(2001) 03 PAT CK 0073

In the Patna High Court

Case No : Civil Revision No. 1230 of 2000

Ramesh Kumar Bhalotia APPELLANT

Vs

Lalti Kumar Bhalotia and Others RESPONDENT

Date of Decision : 14-03-2001

Acts Referred:

Citation : (2001) 03 PAT CK 0073

Final Decision : Dismissed

Judgement

Nagendra Rai, J.—The defendant is the petitioner against the order dated 8-6-2000 passed by Munsif Jamui in Title Suit No. 49 of 1998 rejecting his objection regarding the maintainability of the suit.

2. The plaintiff-opposite party on 19-4-1996 filed Administrative Suit No. 24 of 1996 claiming that they and the defendant-petitioner are own brothers and they deal in kerosene oil business in the name and style of M/s National Agencies at jamui. The kerosene oil business was a joint family business and looked after by his father as a Karta and after his death, the defendant-petitioner was looking after the same. In 1989, a partnership deed was created between them which was registered under the provisions of the Registration Act. Later on, the defendant-petitioner started acting dishonestly and accordingly, the said suit was filed for declaration that the plaintiffs and defendant being partners of M/s National Agencies are entitled to 1/3rd share each in profits and loss and defendant may be directed to render account of the said firm and necessary direction may be issued for rendition of the account and for proper administration of the firm and after adjudication decree for the amount of the plaintiffs'' share be passed against the defendant and he may be permanently restrained from removing the materials or from selling any of the assets. While the said suit was pending, the present suit being Title Suit No. 49 of 1998 was filed on 17-8-1998, out of which this civil revision arises, for declaration that the plaintiffs and the defendant being partners of M/s National Agencies are entitled to 1/3rd share and the defendant may be directed to wind up the firm and to render the account

of the said firm and necessary order may be passed by the Court to the defendant for dissolution of the firm and for rendition of account and for proper administration of the business till the dissolution of firm is completed and on adjudication, if any amount is found due, decree for the same may be passed and the defendant may be permanently restrained from removing the materials or from selling any of the assets of the partnership business.

3. The defendant filed a written statement in the aforesaid Administrative suit raising various objections including maintainability of the suit u/s 69(1) of the Indian Partnership Act (hereinafter referred to as the Act). The learned Munsif considered the matter and by order dated 7-5-1999 held that the suit was barred u/s 69(1) of the Indian Partnership Act. The plaintiff-opposite party filed revision application before this Court which was dismissed as not maintainable. Thereafter, the defendant filed a petition under Order XIV, Rule 2 of the CPC (hereinafter referred to as the Code) in Title Suit No. 49 of 1998 to decide the questions of maintainability of the suit. According to him, the suit was not maintainable on three grounds, namely, the suit was barred by principles of res judicata. It was also barred under Order II, Rule 2 of the Code and u/s 69 of the Act. The Court below decided the aforesaid three grounds as preliminary issues and by the impugned order held that none of the objections raised by the defendant-petitioner was sustainable and accordingly held that the suit is maintainable.

4. The learned Counsel for the petitioner submitted that he will not press the point regarding the maintainability of the suit on the ground of res judicata and bar u/s 69(1) of the Act. He will confine his objection with regard to maintainability of the suit under Order II, Rule 2 of the Code. According to him, the cause of action in the earlier suit as well as in the subsequent suit being the same the plaintiff would have included all the claims and reliefs in the earlier suit. As he has not claimed entire claims and reliefs in the earlier suit, he is debarred from making additional claims and reliefs in the subsequent suit in view of the provisions contained under Order II, Rule 2 of the Code.

5. The learned Counsel appearing on behalf of the plaintiff/ opposite party on the other hand submitted that the cause of action in both the suits are not the same. In the earlier suit, the claim was made only for declaration of share and rendition of the accounts and there was no prayer of dissolution of the firm whereas in the subsequent suit, the prayer for dissolution of the firm as also prayer for accounting was made and as such, the suit is not barred under Order II, Rule 2 of the Code.

