person

withdraws a suit without reserving liberty to file an another suit or cause of action and when no such liberty was sought for, he should not be

allowed to file a separate suit.

17. In the light of these legal precedents, the learned Senior Counsel sought for revoking of the leave granted to institute the suit and also for

rejecting the plaint.

18. Mr. M.K. Kabir, learned Senior Counsel appearing for M/s. Rank Associates

countered the submissions by relying upon the judgment of the

Supreme Court in *Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another*, . Reliance placed upon the following

passages found in paragraphs 146, 149, 151, 152 and 155 may be usefully extracted below:

146. It may be true that Order 7 Rule 11(a) although authorises the court to reject a plaint on failure on the part of the plaintiff to disclose a cause

of action but the same would not mean that the averments made therein or a document upon which reliance has been placed although discloses a

cause of action, the plaint would be rejected on the ground that such averments are not sufficient to prove the facts stated therein for the purpose

of obtaining reliefs claimed in the suit. The approach adopted by the High Court, in this behalf, in our opinion, is not correct.

149. In *D. Ramachandran v. R.V. Janakiraman* it has been held that the court cannot dissect the pleading into several parts and consider whether

each one of them discloses a cause of action.

151. In ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or complicated

questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is

shown. In *Vijai Pratap Singh v. Dukh Haran Nath Singh* this Court held: (AIR pp.943-44, para 9)

By the express terms of Rule 5 Clause (d), the court is concerned to ascertain whether the allegations made in the petition show a cause of action.

The court has not to see whether the claim made by the petitioner is likely to succeed: it has merely to satisfy itself that the allegations made in the

petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting

relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the

court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences

which the defendant may raise upon the merits; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of

law or fact. If the allegations in the petition, *prima facie*, show a cause of action,

the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him.

152. So long as the claim discloses some cause of action or raises some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The purported failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars. (See Mohan Rawale.)

155. The reason for the aforementioned conclusion is that if a legal question is raised by the defendant in the written statement, it does not mean that the same has to be decided only by way of an application under Order 7 Rule 11 of the CPC which may amount to prejudging the matter.

19. The learned Senior Counsel also brought to the notice of this Court a judgment of the Division Bench of this Court in Wipro Limited, Thiru Vi

Ka Industrial Estate and Wipro Chandrika Limited Vs. Oushadha Chandrika Ayurvedic India (P) Limited, Oushadha Chandrika Research Centre

and Narayana Stores, , wherein a division bench of this Court held that in an application under Order 7 Rule 11 CPC, it is only the plaint

averments will have to be taken note of and relying upon the defence or the written statement are wholly irrelevant at this stage.

20. The Supreme Court's judgment and the subsequent division bench judgment of this Court relied on by the respondent will clearly enure to the

benefit of the respondent/plaintiff. These two applications deserve to be dismissed. In any event, the withdrawal of the leave to sue application in

the earlier suit cannot be put against the plaintiff. Further, whether that could be brought within the bar under Order 23 Rule 1 CPC has to be

considered.

21. In the present case, only leave to sue application was withdrawn and the suit was not rejected. Merely because no liberty was given will not

prevent this Court from entertaining the second suit. Secondly, the prayer in the first suit and the second suit materially differs. Therefore, the

second suit cannot be said to be a bar because of withdrawal of the earlier application for leave to sue without liberty. In this context, it is

necessary to refer to the judgment of the Supreme Court in Vallabh Das Vs. Madan Lal and Others, . The following passage found in paragraph 5

of the said judgment may be usefully extracted below:

5. Rule 1 of the Order 23, CPC empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. The expression ""subject-matter"" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said, that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between Dr Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the previous suit as well as in the present suit the factum and validity of adoption of Dr Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent event which conferred certain rights on him. Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits. As observed in *Rukhma Bai v. Mahadeo Narayan*, the expression ""subject-matter"" in Order 23 of the Rule 1, CPC means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words ""subject-matter"" means the bundle of facts which have to be

proved in order to entitle the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis, C.J., in Singa Reddi v. Subba

Reddi that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the

first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit.

22. In the said judgment, the Supreme Court held that unless cause of action and the relief claimed known as the subject matter and unless the

cause of action and the relief claimed in the second suit is same as in the first suit, it cannot be said that the subject matter of the second suit is same

as that of the previous suit.

23. In the light of the above, both applications do not merit legal scrutiny. Hence they stand dismissed. No costs.

24. Post the other applications for orders on 10.08.2009.