

(2017) 04 AHC CK 0057
In the Allahabad High Court
Case No : Civil Revision No. 194 of 2016

Smt. Sushila Suri

APPELLANT

Vs

Dr. Susheel Suri

RESPONDENT

Date of Decision : 12-04-2017

Acts Referred:

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

Citation : (2017) 2 ARC 110

Hon'ble Judges : Attau Rahman Masoodi, J.

Bench : Single Bench

Advocate : Daya Shanker Tripathi, Advocate, for the Revisionist; Anagh Mishra, Gaurav Mehrotra, Sagar Suri, Tanveer Ahmad Siddiqui, Advocates, for the Opposite Party

Final Decision : Dismissed

Judgement

Attau Rahman Masoodi, J.—This civil revision filed under Section 115 of CPC has questioned the legality of order passed by the trial court in Regular Suit No. 342 of 2015 on 12.8.2016 rejecting the objections filed by the revisionist/defendant no. 2 under Order 7, Rule 11 CPC.

2. At the very outset learned counsel for opposite parties no. 1 and 3 raised a preliminary objection as to the maintainability of present revision on the ground that the trial court has left the objections raised by the revisionist under Order 2, Rule 2 CPC open, as such, the present revision is not maintainable before this Court at this stage.

3. Undisputedly, the objections raised by the revisionist under Order 7, Rule 11 have been rejected by recording a clear finding that the cause of action giving rise to the subsequent suit itself cannot be adjudged without proving the averments of the earlier plaint by leading evidence. Thus, the court below has left open to consider all the objections in the light of principles underlying Order 2, Rule 2 CPC at an appropriate stage of suit proceedings. There is no doubt that

the satisfaction arrived at to defer the consideration of an objection amounts to an order which is revisable, hence the preliminary objection is overruled.

4. The question that crops up for consideration in the present revision is two - fold:

(1) Whether deferring the consideration of objections raised under Order 2, Rule 2 CPC to an appropriate stage, amounts to a failure to discharge statutory duty envisaged under Order 7, Rule 11 (d) CPC.

(2) Whether recording a finding by the court below that for consideration of the objection raised on the strength of Order 2, Rule 2 CPC, it is legally required on the part of revisionist to prove the earlier plaint at an appropriate stage and thus, the finding is not perverse, once there is an admission in the subsequent plaint about the filing of earlier suit by reserving a relief of partition though being available on the same cause of action but the plaintiff chose to omit his right without obtaining leave of the court, hence the subsequent suit is barred under Order 2, Rule 2 (c) CPC.

5. Since answer to question no. 1 framed above, is dependent upon the justiciability of question no. 2, therefore, the Court would firstly proceed to consider question no. 2 for which the relevant facts may be stated as under:

6. The revisionist herein is the real mother of all the respondents who include two brothers and three sisters and they being real children of late Govind Ram Suri are stated to be successors in interest of disputed suit property which comprises of several immovable properties set out in the plaint. The properties are stated to be self - acquired properties of late Govind Ram Suri who is alleged to have died intestate on 24.10.2011 as per the version of plaint although a registered will dated 11.6.2004 executed in favour of the revisionist (mother) by late Govind Ram Suri where under the exclusive title of some properties has been passed on to her and after her death, the same would devolve upon respondent no. 2 exclusively. The will deed is described to be fraudulent as per the averments made in the plaint.

7. The suit giving rise to this revision is the second suit filed by respondent no. 1 who is one of the sons of late Govind Ram Suri and claims to have a hereditary right over onesixth of the disputed property. There is no dispute insofar as the composition of family comprising of two brothers, three married sisters and revisionist - mother is concerned and the position being undisputed would entitle the plaintiff to claim one - sixth share of the property provided late Govind Ram Suri is proved to have died intestate as is the factual position narrated in the plaint.

8. Respondent no. 1 having earlier come to know about Regular Suit No. 223 of 2012 which was filed by his mother (revisionist) and the brother (respondent no. 2) against Sri Gaurav Suri (nephew) for declaration on the basis of registered will dated 11.6.2004, made an application for impleadment in the said suit on

24.7.2012 and soon thereafter on 6.8.2012, the said suit was dismissed by the trial court for want of prosecution. Thereafter feeling apprehensive of the disputed property being alienated by respondent no. 2 (brother) and Sri Gaurav Suri (nephew), Regular Suit No. 1364 of 2012 was filed by respondent no. 1 against respondent no. 2 (brother) and Sri Gaurav Suri (nephew) seeking perpetual injunction against them and the relief so prayed reads as under:

"A decree for permanent injunction be passed in favour of plaintiff against the defendants restraining the defendants from selling, alienating or transferring the property morefully describe in para 2 of the plaint or to create any third party right in property in suit."

9. In the above - mentioned suit filed by respondent no. 1 on 18.10.2012, impleadment was sought by the revisionist (mother) and the said application was allowed on 26.4.2013. Later on, the three sisters also sought impleadment as successors of Late Govind Ram Suri in the suit and their impleadment was also allowed by the trial court as defendants.

