

(2008) 12 DEL CK 0116

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 70 of 2008

Smt. Amarjit Kaur and Others

APPELLANT

Vs

Smt. Satnam Kaur and Others

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 2 Rule 2, Order 2 Rule 2(3), Order 7 Rule 11

Citation : (2009) 156 DLT 544

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

Bench : Division Bench

Advocate : S.N. Kumar and K.B. Soni, for the Appellant; Inder Bir Singh, for R-2, for the Respondent

Judgement

Manmohan, J.—The Appellants are aggrieved by the judgment and order dated 13th August, 2008 passed by the learned Single Judge by virtue of which their plaint has been rejected under Order VII Rule 11 of CPC (hereinafter referred to as "CPC") on the ground that the Appellants had not taken any leave or liberty under Order II Rule 2 CPC, while instituting their earlier suit for declaration.

2. Briefly stated the material facts of this appeal, as alleged by the Appellants, are that two brothers, namely, Harbhajan Singh and Pritam Singh had purchased property bearing No. F-67, Radio Colony, Delhi - 110 009 vide registered Sale Deed dated 29th July, 1954. It is alleged that on 15th September, 1964 Harbhajan Singh executed a Will in favour of his nephew Jatinder Pal Singh and Smt. Satnam Kaur, while excluding his legal heirs. Subsequent to the death of Harbhajan Singh in August, 1967, his Will was probated on 28th May, 1971.

3. On 22nd March, 1972, Pritam Singh filed a suit for partition being Suit No. 206 of 1972 (hereinafter referred to as the "initial partition Suit") in the District Court against legal heirs of Harbhajan Singh without impleading either Jatinder Pal Singh or Smt. Satnam Kaur. On 21st January, 1983 an ex-parte preliminary decree of partition was passed by the Civil Judge.

4. When the Local Commissioner, appointed by the Civil Judge, visited the premises on 27th August, 1983 for suggesting modes of partition, it is alleged that Jatinder Pal Singh came to know for the first time about the institution of the initial partition suit. On 2nd September, 2003 Jatinder Pal Singh moved an application under Order I Rule 10 CPC for impleadment in the initial partition suit.

5. On 30th May, 1985 Jitender Pal Singh filed a suit for declaration in the District Court being Suit No. 606 of 1985 seeking a declaration that the preliminary decree passed in the initial partition Suit be declared null and void.

6. On 3rd January, 1986 Jitender Pal Singh was impleaded as a defendant by the Civil Judge in the initial partition suit. However, on a Civil Revision (CR No. 92 of 1986) being filed against the order of impleadment, this Court stayed the order of Civil Judge dated 3rd January, 1986, but subsequently on 28th March, 2003 the said Civil Revision petition was dismissed. Pursuant to this order, the plaintiff on 22nd November, 2003 filed an amended memo of parties impleading Jatinder Pal Singh as a Defendant in initial partition Suit.

7. Despite having been impleaded in the original partition suit as well as having filed a suit for declaration, Jatinder Pal Singh on 13th April, 2005 filed a partition suit in this Court being CS(OS) No. 543 of 2005 (hereinafter referred to as the "new suit"). Unfortunately, on 17th May, 2005 Jatinder Pal Singh died of cancer and his legal heirs comprising of his wife and three daughters were substituted as plaintiffs in the new suit for partition. On applications being filed by the Respondent Nos. 2 & 3 under Order VII Rule 11 CPC, the learned Single Judge on 13th August, 2008 passed the impugned order rejecting the plaint. The reason given by the learned Single Judge for rejecting the plaint are reproduced hereinbelow for ready reference :

12. It is evident that when the plaintiff filed a suit for declaration, he was aware of his legal rights in respect of the suit property as well as the extent of his share, since the probate was granted in 1971 yet he did not choose to include the relief of partition. Now, even though there is no prescribed limitation for claiming partition, the provisions of Order II Rule 2 would squarely apply; the position clearer when the relief claimed is a declaratory one. The plaintiff has nowhere disclosed about filing of the declaratory suit or its outcome. In the reply to the application filed for rejection of plaint, he is not denied that such suit was filed. He has also not produced any order of the trial court granting leave to file the present suit which relates to the same property and has intrinsic connection in the suit and the issues that would arise before the Court. The declaration sought by the plaintiff necessarily involves inquiry and trial of questions relating to the share the plaintiff would be entitled to, in the suit property. Therefore, he should have sought leave under Order II Rule 2 CPC. In the absence of such an order, the present suit is clearly barred in law....

