

(2010) 08 DEL CK 0275
In the Delhi High Court
Case No : CS (OS) 700 of 2008

Shri Rohit Shekhar

APPELLANT

Vs

Shri Narayan Dutt Tiwari and Another

RESPONDENT

Date of Decision : 13-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(3), Order 23 Rule 1(4), Order 32 Rule 1, Order 32 Rule 10
Constitution of India, 1950 — Article 361, 361(4)

Citation : (2010) 08 DEL CK 0275

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Sudhir Nandrajog, S. Santhanan, Kirtiman Singh, T. Singhdev and Pia Singh, for the Appellant; Rajeev Nayyar B.B. Gupta, Atul Sharma, Abhishek Agarwal, Jaspreet Singh, Nitesh Jain, Abhishek Misra, for Defendant No. 1 and Sachin Midha, for Defendant No. 2, for the Respondent

Judgement

S. Ravindra Bhat, J.

I.A. No. 7125/2010

1. The first defendant applies to this Court under Order 23 Rules 1 (3) and (4) CPC (CPC), contending that some averments in the suit have to be deleted or struck-off. In the suit, the plaintiff seeks a decree for declaration that he is the natural-born son of the defendant and that the first defendant is his father. He also seeks consequential injunctive relief.

2. The controversy raised by the first defendant in the present application is that the plaintiff had instituted a previous suit being CS (OS) 1711/2007, in which the Court had not issued summons on account of the bar enacted under Article 361(4) of the Constitution of India; at that time, the first defendant was the Governor of Andhra Pradesh. The Court had apparently noticed this aspect and required the plaintiff to take corrective action. It is a matter of record - an undisputed position by all the contesting parties that the plaintiff had, in the

previous suit, moved two amendment applications, I.A. Nos. 10860/2007 and 1660/2008. In I.A. No. 10860/2007, the plaintiff had sought to amplify the pleadings by introducing averments, which have now found its place in para 3(xvi) of the present suit. These are allegations to the effect that the plaintiff had approached the first defendant on 07.12.2005 with his maternal grandmother for an appointment, but the latter (the first defendant) avoided meeting him, i.e. the plaintiff.

3. CS (OS) 1711/2007 was withdrawn, as the plaintiff moved I.A. No. 2912/2008, who sought further opportunity to move the Court, to institute separate proceedings. The order disposing of the suit dated 24.03.2008, is in the following terms:

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CS (OS) 1711/2007

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.

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It is to be observed here that at that stage, the pending applications, being I.A. Nos. 10860/2007 and 1660/2008 (seeking amendment of the older suit) had not been allowed and were pending consideration of the Court.

4. In this background of circumstances, the plaintiff filed the present suit, claiming the reliefs that he does, on 11.04.2008. The suit was first listed on 23.04.2008 and thereafter on 28.04.2008. The Court called for records in the previous suit, CS (OS) 1711/2007 and after considering the same, issued summons in this case. The Court had apparently directed the first defendant to appear in person; that order was carried in appeal, and the appeal was disposed of by the Division Bench in FAO 477/2008. The defendant thereafter entered appearance and contested the suit. An application, I.A. No. 9474/2008, urging that the suit was time-barred, was moved by the defendant. Initially, it found favor in the Court; the Single Judge rejected the suit as time-barred on 03.11.2009. In addition to holding that the suit was time-barred, the Court also held that it did not possess territorial jurisdiction to entertain and try the claim. The judgment was carried in appeal. In this round, the Division Bench again set-aside the determination of the Single Judge and directed that the matter may be proceeded with on merits. The order of the Division Bench was contested in appeal by Special Leave before the Supreme Court, which on 10.05.2010 remitted the entire matter for fresh consideration on merits by this Court, uninhibited by the observations made either by the Single Judge or the Division

Bench.