10. The suit for perpetual injunction which at the initial stage was filed against respondent no.2 (brother) and nephew (Gaurav Suri), relief of partition at that stage was not sought and the suit continues to be pending although an order of injunction restraining alienation of the property has also been passed and is operative.

11. The subsequent suit though it mentions the pendency of earlier suit for permanent injunction having arisen due to the ill intention of respondent no. 2 (brother) and his son to grab the property through illegal means prays for the following relief:

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12. The cause of action for seeking the above relief is stated to have arisen when the police authorities did not stop construction work on the strength of restraint order passed in Regular Suit No. 1364 of 2012, whereby the alienation of disputed property was stayed by civil court order dated 23.12.2013 passed in the earlier suit. The cause of action is further stated to have accrued on 10.02.2015

when the revisionist and all other defendants are said to have refused to partition the property.

13. The significant facts demarcating the cause of action for filing suit for perpetual injunction and subsequent suit for partition coupled with permanent injunction are that the earlier suit was filed when two of the parties with ill intention had attempted to alienate the property and the subsequent suit was filed when on the strength of existing injunction order restraining to alienate the disputed property, the police authorities did not intervene in the illegal construction work and the revisionist and other defendants on 10.02.2015 refused to partition the property.

14. Learned counsel for the revisionist has strenuously argued that the cause of action for both the suits is same, thus, the filing of subsequent suit for partition and permanent injunction is barred by Order 2, Rule 2 CPC and non consideration of this objection by the court below is violative of the mandate of law envisaged under Order 7, Rule 11 (d) CPC. In order to substantiate the point, learned counsel for the revisionist has argued that cause of action for claiming relief in both the suits arises in the context of a legal right and it is the heritable right in the present controversy that forms the bedrock of claim. Learned counsel for the revisionist further argued that the plaintiff himself in the subsequent plaint has mentioned about the will dated 11.06.2004 but has left the said will unchallenged merely by calling it forged and fraudulent. It is argued that the rights once determined by a testament leave no scope for a hereditary right to be claimed on the basis of succession unless the will deed is challenged and proved as non - enforceable. However, the subsequent suit was filed at a stage when all the necessary parties were impleaded as defendants in the earlier suit and relief of partition was thus available to be sought therein but before filing the second suit, leave was neither sought nor granted by the court in the earlier suit for perpetual injunction i.e. R.S. No. 1364 of 2012.

15. Learned counsel for the revisionist, in view of above, has argued that the averments made in the plaint itself lead to an irresistible conclusion that the subsequent suit, in absence of a challenge to the will deed and absence of leave of the Court under Order 2, Rule 2 (3) CPC, could not bring about a second suit and for deciding such an objection, the court below has wrongly opined that the revisionist in the given circumstances is required to prove the earlier plaint on the basis of evidence. Learned counsel for the revisionist relies upon a series of case laws which may be noted as under:

Sl. Parties Citation

1. N.V. Srinivasa Murthy v. Mariyamma & others (2005) 5 SCC 548
2. Virgo Industries Pvt. Ltd. v. Venturetech Solutions Pvt. Ltd. (2013) 1 SCC 625
3. State Bank of India v. Gracure Pharmaceuticals Ltd. (2014) 3 SCC 595
4. Coffee Board v. Ramesh Exports Pvt. Ltd. (2014) 6 SCC 424

5. Sri Gangai Vinayagar Temple & others v. Meenakshi Ammal & others (2015) 3 SCC 624

6. Deepa Dua v. Tejinder Kumar Muteneja ILR (2013) V Delhi 3525

7. Surinder Kaur v. Ram Narula & others (Delhi High Court) CS (OS) No. 651 of 2000 decided on 30.10.2013

8. Anathula Sudhakar v. P. Buchi Reddy (dead) and others (2008) 4 SCC 594

16. The submissions put forth by learned counsel for the revisionist were equally supported by respondents no. 2, 4 and 5 represented by Sri Gaurav Mehrotra and Tanveer Ahmad Siddiqui.

17. On the contrary, learned counsel for the respondents no. 1 and 3 refuting the arguments advanced by learned counsel for the revisionist has argued that the premise on which the legal rights rest and the cause of action are two distinct aspects of the matter and the respondent o. 1 while filing the plaint has categorically demarcated the facts giving rise to the distinct causes of action for which relief has been sought. Learned counsel for respondents no. 1 and 3 has also cited a series of judgements which are noted as under:

Sl. Parties Citation

1. A. Nawab John and others v. V.N. Subramaniam (2012) 7 SCC 738

2. Inbasagaran and another v. S. Natarajan (Dead) (2015) 11 SCC 12

3. Sat Bhan Singh v. Mahipat Singh ILR (2012) 6 DELHI 262 CS (OS)

4. Suresh Kakkar v. Mahender Nath Kakkar 2008 (1050) DRJ 211

5. Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat 1969 (2) SCC 74

6. Sucha Singh Sodhi (Deceased) v. Baldev Raj Walia RFA No. 353/2012 decided on 18.2.2014

7. Jayantilal Chimanlal Patel v. Vadilal Purushottamdas Patel Civil Appeal Nos. 3056-3057 of 2017 decided on 21.2.2017

8. S. Nazeer Ahmad v. State Bank of Mysore (2007) 11 SCC 75

18. Before coming to the rival contentions and the finding recorded by the court below it is apt to refer to Order 2, Rule 2 CPC which for ready reference is reproduced hereunder:

"Order 2, Rule 2 :

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.