6. The only question that falls for determination is as to whether the subsequent suit is barred under Order II, Rule 2 of the Code.

7. The provision of Order II, Rule 2 of the Code is based on the principle that no person should be vexed twice for the same cause of action. The rule provides that every suit shall include the whole of the claim and the reliefs which the

plaintiff is entitled to make in respect of the cause of action. If he fails to do so, afterwards, he will not be entitled to sue for the portion of the claim or the relief so omitted. However, if there are different cause of actions arise even out of the same transaction, the plaintiff is not obliged to bring suit with regard to all of them. Similarly, when the cause of action on the basis of which the earlier suit was brought, does not form foundation of the subsequent suit and in the earlier suit, the said relief would not have been claimed which have been claimed in the subsequent suit, the subsequent suit is not barred under the said provisions.

8. In the case of Sidramappa Vs. Rajashetty and Others, , the apex Court while interpreting the provision of the aforesaid order held that "the requirement of Order II, Rule 2 is that very suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings".

9. In the case of Kewal Singh Vs. Smt. Lajwanti, while interpreting the provisions, their Lordships held that the aforesaid Order II, Rule 2 of the Code has no application to cases where the plaintiff bases his suit oh separate and distinct causes of action and choses to relinquish one or the other of them. In such cases, it is always open to the plaintiff to file a fresh suit on the basis of a Distinct cause of action which he may have relinquished. Following the judgment of the Privy Council in the case of AIR 1949 78 (Privy Council) their Lordships laid down the test to determine the applicability of Order II Rule 2 of the Code which runs as follows.

The principles laid down in the cases thus far discussed may be thus summarised:

(1) The correct test in cases falling under Order II, Rule 2 is "whether the claim in the new suit is, in fact, founded on cause of action distinct from that which was the foundation for the former suit (Moonshee Buzloor Ruheem v. Shumsoonnissa Begum)(2). The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment (Read v. Brown)(3) If the evidence to support the two claims is different then the causes of action are also different (Brunsden v. Humphery). (4) The causes of action in the two suits may be considered to be the same if in substance they are identical (Brunsden v. Humphery). (5) The cause of action has no relation whatsoever to the defence that may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers "to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour" (Muss. Chand Kour v. Partab Singh). This observation was made by Lord Watson in a case u/s 43 of the Act of 1882 (corresponding to Order II, Rule 2) where plaintiff made various claims in the same suit.

10. In the light of the law laid down by the apex Court, it has to be seen as to

whether subsequent suit is barred under Order II, Rule 2 of the Code. The suit filed by the firm not registered under the provisions of the Act is not maintainable u/s 69(1)(2) of the Act. However, there are exceptions to the said provisions as contained in Sub-section (3)(a) to Section 69 of the Act wherein it is held inter alia that a suit for dissolution of the partnership firm may be filed by even unregistered firm. In the earlier suit, the cause of action was different as there the plaintiffs claimed for declaration of share, proper administration of firm and rendition of accounts. The suit from its very inception was not maintainable in view of the bar created u/s 69(1) of the Act as the firm was not registered and accordingly, it was dismissed on that ground. The prayer for dissolution of the firm made in the subsequent suit is a distinct and alternative relief which would not have been claimed in the earlier suit. The foundational facts as well as the evidence will be different in both the suits. As stated above, the cause of action means the cause of action for which the suit was brought. In the earlier suit, there was a different claim whereas in subsequent suit prayer for dissolution of the firm and other consequential relief was made and as such, cause of action in both the suits are different. This apart, it was not necessary for the plaintiffs to make a prayer for dissolution of the firm in the earlier suit and this is an alternative relief which they could claim by filing a fresh suit. Thus, the learned Munsif rightly held that the suit was not barred under Order II, Rule 2 of the Code.

11. Accordingly, this Civil Revision application is dismissed.