

Deepa Dua Vs. Tejinder Kumar Muteneja

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Court : Delhi

Decided On : Aug-22-2013

Judge : Jayant Nath

Appellant : Deepa Dua

Respondent : Tejinder Kumar Muteneja

Judgement :

\$~ * + IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on :11.07.2013 Decided on :

22. 08.2013. IA No. 19136/2012 in CS(OS) 1363/2012 Plaintiff DEEPA DUA Through Mr.Sanjeev Madaan and Mr.Amresh Mathur, Advs. alongwith husband of the plaintiff versus TEJINDER KUMAR MUTENEJA Defendant Through Ms.Anjali J.Manish, Adv. CORAM: HON'BLE MR. JUSTICE JAYANT NATH JAYANT NATH, J.

1. This is an application filed by the defendant under Order 7 Rule 11 of the Code of Civil Procedure for dismissal of the suit. The plaintiff and defendant are brother and sister. The present suit is filed for partition, declaration and permanent injunction by the plaintiff who claims to be a coowner of property No. E-134, Preet Vihar, Near Durga Mandir, Delhi110092.

2. It is the contention of the plaintiff that the property was owned by her late father and mother. The father of the plaintiff and defendant died on 27 th January, 1992

without leaving any Will. The mother of the parties died on 9th January, 2006. Hence it is contended that the said property was joint property and the plaintiff is a co-sharer.

3. The plaintiff further states that the defendant came to the residence of the plaintiff on 20.04.2010 and asked her to sign some papers for the transfer of the said property in the name of the defendant but the plaintiff refused to sign the papers. The plaintiff further admits that she had earlier filed a suit for permanent injunction in the Court of Senior Civil Judge, Karkardooma, Delhi on 15.05.2010. It is further stated that when the defendant appeared, a new fact came into the picture when the defendant told the Court that the plaintiff had already executed a relinquishment deed in favour of the defendant on 12.08.2009 which deed, the plaintiff states, is not admitted. The plaintiff further submits that defendant has fraudulently and by misguiding her taken her signature on the said documents. Nothing further is mentioned about the earlier suit filed in the Court of Senior Civil Judge, Karkardooma Court, Delhi.

4. In view of the above averments, the defendant has filed the present application under Order VII Rule 11, CPC stating that the present suit is barred under Order II Rule 2 CPC. It is pointed out in the application that the plaintiff has previously instituted a suit in the Court of Senior Civil Judge, Karkardooma Courts, Delhi and has withdrawn the said suit after filing the present suit without taking any liberty whatsoever for filing a fresh suit.

5. Learned counsel for the defendant/applicant has submitted that the cause of action of the earlier suit and that of the present suit is identical namely the plaintiffs seeking rights in the suit property. The counsel further submits that the first suit filed in the Karkardooma Courts was filed prior to in time and without withdrawing that suit, the present suit was filed in Delhi High Court. After having filed the present suit, the plaintiff is stated to have withdrawn the suit in Karkardooma Courts without seeking any liberty to file a fresh suit. Learned counsel also further submits that no leave to withdraw the case was sought from the Court under Order 23 Rule 1 CPC and hence, even otherwise, the present suit is barred under Order XXIII Rule 1 CPC.

6. Learned counsel for the defendant relies upon *Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited* (2013) 1 SCC 62. and *Madan Lal Arora v. Shiv Kumar* 2007 (95) DRJ 39.(DB) to state that in view of provisions of Order II Rule 2, CPC the present suit filed by the plaintiff before this Court is barred.

7. Learned counsel for the plaintiff on the other hand contends that when the first suit was filed, the plaintiff was not aware about the relinquishment deed dated 12.08.2009 allegedly executed by her and which is a registered document. It is stated that only in the course of proceedings before the Karkardooma Courts, on the basis of pleas raised by the defendant, it came to light that the defendant has fraudulently obtained signature of the plaintiff on the said relinquishment deed. Hence the necessity to file the present suit arose. It is further contended that the preset suit is based on a different cause of action. The learned counsel for the plaintiff relies upon *Vallabh Das v. Dr. Madan Lal & Ors* (1971) 1 SCR 21. and *Sidramappa v. Rajashetty and Ors* (1970) 3 SCR 32. to submit that the present suit is not barred under Order II Rule 2 CPC.