Explanation: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

19. It may be relevant to note that the hereditary right is not in dispute by virtue of respondent no. 1 being the real son of late Govind Ram Suri and interception of this right available under the general law of succession by a registered will to the exclusion of all other legal heirs is a defence available to the revisionist. Even if it is to be understood that the cause of action in the context of legal rights ought to have been considered by the court below, yet the Court is required to record a finding on the exclusion of hereditary rights of all other co - owners for which purpose the suit has to proceed upto the stage of evidence.

20. Now coming to the cause of action for filing the two suits, it is significant to note that cause of action is a bundle of facts existence of which gives birth to a claim in the form of relief sought by an aggrieved person. The demarcating facts set out herein above do show that the suit for perpetual injunction was resorted to looking to the attempt on the part of respondent no. 2 and his son to alienate/ transfer the property and the subsequent suit came to be filed when the police authorities refused to protect the rights of respondent no. 1 on the strength of interim injunction passed in R.S. No. 1364 of 2012 and subsequent refusal for partition on 10.2.2015 by all the co - owners.

21. To meet the submission of demarcation of facts for giving rise to independent causes of action justifying filing of two suits, learned counsel for the revisionist himself has drawn attention of this Court to para-20 of the earlier plaint of R.S. No. 1364/2012 which reads as under:

"20. That the mother of the plaintiff and defendant no. 1 is alive therefore the plaintiff is not praying for partition but only seeking permanent injunction."

1. The above statement is a fact mentioned in the plaint of earlier suit, thus, in order to establish the bar for filing the second suit under Order 2, Rule 2 CPC, reference to the pleading of earlier plaint would be a binding exercise without which the objection so raised cannot be considered to its fullest extent. Hence

the finding recorded by the court below irrespective of making any comment on the merit of the case is just and may not call for an interference at this stage when the objection is left open to be decided at an appropriate stage. The submission put forth that right to sue cannot be reserved is also capable of being judged when the court would refer to the averments made in the earlier plaint and not otherwise. The situation is no better insofar as the objection on the aspect of court fee is concerned, for the reason that the very objection rests on the premise of valuation of suit set out in earlier plaint.

22. It is to be noted that the interested parties of their own have sought impleadment in the earlier suit, although the relief was claimed only against two defendants in a given set of facts. The relief for partition for which no limitation is prescribed, was not chosen to be sought and the reasons therefor are stated in the earlier plaint but the cause of action for filing the later suit is independently set out which essentially are the questions of fact.

23. It is true that at the time of instituting second suit, all the necessary parties had come to be represented in the earlier suit and that being so, without seeking leave of the Court, multiplicity of the proceedings between the same parties would offend the rule of public policy in adversarial litigation but at a stage when both the suits are pending in two competent courts of the same district, the suits can be heard together.

24. This Court would note that the injunction granted in the later suit under Order 39, Rule 1 and 2 CPC was questioned before this Court in First Appeal No. 828 of 2015 and the appeal was allowed with a direction that the suit be finally decided in accordance with law. The judgment passed by this Court on being challenged before the apex court was modified by making injunction order granted by the civil court operative during pendency of the two suits and it was further observed that the parties shall abide by the outcome of two suits.

25. The submission made by learned counsel for the revisionist is based on the object of public policy in adversarial litigation and the objection was vehemently argued in the light of Order 2, Rule 2 (3) CPC. Public policy in civil litigation when construed against a civil right would not mean that the civil rights stand eclipsed and lose their statutory sanctity altogether but what is to be seen is that chance of a conflicting decision is to be avoided.

26. Thus, in the totality of circumstances this Court is of the considered opinion that the impugned order passed by the trial court does not suffer from any illegality, however, both the suits pending before the court below shall be tried together for which the District Judge may pass necessary orders on an application being filed before him. It is made clear that this Court has not expressed any opinion on the merit of the case. The suit proceedings shall be concluded expeditiously and without granting any undue adjournment. Once question no. 2 is answered in negative, any exercise to look into question no. 1 would be academic. Applying the position of law as it emerges from the case

laws cited before this Court, the finding recorded by the Court below in the impugned order does not call for any interference at this stage.

27. The revision is accordingly dismissed. No order as to cost.