

(2008) 07 DEL CK 0262

In the Delhi High Court

Case No : IA 2950 of 2005 in CS (OS) 1132 of 2004

Sh. Suresh Kakkar and Another

APPELLANT

Vs

Sh. Mahender Nath Kakkar and Others

RESPONDENT

Date of Decision : 02-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 2(3), Order 7 Rule 11

Citation : (2008) 4 CivCC 609 : (2008) 152 DLT 56 : (2008) 105 DRJ 211 :
(2008) ILR Delhi 117 Supp : (2008) 152 PLR 58 : (2009) 1 RCR(Civil) 788

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Praveen K. Mehdiratta and Dharam Dev, for the Appellant; Preetjit Singh, for Defendant Nos. 1-6, for the Respondent

Judgement

Badar Durrez Ahmed, J.—An interesting question arises for consideration in this application. The question is - whether a plaint can be rejected under Order 7 Rule 11 (d) of the Code of Civil Procedure, 1908 on the plea taken by the defendants that the present suit is barred under Order 2 Rule 2 of the said Code ?

2. It is alleged by the defendant Nos. 1 to 6 (applicants) that the plaintiff No. 1 had earlier instituted a civil suit for permanent injunction being Suit No. 10/2004 titled as Shri Suresh Kakkar v. Shri Mahender Nath Kakkar and Ors. In that suit, which is pending before the Civil Judge, Karkardooma Courts, Delhi, the plaintiff No. 1 has sought a perpetual injunction against some of the defendants herein from selling or alienating the suit property. It is alleged by the defendant Nos. 1 to 6 that all the material and substantial allegations made in the present plaint and in the plaint of Suit No. 10/2004 are identical. It is also submitted that the alleged causes of action in the present suit and in the previous civil suit are, substantially, one and the same. The said defendants also submit that in the earlier suit, the plaintiffs did not claim the relief of partition in respect of the suit property nor did they claim the relief of recovery of the amount as claimed in the present suit. In the earlier suit, only the relief of permanent injunction was

sought although the plaintiffs could have sought the reliefs of partition and recovery on the basis of the same cause of action. The said defendants further submitted that the plaintiffs did not seek any liberty or permission of the Civil Judge in terms of Order 2 Rule 2, CPC for instituting the present suit, subsequently. According to the said defendants, this amounted to failure and / or voluntary omission on the part of the plaintiffs to seek the further reliefs of partition and recovery in the said Suit No. 10/2004 and this resulted in the plaintiffs giving up and relinquishing their claims to the reliefs of partition and recovery of money. On the basis of these averments, it is prayed on behalf of the said defendant Nos. 1 to 6 that the plaint ought to be rejected as it is barred by law (Order 2 Rule 2, CPC).

3. The present application under Order 7 Rule 11, CPC was filed simultaneously with the filing of the written statement on behalf of the defendant Nos. 1 to 6 on 17.01.2005. In the written statement also, the said defendants have taken the plea that the suit is not maintainable and is barred under the provisions of Order 2 Rule 2, CPC. Along with the written statement, the said defendants have also filed a set of documents which include a copy of the plaint in Suit No. 10/2004.

4. The learned Counsel for the defendants 1 to 6 (applicants) drew my attention to the plaint filed in the earlier suit (Suit No. 10/2004) and sought to compare it with the plaint filed in the present suit. Various submissions were made with regard to the similarities and differences in the two plaints as also the improvements made in the present plaint. It was contended that while there was a mention of a request for partition in the earlier plaint as also the fact that though the partition was promised, it was refused, the plaintiffs only sued for injunction and omitted to sue for partition and recovery of money. It was contended that the relief of partition could very well have been claimed on the same cause of action as alleged in the earlier suit, but had not been claimed and in view of the provisions of Order 2 Rule 2, CPC, leave not having been taken of the court, cannot now be claimed in the present suit. Therefore, the plaint ought to be rejected in view of the principles set out in Order 7 Rule 11 (d), CPC. The learned Counsel also referred to the decisions in *Kamal Kishore Saboo Vs. Nawabzada Humayun Kamal Hasan Khan*, , *Shri Vishal Anand Vs. Smt. Bimla Anand and Others*, and *(Sree Rajah) Venkata Rengiah Appa Rao Bahadur and Others Vs. Secy. of State and Others*, .

5. In reply, the learned Counsel appearing on behalf of the plaintiffs stated that the two suits were different. The earlier suit had been instituted only by the plaintiff No. 1. In the present suit, there are two plaintiffs. The parties in the present suit are all heirs of Late Shri Nihal Chand to whom the suit property originally belonged. The plaintiffs 1 and 2 are the son and daughter of Late Shri Dharam Chand who was the son of Late Shri Nihal Chand. The defendants 1 and 2 are the sons of Late Shri Nihal Chand whereas, the defendants 3, 4, 5 and 6 are the legal representatives of Late Shri Ram Chand Kakkar who was also a son of Late Shri Nihal Chand. The defendants 7 to 11 are the daughters of Late Shri

Nihal Chand and defendants 12 to 17 are the legal representatives of Late Smt Kanta Rani who was also a daughter of Late Shri Nihal Chand. The claim in the suit is that Late Shri Nihal Chand died intestate in 1978 and left behind four sons and six daughters. Consequently, each son and daughter was entitled to a 1/10th share in the suit property left by Late Shri Nihal Chand. The plaintiffs 1 and 2 being the children of Late Shri Dharam Chand, who was a son of Late Shri Nihal Chand, jointly claimed a 1/10th share in the suit property.

