
(2010) 11 DEL CK 0119
In the Delhi High Court
Case No : FAO (OS) 578 of 2010

Shri N.D. Tiwari

APPELLANT

Vs

Sh. Rohit Shekhar and Dr. Ujjwala Sharma

RESPONDENT

Date of Decision : 12-11-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 23 Rule 1, Order 23 Rule 1(3), Order 23 Rule 1(4), Order 23 Rule 3
Constitution of India, 1950 — Article 361(4)

Citation : (2011) 1 AD 404 : (2011) 121 DRJ 170

Hon'ble Judges : Vikramajit Sen, J; Mukta Gupta, J

Bench : Division Bench

Advocate : Rajiv Nayyar, J.P. Singh and Chetan Sharma, Atul Sharma, Abhishek Agarwal, Anil Sharma, Abhishek Misra and B.B. Gupta, for the Appellant; Sudhir Nandrajog S.S. Swaminathan and Kirtiman Singh for R 1 and Gaurav Mitra, for R 2, for the Respondent

Judgement

Mukta Gupta, J.—Civil Suit CS (OS) 1711/2007 was filed on 12th September, 2007 by the Respondent No. 1 primarily against the Appellant inter alia seeking a declaration of relationship with the Appellant and a perpetual injunction from denying the said relationship and publishing the same in the newspaper. No summons were issued to the Appellant in the said suit and on 20th September, 2007 an Application IA No. 10860/2007 under Order VI Rule 17 CPC was filed seeking amendment of the plaint by incorporation of additional facts. It is this incorporation of facts as sought in CS (OS) 1171/2007 which is the bone of contention in the present Appeal. The incorporation sought was addition of para 3 (xvi) and to para 8 of the plaint:

3 (xvi) The Plaintiff submits that after the Defendant No. 1 became Chief Minister of Uttaranchal, the Petitioner and his mother visited the Defendant No. 1 number of times and some of the photographs of the functions attended by the Plaintiff and his mother after 2002 and upto 2005 are filed separately in the present suit. It was on 7th December, 2005 when the Plaintiff approached Defendant No. 1

with his maternal grandmother at the airport in Delhi to seek an appointment with him that the Defendant No. 1 avoided to meet the Plaintiff. Thereafter, many attempts have been made by the Plaintiff to contact the Defendant No. 1 but he has refused to meet the Plaintiff.

In para 8 the Appellant wants to add "2005, as stated hereinabove, and till date," whereby the after amendment para 8, would read as:

The Cause of action for the present suit arose for the first time when the Defendant No. 1 refused to have any thing to do with the Plaintiff and denied entry to the Defendant No. 2 to his Tilak Lane residence in Delhi in the year 2001. It further arose on 1st of October, 2001, when the Defendant No. 1 again refused to meet the Plaintiff and refused to acknowledge the Plaintiff as his son. It has also arisen on all the occasions that the Defendant No. 1 has refused to acknowledge the Plaintiff as his son after 2005, as stated hereinbefore, and till date. The cause of action is continuing till date, hence, this suit.

2. In the civil suit filed earlier, that is, CS (OS) 1711/2007 the requirement of Article 361(4) of the Constitution of India was not met and in view of this hurdle the Respondent No. 1 sought liberty to withdraw the plaint by filing an application being IA No. 2912/2008. By the said application the Respondent No. 1 sought permission to withdraw the suit with liberty to file a fresh suit on the same cause of action incorporating the factum of notice issued by the Respondent No. 1 under Article 361(4) of the Constitution of India, to the Appellant. The Order dated 24th March, 2008 passed by the learned Single Judge permitting withdrawal of the suit reads:

Learned Counsel for the plaintiff submits that the plaintiff seeks to withdraw this suit because the suit suffers from technical defects, with liberty to file fresh suit.

In view of these submissions, the suit is hereby dismissed as withdrawn with liberty as prayed for.

Registry is directed to return all the documents to the plaintiff.

3. The Respondent No. 1 filed a fresh suit on 11th April, 2008 being CS (OS) 700/2008 and the amendments sought by way of IA No. 1660/2008 in CS (OS) 1711/2007 were incorporated in para 3 (xvi) and para 9 of the fresh plaint. On receipt of the summons the Appellant filed an Application being IA No. 9474/2008 in July, 2008 for rejection of the plaint under Order VII Rule 11 CPC for lack of territorial jurisdiction and being barred by the law of limitation. The learned Single Judge vide its Order dated 3rd November, 2009 allowed the Application of the Appellant and dismissed the suit as being not maintainable. This Order was taken to the Division Bench by way of an Appeal wherein this Court allowing the Appeal dismissed the contentions of the Appellant and held that the suit was not barred by limitation and the Delhi Court had the territorial jurisdiction to entertain the same. In a SLP filed against the Order dated 17th March, 2010 passed by the Division Bench of this Court the Hon"ble Supreme

Court disposed of the Appeal directing that on the strength of the pleadings of the parties the learned Trial Judge is required to frame issues and if the Appellant felt any of the issues is to be tried as a preliminary issue then it was open to the Appellant to request the learned Trial Judge to try those issues as preliminary issues, uninfluenced by any observations made either by the learned Single Judge or the Division Bench while deciding the question on merits.