5. The applicant/first defendant urges that the introduction of para 3(xvi) is impermissible, having regard to the mandate of Order 23 Rule 1(4) as the subject matter, i.e. the allegations regarding meetings said to have taken place between the plaintiffs and the first defendant in 2005 had not found place in the previous suit. It is submitted in this context that the expressions "claim" and "subject-matter", which find mention in Order 23 Rule 1(4) would comprehend the facts - either pleaded or omitted. In the previous suit, CS (OS) 1711/2007, the plaintiff had not pleaded or urged what he seeks today in the present suit, i.e. the allegation contained in para 3(xvi). If the Court were not to enforce the mandate of Order 23 Rule 1(4) and hold that the said pleading was not to be stricken-off, grave prejudice would be caused to the applicant/defendant, as a proper decision on the issue of limitation would be radically altered.

6. In support of the contention, the applicant relies upon the decision of the Lahore High Court in *Shadi Ram v. Amin Chand and Ors.* AIR 1930 Lah 937 and also the judgment of the Supreme Court in *Vallabh Das Vs. Madan Lal and Others*, The applicant's senior counsel emphasizes on the following passage in *Shadi Ram (supra)*:

... The plaintiffs would no doubt, be precluded from instituting a fresh suit in respect of the subject-matter of the previous suit but "subject-matter" has been interpreted by authority to be equivalent to the phrase "cause of action,

7. It is contended by the applicant/defendant that not having secured the benefit of an order on the claim for amendment, and sought withdrawal of the suit as it existed, the plaintiff cannot now improve his case to his detriment (i.e. of the defendant) as the question of limitation would assume an altogether different character, if the suit pleadings as presented are allowed to be maintained. On these grounds, says the applicant's learned senior counsel, the relief of striking-off the relevant portions of the pleadings has to be granted.

8. The plaintiff submits that the question as to whether the suit is time-barred was contested in a previous application, I.A. No. 9474/2008. It is submitted that while so, the defendant omitted to notice the so-called lacunae, which is being pointed-out here, i.e. the so-called "unauthorized" introduction of para 3(xvi). It is urged that having omitted to take this ground, the applicant cannot, through the back-door, as it were, introduce the plea, which could have been and was not urged logically as part of the application under Order 7 Rule 11, for rejection of the suit. It is also argued that Order 6 Rule 16 CPC, which is the relevant provision authorizing the Court to strike-off the pleadings, does not envision a situation of the present kind and that the Court should, therefore, decline the relief.

9. The plaintiff further argues that the amendment applications for introducing pleadings which have now formed part of para 3(xvi) were existing on the file of this Court even before the summons were issued and since the Court was not

satisfied on account of the bar contained in Article 361 (of the Constitution), the said previous suit had to be withdrawn, with express liberty to file the present one. It was argued significantly that the expressions "cause of action" and "subject matter" are broader than "facts". Learned Counsel emphasizes here that the terms "cause of action" and "subject matter" would be a bundle of facts and not merely individual facts. Therefore, it is urged that so long as the main claim and essential facts remain the same, the litigant is permitted to amplify them by outlining detailed facts which may constitute one or more than one cause of action. The plaintiff points-out that in answer to Para 3(xvi) of the suit, the defendant has nowhere urged that this aspect was introduced in the present suit and that the written statement in fact contains admissions which would enure to the plaintiff's benefit.

10. At this stage, it would be relevant to extract Order 23 Rule 1 CPC, which is in the following terms:

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1. Withdrawal of suit or abandonment of part of claim.- (1) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of the claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

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11. The facts noticed above would show that the previous suit, being CS (OS) 1711/2007 hit a road-block in the sense that the Court was unwilling to issue notice in view of the bar contained in Article 361. Even while facing it, the plaintiff wished to amend the suit and incorporate certain allegations. It is not in dispute that such allegation were concerned with the averments in para 3(xvi) of the present suit. For the sake of convenience, it would be necessary to extract the averments in paras 3(xv) and 3(xvi). The previous suit has been annexed with the documents filed by the plaintiffs on 14.07.2010. It would reveal that para 3(xv) is the same as in the present suit. The said paras 3(xv) and 3(xvi) read as follows:

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3.(xv) Thereafter, the Defendant No. 1 became the Chief Minister of Uttaranchal in the year 2002 and maybe because he was afraid that the plaintiff might try to cause some problem for him, he agreed to meet the plaintiff occasionally. This continued for a while, but thereafter, the defendant No. 1 again started avoiding the plaintiff and absolutely refused to see him for the last number of years.