6. The learned Counsel for the plaintiffs submitted that in the earlier suit (Suit No. 10/2004), the only parties were the present plaintiff No. 1 as the sole plaintiff and the present defendant Nos. 1 to 3 and the plaintiff No. 2 as defendants. That suit was for permanent injunction against the present defendant Nos. 1 to 3 from selling and / or alienating the suit property in whole or in part without the consent and permission of the plaintiff therein. The present suit, according to the learned Counsel for the plaintiffs, is founded on a separate cause of action and is one where the plaintiffs have sought partition of the suit property and recovery of money on account of rents collected by the defendants. It was contended that the cause of action for filing of the earlier suit was the threatened sale of the suit property by the defendants 1, 2 and 3 herein, whereas the cause of action for filing the present suit was the refusal on the part of the defendants to partition the suit property. The learned Counsel placed reliance on several decisions:

- 1) Abnashi Singh and Ors. v. Smt. Lajwant Kaur and Anr. AIR 1977 P&H 1;
- 2) Lajwant Kaur and Another Vs. Abnashi Singh and Others, ;
- 3) Giryamman Narasimhan Empran v. Ramachandran Venkitarayan Empran and Ors. AIR 1954 T&C 384;
- 4) K. Palaniappa Gounder Vs. Valliammal, .

On the basis of these decisions, the learned Counsel for the plaintiffs contended that the provisions of Order 2 Rule 2 were not attracted in the present case inasmuch as the parties were different, the causes of action were different and the earlier suit was pending and had not yet been decided on merits.

7. It was finally contended by the learned Counsel on behalf of the plaintiffs that this is an application under Order 7 Rule 11, CPC. The parameters for consideration of such an application are entirely different to the parameters where an issue raised in a suit in respect of the bar of Order 2 Rule 2, CPC is considered after the parties have led evidence. Under Order 7 Rule 11, only the plaint needs to be seen and none of the documents filed by the defendants Along with the written statement can be looked into.

8. It is apparent that counsel for the parties addressed this Court on merits on the issue of the bar of Order 2 Rule 2, CPC. But, the fundamental question which, to my mind, arises for consideration is what has been mentioned in the opening paragraph of this judgment and that is - whether a plaint can be rejected under

Order 7 Rule 11 (d) of the Code of Civil Procedure, 1908 on the plea taken by the defendants that the present suit is barred under Order 2 Rule 2 of the said Code ? This question arises because the parameters of discussion under Order 7 Rule 11 are well defined. The requirements of establishing a case under Order 2 Rule 2, CPC are equally well defined. It will become clear shortly that the plea of Order 2 Rule 2, CPC cannot be established unless and until the defendants place on record the plaint of the earlier suit to conclusively prove that the cause of action in the earlier suit was indeed identical to the cause of action in the present suit. It is well settled that for the purposes of considering an application under Order 7 Rule 11 and particularly, Clause (d) thereof, it is only the averments contained in the plaint which are relevant and the pleas taken by the defendants in the written statement or in any other application are wholly irrelevant.

9. Order 2 Rule 2, CPC 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.

As observed by the Supreme Court in *Deva Ram and Another Vs. Ishwar Chand and Another*, , "a bare perusal of the above provisions would indicate that if a plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the court in one suit as Order 2 Rule 2 is based on the cardinal principle that the defendant should not be vexed twice for the same cause." The Supreme Court further observed that "what the rule, Therefore, requires is the unity of all claims based on the same cause of action in one suit. It does not contemplate unity of distinct and separate causes of action." From this, it follows that the essential requirement for the applicability of Order 2 Rule 2 is the identity of causes of action in the previous suit and the subsequent suit. This, as will be apparent from the discussion below, would have to be established on evidence.

10. In the context of Order 2 Rule 2, a Constitution Bench of the Supreme Court in the case of *Gurbux Singh Vs. Bhooralal*, , observed:

In order that a plea of a bar under Order 2 Rule 2(3), CPC should succeed the

defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule.

The Constitution Bench also held:

As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2, Rule 2, CPC can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits.