4. Thereafter, the Appellant moved yet another Application being IA No. 17079/2010 under Order XXIII Rule 1 (3) & (4) CPC in CS (OS) 700/2008 seeking deletion/striking of the allegations made by the Respondent No. 1 in para 3 (xvi) and the consequent effect thereof in para 9 of the plaint or in the alternative holding that the Plaintiff is precluded from filing the suit being barred by law. This Application of the Appellant was dismissed by the learned Single Judge on 21st September, 2010 and this is the Order impugned in the present Appeal.

5. Learned Counsel for the Appellant submits that when the earlier suit was withdrawn, no liberty had been sought as regards the Application being IA No. 10860/2007 under Order VI Rule 17 CPC to amend the plaint and as no liberty was granted to amend the suit this amended fresh suit cannot be entertained by this Court. It is also contended that an amendment which was not allowed earlier cannot be incorporated in the present suit as it is the case of the Respondent No. 1 that the fresh suit has been filed for the same cause of action as the earlier suit. By incorporating the said amendment the Respondent No. 1 is trying to take undue advantage of extending the period of limitation and such an amendment thus prejudicially affects the Appellant. Reliance is placed on Vallabh Das Vs. Madan Lal and Others, and Kurji Jinabhai Kotecha Vs. Ambalal Kanjibhai Patel, .

6. Learned Counsel for the Respondent No. 1, on the other hand, states that in the earlier suit filed the absence of these pleadings can at best be treated as a minor aberration as the documents in this regard had been filed and in the fresh suit in fact no amendment has been brought out only facts have been clarified. It is urged that the expressions "cause of action" and "subject matter" are wider than "facts". "Cause of action" connotes "bundle of facts" and not merely individual facts and as long as the main claim and essential facts remain the same, a party has the liberty to amplify them by outlining detailed facts which may constitute one or more than one cause of action. It is further urged that in terms of Order XXIII Rule 3 liberty is granted to institute a fresh suit for the same subject matter which term is of wide amplitude.

7. We have heard learned Counsel for the parties at length. The issue that calls for determination before us is whether the fresh suit with additional facts is for the same "subject matter and the same cause of action" or a "fresh subject matter and a fresh cause of action" thereby also entailing a bar of filing a fresh suit under Order II Rule 2. At this stage it would be appropriate to reproduce Order II and Rule 2 and Order XXIII Rule 1 (3) and (4) CPC:

Order II Rule 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 relief so omitted.

Order XXIII Rule 1 (3) - Where the Court is satisfied,-

(a) That a suit must fail by reason of some formal defect, or

(b) That there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject- matter of such suit or such part of the claim. (4) Where the plaintiff-

(a) abandons any suit or part of claim under Sub-rule (1), or

(b) Withdraws from a suit or part of a claim without the permission referred to in Sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

8. Thus in terms of Order XXIII Rule 3 liberty is granted to the Plaintiff to institute a fresh suit in respect of the subject matter of such suit or a part of the claim thereof. He would be further precluded from instituting any fresh suit in respect of such subject matter or such part of the claim as regards which no liberty is granted. In terms of Order II Rule 2 if the Plaintiff relinquishes a portion of his claim or omits to sue for one or more of the reliefs in respect of same cause of action then it is precluded from bringing a fresh suit as regards the claim or the relief relinquished or omitted. In the present case the Respondent No. 1 moved an Application under Order XXIII Rule 3 read with Section 151 CPC to withdraw the said suit with liberty to institute a fresh suit for the same cause of action incorporating the factum of notice issued under Article 361(4) of the Constitution of India. Vide Order dated 24th March, 2008 this Court allowing the Application observed as under:

Learned Counsel for the plaintiff submits that the plaintiff seeks to withdraw this suit because the suit suffers from technical defects, with liberty to file fresh suit.

In view of these submissions, the suit is hereby dismissed as withdrawn with liberty as prayed for.

Registry is directed to return all the documents to the plaintiff.

9. Under Order XXIII Rule 1 (3) CPC, what is permitted to be withdrawn and subsequently instituted, is a fresh suit in respect of the same subject matter. Undoubtedly the term "subject matter" is of a wider amplitude than the term "cause of action". The bar in terms of Order II Rule 2, if any, to file a fresh suit with fresh cause of action on the same subject matter would not apply in the present case. Taking the case of the Appellant at the highest it can be said to be an abandoned claim and thus the bar to file a fresh suit for the abandoned claim. In this case in the earlier suit the Application for amendment was filed, however no notice was issued on the same and thus it cannot be said that the same was an abandoned claim. We are fortified in our views in this respect by a decision in *Ghulam Muhammad Khan v. Nur Khan* and another AIR 1917 Lah 414 wherein it was held:

With regard to point (I) in our opinion O.2, R.2, does not operate as a bar to the present suit. No doubt the two suits in question might have been joint; possibly they ought to have been so joined, but it is not necessary for us to decide this question inasmuch as it seems to us that the bar, if any, was removed by the orders passed by the learned District Judge under O.23, R.I, Civil Procedure Code; the suits for the movables having been allowed to be withdrawn with permission to bring fresh suits they must be regarded as non-existent. The effect of the permission given under this rule and order is to leave matters in the position in which they would have stood if no such suits had been instituted. In this view we are supported by *Behari Lal Pal v. Srimati Baran Mai Dasi* (I), which case was followed by *Chevis, J., in Buta v. Bishen Das* (2). We accordingly hold that the present suits are not barred by O.2, R.2, Civil Procedure Code.