(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.

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12. As may be seen, the above averments are concerned with the dates on which the first defendant allegedly met the plaintiff. While the previous suit mentioned that the first defendant had assumed office as the Chief Minister of Uttaranchal in 2002 and that he was afraid that the plaintiff might create problems and that he tried to meet him (i.e. the defendant) occasionally and thereafter he started doing so, para 3(xvi) goes on further to mention of the photographs of the functions in which the first defendant and the plaintiff's mother, along with him (the plaintiff) are found. It is a matter of record that the said photographs had been filed in the previous suit, CS (OS) 1711/2007.

13. In this Court's opinion, the applicant/first defendant's argument that the expressions "facts", "subject matter" and "cause of action" coincide or are synonymous is misconceived. There are several judgments of the Supreme Court [refer Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another, which state that the cause of action, though not defined, signifies all those material facts ("bundle of facts") which impell a litigant to approach the Court for relief. A careful reading of various provisions of the CPC (CPC) would reveal that it distinguishes between "facts", "material facts", "evidence", "cause of action" and "subject matter". In these circumstances, the argument that same facts, if omitted in pleadings, would constitute omission of the entire subject matter, is unacceptable. The applicant/defendant's reliance on Shadi Ram (supra), in this content, is of no avail. It would be apparent that the Court, even while observing as it did in the extracted portion above, proceeded to hold that the argument advanced in that case was untenable, and rejected it. Similarly in the Supreme Court decision reported as Vallabh das (supra), the Court, after noticing Order 23 Rule 1 went on to hold as follows:

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5. Rule 1, 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 terms 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 even which conferred certain rights on him. Mere identity of some of the issues in the two suits does not bring about an identity of the subject matter in the two suits. As observed in *Rakhma Bai v. Mahadeo Narayan* ILR 42 Bom. 1155 the expression "subject matter" in Order 23, 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* ILR 39 Mad. 987 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.

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14. In other words, the Court held that the identity of some of the issues in the two suits will not bring about identity of subject matter.

15. The above observations could have disposed of all the applications. However, this Court is mindful of the fact that the present plaintiff had made an effort to introduce the portions, which have now been introduced in the present suit as para 3(xvi) by way of an amendment application specifically and the consequential addition in the cause of action averments in I.A. No. 10860/2007. It is undisputed that the Court has not issued summons and was concerned about maintainability solely on account of the bar contained in Article 361. If the normal rule of amendment of pleadings is applied, there would have been no

reason for denial of the application to include these averments, which are now being opposed by way of these applications. That the amendments were not allowed or permitted and the suit itself was allowed to be withdrawn, with liberty to press a fresh suit is a matter of detail which should not inhibit this Court from being conscious about the normal rule about law of pleadings. In other words, but for the bar of Article 361, in all likelihood, the amendment sought would have been permitted, having regard to the law pertaining to Order 6 Rule 17, CPC.

16. Undoubtedly summons had not been issued at that stage. Having regard to these facts that the suit had to be withdrawn on account of the bar under Article 361, and later presented, in the opinion of this Court, there is no impediment for the plaintiff to urge in what he does in the portions objected to in his averments. Some evidence, as it were, in the form of photographs, which include some that are alleged to have been taken in the year 2005 - were part of the record in the previous suit.

17. An oft repeated aphorism is that procedure is only a handmaiden of justice, and not its master. Having regard to the above discussion, the Court is satisfied that this application is unmerited. In the circumstances, it is accordingly dismissed. The applicant is directed to pay costs to the plaintiff, quantified at Rs. 75,000/-, within four weeks.

CS(OS) 700/2008, I.A. No. 4720/2008

List on 21.09.2010.