11. Thus, the defendant has to establish the precise cause of action upon which the previous suit was filed and since the plea raises a technical bar, it has to be established satisfactorily and cannot be presumed merely on the basis of inferential reasoning. The plea of a bar under Order 2 Rule 2, CPC can be established only if the defendant files in evidence the pleadings of the previous suit and thereby proves to the court the identity of the causes of action in the two suits. This clearly implies that before a plea of the bar under Order 2 Rule 2, CPC can be upheld, the defendant has to file the pleadings of the previous suit as and by way of evidence to prove to the court, the identity of the causes of action in the two suits. This automatically implies that before the court can return a finding or come to a conclusion that the plea of the bar under Order 2 Rule 2, CPC is well substantiated, the court, as a rule, would have to consider the pleadings in the previous suit which require to be filed by way of evidence by the defendant. In other words, the court cannot consider the plea of Order 2 Rule 2, CPC without traveling beyond the averments made in the plaint of the subsequent suit, a limitation which is placed on Order 7 Rule 11, CPC.

12. In *M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another*, , after referring to the Constitution Bench decision in the case of *Gurbux Singh (supra)*, the Supreme Court observed as under:

Firstly, the Constitution Bench of this Court in *Gurbux Singh Vs. Bhooralal*, has clearly ruled that there cannot be any inference about the bar of Order 2, Rule 2, Sub-rule (3), CPC which may be culled out from plaint in the second case and secondly once the plea of bar of Order 2 Rule 2 Sub-rule (3) was not available to

the defendants in the suit in the absence of the pleadings in the earlier suit being brought on the record by them in support of their case before the Trial Court they had missed the bus especially when even before the High Court no attempt was made by the defendants to produce the pleadings in the earlier suit by way of an application for additional evidence....

13. This leaves no manner of doubt that there cannot be any inference about the bar of Order 2 Rule 2 (3), CPC which may be culled out from the plaint in the second case and that the same can only be established in evidence by bringing the pleadings of the earlier suit on record. Thus, the position in law is clear. The plaint in the second suit by itself cannot be used for arriving at a conclusion with regard to the bar of Order 2 Rule 2, CPC in the absence of pleadings in the earlier suit.

14. In *Dalip Singh v. Mehar Singh Rathee and Ors.*, (2004) 7 SCC 650, the Supreme Court noted that "the sine qua non for applicability of Order 2 Rule 2 CPC is that a person entitled to more than one relief in respect of the same cause of action has omitted to sue for some relief without the leave of the court." The Supreme Court further observed that "when an objection regarding the bar to the filing of the suit under Order 2 Rule 2 CPC is taken, it is essential for the court to know what exactly was the cause of action which was alleged in the previous suit in order that it might be in a position to appreciate whether the cause of action alleged in the second suit is identical with the one that was the subject matter of the previous suit." It is obvious, that unless the pleadings in the previous suit are looked into, the court cannot come to a conclusion with regard to the bar under Order 2 Rule 2 CPC.

15. With this background, it would be appropriate to examine the parameters of an application under Order 7 Rule 11, CPC. In *Saleem Bhai and Others Vs. State of Maharashtra and Others*, the question which arose for consideration was-whether an application under Order 7 Rule 11, CPC ought to be decided on the allegations in the plaint and filing of the written statement by the contesting defendant was irrelevant and unnecessary? After construing the provisions of Order 7 Rule 11, CPC, the Supreme Court held as under:

A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application there under are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit - before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under Clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage

16. In a later decision in the case of *Popat and Kotecha Property Vs. State Bank of India Staff Association*, the Supreme Court held:

Clause (d) of Order 7 Rule 71 speaks of suit, as appears from the statement in

the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.

On the basis of the facts before the Supreme Court in the said case, it observed that it was not a case where the suit, from the statement in the plaint, could be said to be barred by law. The Supreme Court observed that "the statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11".

17. In the light of the above discussion, it is clear that before the bar under Order 2 Rule 2, CPC can be set up, the defendant has to produce the pleadings in the previous suit by way of evidence and the court is required to go into the pleadings of the previous suit and compare it with the pleadings in the present suit to arrive at a conclusion as to the identity of the causes of action. However, under Order 7 Rule 11, CPC, the court is enjoined only to look at the averments made in the plaint of the present suit and not travel to the written statement or other documents filed by the defendant. The plaint by itself must disclose that the suit is barred by law. The Constitution Bench in the case of *Gurbux Singh* (supra) has settled the issue that the inference as to the identity of the causes of action between the present suit and the earlier suit cannot be culled out from the plaint in the subsequent suit. It is, Therefore, abundantly clear that in an application under Order 7 Rule 11, CPC, the plaint cannot be rejected on the bar of Order 2 Rule 2, CPC. The bar of Order 2 Rule 2, CPC can be raised by the defendants in the written statement and, if so raised, an issue can be framed in respect thereof. The court would then be in a position to conclusively determine the identity of the causes of action between the earlier suit and the later suit and rule on the basis of evidence led by the parties. But, such a course of action is not permissible under Order 7 Rule 11, CPC. As a result, this application is rejected.

18. It is made clear that I have not expressed any opinion on the merits with regard to the plea of the bar of Order 2 Rule 2, CPC. It shall be open to the parties to agitate this issue in the suit. No costs.