10. In our opinion, this is yet another attempt by the Appellant to get the issues in the suit decided summarily by way of applications. By way of an IA No. 7125/2010 in CS (OS) 700/2008 under Order XXIII Rule 1 (3) & (4) the Appellant has prayed for deletion/striking of the allegations made by the Plaintiff in para 3(xvi) and the subsequent effect thereof in para 9 of the present plaint or alternatively holding that the Plaintiff is precluded from filing the present suit on the said allegations being barred by law. We find the contentions of the Appellant self contradictory. It is well settled that if the Plaintiff files a fresh suit on a different cause of action then no permission of the Court at the time of withdrawal of the suit is required. The requirement of liberty of the Court to file a fresh suit arises only if the cause of action is the same. The Respondent basis its claim in the plaint stating it to be the same cause of action and thus the liberty granted in terms of the Order dated 24th March, 2008 would permit him to file the present suit on the same cause of action. It may be noted that fresh facts have been pleaded in the present suit which were sought to be added by way of an Application seeking amendment in the earlier suit. However, since the earlier suit had been withdrawn prior to any cognizance of the amendment Application being taken, i.e. prior to even the notice thereon being issued it cannot be said

that these averments were a part of the earlier suit. If the Appellant's contention is to be upheld, the present Suit at best would be treated to be a suit on a fresh cause of action in which case all that the Respondent would have to satisfy is as regards the period of limitation and the advantage of the liberty being granted by earlier withdrawal will not be available to the Respondent. In our opinion, taking the case of the Appellant at the highest that the present suit is based on fresh cause of action in view of the facts pleaded therein, as the law permits the Respondent No. 1 to file a fresh suit for a fresh cause of action he cannot be non-suited in the present suit summarily. These are issues which are required to be decided during the trial of the suit. The photographs relating to the meetings between the Appellant and Respondent Nos. 1 and 2 till 2005 thereby showing that the Appellant acknowledged the relationship with Respondent No. 1 were filed in the earlier suit. This is required to be dealt as an issue in the trial because it is a mixed question of fact and law. We are guided in this approach by the decision of the Hon'ble Supreme Court dated 10th May, 2010 in Civil Appeal No. 4401/2010 filed by the Appellant against the Division Bench Order of this Court whereby this Court decided the issues of limitation and territorial jurisdiction. Their Lordships held:

Leave granted. Records perused.

Heard learned senior counsel for the appellant and learned senior counsel for the respondents on merits.

The first respondent herein filed a Suit for declaration and permanent injunction against the appellant that the appellant is his father. The appellant herein is the defendant No. 1 in the suit and he raised an objection that the suit is liable to be dismissed for lack of territorial jurisdiction, no cause of action is disclosed against the appellant and that it was barred by time, by filing an application under Order 7 Rule 11 of the Code of Civil Procedure. All these were upheld by the learned single Judge and the appellant's application was allowed. Feeling aggrieved by the same, the plaintiff/ respondent No. 1 filed RFA (O.S.) before the Division Bench and the Division Bench held that the suit is not barred by limitation and it did not lack territorial jurisdiction and it issued various directions. We see from the impugned judgment passed by the Division Bench that certain observations have been stated regarding merits of the case.

Learned senior counsel Mr. Harish N. Salve, appearing for appellant-defendant No. 1 raised several contentions. We have come to understand that till the time the impugned order came to be passed, appellant had not filed his detailed written statement but the same has been filed now.

Obviously, on the strength of the pleadings of parties, learned Trial Judge is required to frame issues. After framing of issues, if the appellant feels that any of the issues are to be tried as preliminary issues then it shall be open for the appellant to request the learned Trial Judge to try these issues as preliminary issues.

We also make it clear that while considering the issues on merits, any observations made either by learned Single Judge or by the Division Bench shall not have any persuasive effect while deciding the question on merits.

We also make it clear that keeping in mind the various important posts held by the appellant herein, he would be at liberty to make an appropriate application before the learned Trial Judge for in-camera trial of the suit. On such an application being filed, the same be considered by the Trial Judge in accordance with law.

Keeping in view the special circumstances herein, we dispose of the appeal accordingly. No order as to costs.

11. In our view these issues cannot be dealt by way of the application filed and have to be dealt during the trial of the suit by framing issues, adducing evidence and trying thereon. Learned Single Judge if feels fit can frame these issues as preliminary issues because the same also have a bearing on the issue of limitation.

12. The Appeal is disposed of accordingly.