

(2008) 09 DEL CK 0258

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 29 of 2001

Shri Prem Singh Verma and Another

APPELLANT

Vs

Girdhari Lal Dhara and Others

RESPONDENT

Date of Decision : 23-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 4, 2(12)

Citation : (2008) 09 DEL CK 0258

Hon'ble Judges : Mukul Mudgal, J; Manmohan, J

Bench : Division Bench

Advocate : Manjit Singh, for the Appellant; Rajinder Dutt, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.

CM Appl. No. 73/2003

1. While the present application under Order 47 Rule 27 CPC was not argued at the time of final hearing of the appeal, we find that the Appellants through this application wanted to place on record additional documents to show that they are the owners of the suit property.

2. We find that even though the suit remained pending before trial court for twenty-three years, the said documents were not placed on record. Moreover, we do not understand as to what is the significance of these documents when there is no pleading or issue that Appellants are the owners of the suit property.

3. In fact, in reply to the said application, the Respondent No. 1 has pointed out that a petition for declaration of bhoomidari rights was fraudulently and collusively filed by the Appellants but the same was dismissed by the Additional Collector, Delhi and Financial Commissioner, Delhi. The Appellants' writ petition against the said order was also dismissed.

4. Therefore, the present application is meritless and is dismissed.

5. The present appeal has been filed seeking to set aside the impugned judgment and decree dated 28th August, 2001 passed in Suit No. 486 of 1977. In the present appeal it has also been prayed that the suit for possession and recovery of damages filed by the plaintiff/Respondent No. 1 herein be dismissed.

6. The facts of the present appeal are that the plaintiff/Respondent No. 1 herein in the Suit alleged that he is the owner of the land admeasuring 4000 sq. yrd. comprising of Khasra No. 742 situated in the revenue estate of Village Mandawali, Fazalpur, Shahdara. On a part of this land he got a cinema hall constructed. On 15th November, 1971 the plaintiff/Respondent No. 1 granted a licence to Defendant Nos. 1 & 2 (Respondent Nos. 2 & 3 herein) to use the said land for a cinema hall on a fee of Rs. 2,000/- per month.

7. As the initial licensee, Respondent Nos. 2 & 3, were unable to obtain the requisite licences for running a cinema they handed back possession of the suit property to the plaintiff/Respondent No. 1 in the month of February 1972. It is further alleged that as in April 1972 the Respondent Nos. 2 & 3 wanted to retake forcible possession of the Suit land, the plaintiff/Respondent No. 1 filed a Suit bearing No. 362 of 1972 for permanent injunction against the initial licensee.

8. On 7th June, 1972 Suit No. 362 of 1972 was compromised between the parties. Some of the relevant terms of the compromise are reproduced hereinbelow for ready reference:

- a) That the premises portion under the license shall be 450 sq. yds., tin shed, one room 24" x 24" by the side of the corner room on North West side and open land.
- b) That the Licensor/plaintiff shall also live in the portion and shall occupy one thousand and three hundred square yards on the back side and one room measuring 24" x 24" on the North West corner. The right passage shall remain common for both the parties.
- c) That the monthly licence fell shall be Rs. 1500/- to be paid by the end of every English calendar month and in any case by 15th of every following month.
- d) That the defendants shall use the premises for cinema purposes only and not for any other purpose....
- h) That the licensees shall not part with the possession to any third party....
- j) That the licence is for a period of 5 months only and can be extended with the mutual consent of both the parties but the same will be in writing.

9. As the aforesaid licence was only for a period of five months, it came to an end on 6th November, 1972. The plaintiff/Respondent No. 1 in November 1972 itself issued a notice requiring the said Respondent Nos. 2 & 3 to hand over possession of the suit property, but they refused to do so. Subsequently, the

plaintiff/Respondent No. 1 came to know that the said property had been unauthorisedly occupied by the Appellants/Defendant Nos. 3 & 4 to the suit.

10. In the year 1974 the plaintiff/Respondent No. 1 filed a Suit bearing No. 386 of 1974 for recovery of Rs. 50,375/- as arrears of licence fee and damages for use and occupation against the original licensee/Defendant Nos. 1 & 2 as well as the present Appellants/Defendant Nos. 3 & 4. The cause of action paragraph in the Suit is reproduced hereinbelow:

21. The cause of action arose in favour of the plaintiff against the defendants on 15th of July, 1972, when the amount of license fee first became due, then on 7th November, 1972 when the defendants became unauthorised occupants and did not pay the arrears of the licence amount in spite of demand, then on each day till the date of filing of the suit when the premises remained in occupation of the defendants without paying damages for its use and occupation.

11. In the year 1977 the plaintiff/Respondent No. 1 filed the present suit bearing Suit No. 486 of 1977 for possession and recovery of Rs. 90,000/- against the original licensee/Defendant Nos. 1 & 2 as well as the present Appellants/Defendant Nos. 3 & 4. The cause of action in the said suit is also reproduced hereinbelow:

19. That the cause of action arose for recovery of mesne profit/damages in favour of the plaintiff and against the defendants on 15th of July 1972 when the amount of licence fee first became due, then on 7.11.1972 when the defendants became unauthorised occupants in respect of the whole of the premises and did not pay the arrears of the licence fee inspite of the demands. The cause of action also arose for recovery of mesne profit/damages on each day till the date of filing of this suit when the premises remained in use and occupation of the defendants without paying any amount towards mesne profit/damages for its use and occupation. The cause of action for possession arose on 7.11.72 i.e. on the expiry of period of licence and when the defendants also occupied the other portion and then on each day till the date of filing this suit when the premises remained in unlawful occupation of the defendants.