14. In view of the above discussion, this Court is of the opinion that in the absence of leave or liberty under Order II Rule 2, the plaintiff could not have filed

the present suit. Therefore, it is clearly barred under Order VII Rule 11. This order will not however be construed as precluding the plaintiff from taking such steps or remedies, if available in law, in other pending proceedings. All rights of the parties are expressly reserved in that regard. The I.A. 6139/2005 and I.A. 9103/2005 are, therefore, allowed. The plaint is accordingly rejected, in these terms. No costs.

8. Mr. S.N. Kumar, learned Senior Counsel for the Appellants, that is the heirs of Jatinder Pal Singh, submitted that the bar of Order II Rule 2 CPC would only apply, if the plaintiff in the initial suit for declaration had not filed its whole claim pertaining to that cause of action. According to Mr. Kumar, Order II Rule 2 CPC only mandated that on every cause of action, all reliefs have to be claimed. He further submitted that the causes of action for filing a suit for declaration were entirely different from the Appellants' cause of action to seek partition of the suit premises. In support of his submission, Mr. Kumar relied upon and referred to the following passages in the judgments mentioned below :

A) M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another, wherein it has been held as under :

7. A mere look at the said provisions shows that once the plaintiff comes to a court of law for getting any redress basing his case on an existing cause of action he must include in his suit the whole claim pertaining to that cause of action. But if he gives up a part of the claim based on the said cause of action or omits to sue in connection with the same then he cannot subsequently resurrect the said claim based on the same cause of action. So far as Sub-rule (3) of Rule 2 of Order 2 CPC is concerned, bar of which appealed to both the courts below, before the second suit of the plaintiff can be held to be barred by the same it must be shown that the second suit is based on the same cause of action on which the earlier suit was based and if the cause of action is the same in both the suits and if in the earlier suit plaintiff had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press in service in that suit cannot be subsequently prayed for except with the leave of the court. It must, therefore, be shown by the defendants for supporting their plea of bar of Order 2, Rule 2, Sub-rule (3) that the second suit of the plaintiff filed in 1982 is based on the same cause of action on which its earlier suit of 1980 was based and that because it had not prayed for any relief on the ground of passing off action and it had not obtained leave of the court in that connection, it cannot sue for that relief in the present second suit. So far as this plea of the defendants is concerned there is a threshold bar against them for their failure to bring on record the pleadings of the earlier suit which unfortunately has not been properly appreciated by the courts below....

B) Sandeep Polymers Pvt. Ltd. Vs. Bajaj Auto Ltd. and Others, wherein it has been held as under :

16. As observed by the Privy Council in Payana v. Pana Lana (1914) 41 IA 142,

the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action or different causes of action, even though they arise from the same transaction. One great criterion is, when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit whether the same evidence will maintain both actions. (See *Mohammad Khalil Khan v. Mahbub Ali Mian* AIR 1949 PC 780).

17. It would be appropriate to quote para 61 of the said judgment, which reads as follows:

61. (1) The correct test in cases falling under Order II Rule 2, is whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit (*Moonshee Buzloor Fuheer v. Shumroonnissa Begum* (1967) 11 Moo I 551 : 2 Bar 259 (P.C.)).

(2) The "cause of action" means every fact which will be necessary for the plaintiff to prove it traversed in order to support his right to the judgment (*Real v. Brown* (1889) 22 Q.B.O. 138 : 58 L.J. Q.B. 476).

(3) If the evidence to support the two claims is different, then the causes of action are also different. (*Brunsoon v. Nurnphroy* 18841 Q.B.O. 141. : 53 L.J.Q. B. 476).

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical (*Brunsoon v. Nurnphroy*, *supra*).

(5) The cause of action has no relation whether to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers...to media upon which the plaintiff asks the Court to arrive a conclusion in his favour. (*Mst. Chand Kour v. Pratap Singh* (1887) 15 IA 156). This observation was made by Lord Watson in a case u/s 43 of the Act of 1880 (corresponding to Order II, Rule 2) where plaintiff made various claims in the same suit.