8. The issue is whether Order II Rule 2 or Order 23 Rule 1 (iv) CPC would apply to the facts of this case. Order II Rule 2 CPC reads as follows:

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.

9. Reference may be had to the judgment cited by the learned counsel for the defendant in the case of Virgo Industries (Eng.) Private Limited vs. Venturetech Solutions Private Limited (supra). In that case a suit was filed by the plaintiff seeking a decree of permanent injunction to restrain the defendants from alienating, encumbering or dealing with the suit property. Relief was claimed on the basis of agreement to sell. Relief of specific performance was not sought as according to the plaintiff the time for performance had not arisen. Liberty was sought to seek relief of specific performance later. Subsequently, the plaintiff filed another suit seeking a decree against the defendant for execution and registration of the sale deed and delivery of possession of the same property. The Honble Supreme Court in para 9, held as under:

9. Order 2 Rule 1 requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order 2 Rule 2 CPC makes it clear that he shall not afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order 2 Rule 2(2) does not contemplate omission or relinquishment of any portion of the plaintiffs claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the court is contemplated by Order 2 Rule 2 (3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the court had been obtained. . The Honble Supreme Court, in the light of the above, held that the foundation for the suit for relief of permanent injunction claimed in the prior suit furnished a complete cause of action to the plaintiff to also sue for specific performance, yet the relief was omitted and no leave in this regard was obtained from the Court. Hence it was held that the subsequent suit was barred under Order II Rule 2 CPC.

10. A perusal of the plaint of this suit shows that the plaintiff has filed the present suit seeking the following reliefs: a. Pass a decree of partition, thereby dividing the property half in between plaintiff and defendant. b. Pass a decree of declaration, declaring the relinquishment deed dated 12.08.2009 and also declare the conveyance deed dated 05.11.2009 being null and void. c. Pass a Decree for permanent injunction in favour of the plaintiff and against the defendant thereby restraining the defendant, his agents, representatives, attorneys etc. and any other person who is claiming to be working on behalf of the defendant from transferring, alienating, mortgaging or creating third party interest and parting with possession in respect of property bearing No. E-134, Preet Vihar, Near Durga Mandir, Delhi-1100092. d. Cost of the suit may also be awarded in favour of the plaintiff and against the defendant. e. Pass any other and further relief, which this Honble Court may deem fit and proper in the facts and circumstances of the case in favour of the plaintiff and against the defendant.

11. In contrast, in the suit filed earlier before the Karkardooma Courts, the plaintiff filed the suit seeking following reliefs: a decree of permanent injunction in favour of the plaintiff and against the defendant, thereby restraining the defendants, their agents, nominees, assignees, attorneys, servants, family members etc. from interfering or selling or creating third party interest in the suit property, bearing House no. E-134, Preet Vihar, Near Durga Mandir, Delhi specifically shown in Red Colour in the annexed site plan or selling, alienating, creating any third party interest qua the suit property.

12. A comparison of the two plaints would show that paras 1 to 7 of the two plaints are exactly identical. Similarly, para 8 and 11 of the present plaint are identical to para 9 and 15 respectively of the plaint filed in the Karkardoom Courts. Similarly, the relief sought in the Karkardooma Courts is identical to the relief prayed in para (c) of the prayer clause in the present suit. The issue is are the two plaints based on the same cause of action.