12. The learned Single Judge in his judgment decreed the suit against the Appellants for recovery of possession of suit property. He further observed that in view of the decision taken by the Division Bench Court of this Court in the case of S. Santosh Singh and Anr. v. S. Gurbax Singh reported in 2001 (VI) AD Delhi 811 which relied upon the case of Sadhu Singh v. Pritam Singh S/o. Narain Singh and Ors. reported in AIR 1996 P&H 38 and Shankarlal Laxminarayan Rathi and Others Vs. Gangabisen Maniklal Sikchi and Another, the suit for possession of immovable property is based on distinct cause of action and not barred by Order 2 Rule 2 CPC.

13. The primary submission of Mr. Manjit Singh, learned Counsel for Appellants-Defendant Nos. 3 & 4 is that the relief of possession claimed in subsequent Suit No. 486 of 1977 is barred by Order 2 Rule 2 of Code of Civil Procedure,

hereinafter referred to as CPC, as in an earlier suit between the same parties, the plaintiff/Respondent No. 1 had initially not claimed possession but had only sought damages/mesne profits. The relevant portion of Order 2 CPC is reproduced hereinbelow for ready reference:

Order II

FRAME OF SUIT....

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....

4. Only certain claims to be joined for recovery of immovable property.? No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except-

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;...

14. In this connection, Mr. Manjit Singh sought to rely upon the cause of action paragraphs in the two suits referred to hereinabove. Mr. Manjit Singh also referred to the judgment of this Court rendered in Kamal Kishore Saboo Vs. Nawabzada Humayun Kamal Hasan Khan, . The relevant portion of the said judgment is reproduced hereinbelow:

8. ...Thus according to the averments contained in the said plaint itself cause of action for seeking relief of specific performance had ripened as according to the appellant respondent had failed to perform his part of the contract. Still the appellant chose to file the suit claiming relief of permanent injunction only when on the basis of aforesaid bundle of facts, he could also claim the relief of specific performance as well....

15. Mr. Manjit Singh further referred to the judgment of the Apex Court in Gurbux Singh Vs. Bhooralal, in order to allude to the concept of cause of action.

16. Mr. Rajinder Dutt, learned Counsel appearing for plaintiff/Respondent No. 1 submitted that the earlier suit sought only damages/mesne profits and thus could not bar a subsequent suit for possession of a property. In this connection Mr. Rajinder Dutt referred to and relied upon the following judgments:

- a) Sadhu Singh and Others Vs. Pritam Singh and Another,
- b) Abburi Rangamma Vs. Chitrapu Venupurnachandra Rao and Others,
- c) Shankarlal Laxminarayan Rathi and Others Vs. Gangabisen Maniklal Sikchi and Another,
- d) Ponnamal v. Ramamirda Aiyar and Ors. reported in AIR 1915 Madras 912.

e) Gurudwara Baba Zorawar Singh and Baba Fateh Singh Ji Regd. Society Vs. Shri Piara Singh and Sons,

17. In our view, the cause of action for a suit for possession is separate and distinct from a cause of action for a suit for mesne profits. Order 2 Rule 4 provides as an exception that two causes of action like mesne profit and possession may be joined together whereas otherwise they could not be joined because of the general principle. In fact, the language of Order 2 Rule 4 CPC confirms beyond doubt that cause of action for damages/mesne profits is separate and distinct from a cause of action for recovery of immovable property.

18. Moreover, the issue raised in the present case stands concluded by the judgment of a Coordinate Bench of this Court in Gurudwara Baba Zorawar Singh & Baba Fateh Singh (Supra) wherein following the Privy Council's judgment in Mohd. Khalil Khan's case it was held as under:

To the same effect is the decision of a Full Bench of the Punjab and Haryana High Court in Sadhu Singh and Others Vs. Pritam Singh and Another, Relying upon the decision of the Privy Council in AIR 1949 78 (Privy Council) and the definition of the expression "mesne profits" given in Section 2(12) of the Code of Civil Procedure, the Court held the cause of action in a suit for possession to be different from a cause of action in a suit for mesne profits. The Court observed:

As is plain from the abovesaid provision the claim for mesne profits may well require evidence of the duration of wrongful possession of profits which the person in wrongful possession may have actually received or in the alternative constructively which he might with ordinary diligence have received; and the quantum of interest on such profits. Can it possibly be said that evidence of the above said nature is equally required to support the claim of possession? In my view, it is hardly so. In a suit for possession it might well suffice the plaintiff to prove his title to the property and the factum of possession within 12 years of the filing of the suit in order to succeed. At the highest it can be said that some facts in the two suits may be either common or similar. But as has often been said mere similarity is not identity. Merely because in the two cases the facts may substantially run to an extent parallel to each other or simply because certain matters are common in the two suits cannot warrant a conclusion that the evidence in a suit for possession and in a suit for mesne profits may necessarily be identical. I find, therefore, that by the application of the abovesaid test also it would be manifest that the two causes of action are distinct and separate.

19. Consequently, we are of the view that a suit for mesne profits and a suit for recovery of immovable property are founded on distinct causes of action and the present subsequent suit was not barred under Order 2 Rule 2 CPC. Therefore, the present appeal being devoid of merits is dismissed with costs of Rs. 25,000/- to the Prime Minister Relief Fund.

20. The interim order in favour of the Appellant stands vacated and all pending

applications are disposed of in the above terms.