9. Mr. Kumar also submitted that it is settled law that "fraud unravels all" and as such the Appellants were entitled to ignore the preliminary decree of partition passed in initial partition Suit and that the same as null and void and to file their own independent suit seeking partition. In this connection Mr. Kumar relied upon the following judgments :

(i) *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*,

(ii) *Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd.*,

(iii) *United India Insurance Co. Ltd. Vs. Rajendra Singh and Others*,

(iv) *K. Rajamouli Vs. A.V.K.N. Swamy*,

(v) 2002 (1) ALT 48 (SC)

(vi) Khetrabasi Biswal Vs. Ajaya Kumar Baral and Others,

(vii) Hamza Haji Vs. State of Kerala and Another,

10. On the other hand, Mr. Inder Bir Singh, learned Counsel appearing for the legal heirs of Late Pritam Singh reemphasized and reiterated the reasoning given by the learned Single Judge for rejection of the Appellants' plaint. He pointed out that the Appellants in their new suit for partition had given four reasons for filing the same, namely, that firstly the institution of the initial partition suit was vitiated by fraud; secondly, the District Court had no pecuniary jurisdiction to decide the initial partition suit; thirdly, the plaintiffs to the initial partition suit had not impleaded the Appellants as parties though they were necessary parties having a decree of probate in their favour; and fourthly, for the last three and a half years the District Court had not proceeded further with the initial partition suit and as a consequence, the Appellants had been deprived of their legitimate rights in the suit property.

11. Mr. Inder Bir Singh submitted that all the four reasons were untenable in law as firstly, the Appellants had already been impleaded in the initial partition suit, secondly, the District Court vide its order dated 17th May, 2007 had already upheld its pecuniary jurisdiction to deal with the initial partition suit, which order has already attained finality, thirdly, the delay in proceedings with the initial partition suit could never be a ground for filing a fresh suit for partition, and fourthly, the Appellants had already availed of two remedies for getting the preliminary decree for partition set aside i.e. by filing an application for recall of the said preliminary decree as well as by filing a suit for declaration being Suit No. 606 of 1985.

12. Thus the admitted position that emerges is that on every cause of action, all reliefs have to be claimed and further the Appellants while filing their suit for declaration had not taken any leave or liberty under Order II Rule 2 CPC to institute their new suit for partition. The expression "cause of action" means every fact which will be necessary for the plaintiff to prove in order to entitle him to relief.

13. Keeping in view the aforesaid facts and law, we are of the view that the core issue and evidence is common in the suit for declaration being Suit No. 606 of 1985 as well as in the Appellants' application for recall of preliminary decree in Suit No. 202 of 1972 and the new suit for partition being CS(OS) No. 543/2005. We are further of the opinion that even if it is assumed that the initial preliminary decree of partition is null and void on the ground that it is vitiated by fraud and proceedings in the said suit are dragging on, the Appellants are not entitled in law to maintain two parallel proceedings on the same issue. This is more so, when the Appellants' application for the impleadment had been allowed in the initial partition suit and their application for recall of the preliminary decree is pending. It is pertinent to mention that it is settled law that all parties to the partition suit are plaintiffs and are entitled to seek their respective shares in the

property. (See A. Thakurdas and Anr. v. A. Venilal and Ors. reported in AIR 1977 Kar 60 and P. Kunhammad and Others Vs. V. Moosankutty and Others,

14. We are also of the opinion that the test formulated by the Privy Council in Bengal Waterproof Limited (supra) and approved by the Hon''ble Supreme Court in Sandeep Polymers (supra), is fulfilled in the present case as the Appellants'' evidence in support of its declaratory suit and the new suit for partition are not different but identical. Even if we assume that the conduct of the Respondents is fraudulent, then also it would not clothe or empower the Appellants to file multifarious proceedings on the same cause of action. Consequently, in our view, the Appellants having not obtained leave and liberty under Order II Rule 2 CPC while filing their suit for declaration being Suit No. 606 of 1985 could not have filed their new suit for partition.

15. Needless to say, as held by learned Single Judge, the rejection of the Appellants'' plaint would not be construed as precluding the Appellants from taking such pleas or remedies, if available in law, in other pending or subsequent proceedings. However, keeping in view the long chequered history of this litigation, we direct the District Court to proceed expeditiously with the disposal of the initial partition suit as well as suit for declaration being Suit No. 606 of 1985, provided there is no other restraint or stay order passed by any other competent court. With the above observations, the present appeal is disposed of.