13. What is cause of action? Reference for this may be had to the judgment of the Honble Supreme Court in the case of Y.A. Ajit vs. Sofana (AIR 2000 SC 3151) where the Honble Supreme Court in para 4 held as under: 4. It is settled law

that cause of action consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise. The expression cause of action has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the proceeding including not only the alleged infraction, but also the infraction coupled with the right itself. Compendiously the expression means every fact, which it would be necessary for the complainant to prove, if traversed, in order to support his right or grievance to the judgment of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove such fact, comprises in cause of action.

14. Reference may be had to the judgment of the Bombay High Court in the case of Mohammad Khalil Khan vs. Mahbub Ali Mian, 1949 (51) BOMLR 9 wherein para 61 the court held as follows: 61. The Principles laid down in the cases thus far discussed may be thus summarised: (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 from that which was the foundation for the former suit. (Moonshee Buzloor Ruheem v. Shumsunnisssa Begum, supra.) (2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. (Read v. Brown, Supra.) (3) If the evidence to support the two claims is different, then the causes of action are also different. (Brunsden v. Humphrey, supra.) (4) The causes of action in the two suits may be considered to be the same if in substance they are identical. (Brunsden vs. Humphrey, supra.) (5) The cause of action has no relation whatever 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 the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. (Musst. Chandkour vs. Partab Singh, supra). This observation was made by Lord Watson in a case under Section 43 of the Act of 1882 (corresponding to Order II Rule 2), where the plaintiff

made various claims in the same suit.

15. It will be useful to refer to the facts of the above case of Mohammad Khalil Khan vs. Mahbub Ali Mian (supra.). In that case the first Suit being 8 of 1928 in respect of the Oudh property was filed by Mohammad Khalil Khan and Fida Ali Khan. Title was claimed on the ground that Rani Barkatunnissa was a sunni and under Muslim law they were the legal heirs. The second Suit being Suit No.2/1988 was filed by the said plaintiff claiming possession of property in Shahjahanpur. The plaintiffs in both the properties claimed that the plaintiffs are heirs of Rani Barkatunnissa who belonged to the sunni sect. The Court held that the facts with respect to both the properties to which title is claimed by the plaintiffs are identical, namely, that they are the heirs of Rani Barkatunnissa who was the owner of the properties and that she was a sunni by faith and that they are the heirs under mohammadan law substantiating some facts constituted the title of the plaintiffs to the two properties. It was in this background that the Court dismissed the second Suit under Order II Rule 2 CPC. In my opinion, the ratio as laid down in this case would apply to the facts of the present case.

16. A cause of action is a bundle of facts. It is on the basis of this bundle of facts that the relief is claimed. Merely because different reliefs are claimed in different proceedings would not necessarily mean that the cause of action would be different. In the first case filed in District Courts by the plaintiff, the bundle of facts on the basis of which the title was pleaded is that the parents of the parties died intestate and hence the plaintiff claims rights to the suit property based on non-testamentary succession. In the present suit that is filed now before this Court, the foundation facts are substantially identical, namely, the death of the parents intestate and the plaintiff claiming rights based on non-testamentary succession. The only difference here is that in the present suit, the plaintiff has added relief of partition and declaration that the Relinquishment Deed executed by the plaintiff in favour of the defendant is void. The cause of action of the two suits in substance is identical. Merely, adding the relief of partition and declaration regarding the Relinquishment Deed executed by the plaintiff would not change the basic facts which are necessary for the plaintiff to traverse to be entitled to claim relief.

17. The judgments cited by the learned counsel for the plaintiff have no application to the facts of the present case. Vallabh Dass (supra) is a case where the first suit was filed seeking to enforce the rights of the parties to separate possession. The second suit was filed to get possession of the suit properties from a tress-passer on the basis of his title. The cause of action was obviously different. The other judgment referred to by the learned counsel for the plaintiff, namely, Sidramappa(supra) also does not help the case of the plaintiff because in that case on fact the Honble court had come to the conclusion that the cause of action on the basis of which the suit was brought is not the same as that of the previous suit. Hence, as I hold that the cause of action in the two suits is substantially identical, the present suit is held to be barred under Order II Rule 2 CPC.

18. We may now come to Order XXIII Rule 1 CPC. Order XXIII Rule 1 (3) & (4) reads as follows:

1. Withdrawal of suit or abandonment of part of claim. *** (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 subjectmatter or such part of the claim.

19. Strictly provisions of Order XXIII Rule 1 CPC could not be applicable as the second suit herein has been filed by the plaintiff during pendency of the first suit itself. The present suit has been filed by the plaintiff on 03.05.2012 whereas the earlier suit filed in the district court has been withdrawn on 04.07.2012. However, the submission of the plaintiffs that the present Suit has been filed after seeking permission of the Karkardooma Courts to withdraw with liberty to file a fresh suit cannot be accepted if one peruses the ordersheet of the proceedings before the

Karkardooma Courts.

20. Reference may be had to the order permitting the plaintiff to withdraw the suit. The present suit is filed on 03.05.2012. The suit in the Karkardooma Courts is withdrawn on 04.07.2012 where the Court held as follows: Pre: None for plaintiff. Defendant with counsel Sh. Satish Sharma. Ld. Counsel for defendant has been appraised with proceedings held on 01.06.2012 whereby plaintiff moved an application for withdrawal of the suit and her statement was recorded on the very same day. Ld. Counsel for defendant stated that defendant has no objection if the present suit of plaintiff is dismissed as withdrawn in view of statement of plaintiff. Let the statement of defendant be recorded separately. Statement of defendant has been recorded vide separate sheet. In view of statement made by plaintiff on 01.06.2012, present suit is dismissed as withdrawn. File be consigned to record room after necessary compliance.

21. The statement of plaintiff and defendant was also recorded on different dates which reads as follows: Statement of Ms Deepa Dua, Age-about 40 years W/O Sh. Jawahar Dua R/O R-Block, 53-B, Dilshad Garden, Delhi-10095. On SA I am plaintiff in the present suit. I want to withdraw present suit as I have already filed a suit for partition, declaration and permanent injunction against defendant before the Honble High Court. My application u/S 15.CPC for withdrawn of present suit is Ex.P1 and the supporting affidavit to the application is Ex.P2. Ex.P1 & P2 bears my signatures at point A. I may be allowed to withdraw the present suit and my suit be dismissed as withdrawn. Statement of Sh. Tajender Kumar Muthleja S/O Late S.P. Muthleja R/O E-134, Preet Vihar Delhi. On SA I am defendant in the present suit. I have no objection if the suit of plaintiff is dismissed as withdrawn without prejudice to my rights.

22. The plaintiff has not placed on record a copy of the application filed by the plaintiff to withdraw the suit in the Karkardooma Courts. Hence I am not aware what relief was sought by plaintiff in the said application. A perusal of the order dated 04.07.2012 clearly indicates that no permission to withdraw the suit under Order XXIII Rule 1 CPC has been given by the Court. There is no application of mind by the court of being satisfied with the ingredients of Order XXIII Rule 1 (3)

CPC, namely, that the suit must fail by reasons of some formal defect or there is sufficient ground for allowing the plaintiff to institute fresh suit for the subject matter of the suit or part of the plaint.

23. In the absence of a specific order to the said effect, it is clear that no permission under Order 23 Rule 1 CPC was given to the plaintiff to withdraw the earlier suit.

24. The plaintiff is clearly indulging in multiple litigations.. After having executed and registered a relinquishment deed, she filed the initial suit in Karkardooma Courts. Her application for injunction was dismissed by the Karkardooma Court on 12.09.2011. Thereafter, it appears that she has gone and filed the present suit pleading ignorance of having executed the registered the relinquishment deed. Having filed the present Suit, she has withdrawn the earlier suit filed at Karkardooma Courts.

25. In view of the above, the present application is allowed. The suit is dismissed as being barred under Order II Rule 2 CPC. All pending applications are also disposed of. JAYANT NATH, J.

AUGUST 22 2013/raj

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