

Neelavva Vs. Drakshayani and Others

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Court : Karnataka Dharwad

Decided On : Jun-29-2016

Judge : A.N. Venugopala Gowda

Appeal No. : Regular Second Appeal No. 100104 of 2016 (PAR/SEP.POSSN.)

Appellant : Neelavva

Respondent : Drakshayani and Others

Judgement :

(Prayer: This RSA is filed u/s.100 r/w Order XLI Rule 1 of CPC, against the Judgment and Decree dtd:27.11.2015 passed in R.A.No.77/2015 on the file of the II Additional District Judge, Dharwad, dismissing the appeal and confirming the Judgment and decree dtd:23.04.2015, passed in OS.No.277/2014 on the file of the II Additional Senior Civil Judge, Dharwad, allowing the suit filed for partition and separate possession.)

1. This is plaintiff s second appeal in a suit for partition and separate possession of agricultural land. For convenience, the parties will also be referred by their rank in the suit.
2. Brief facts which are necessary to decide this appeal are recapitulated as hereunder:

Inter-se relationship between the plaintiff and defendants, which is not in dispute is as hereunder:

NAGAPPA HOLI @ AMMINABHAVI (DIED ON 12/05/2000)		
MALLAVVA (WIFE) (DIED ON 14/11/1999)		
DRAKSHAYANI (DEFT.1)	NEELAVVAGOURAVVA (PLFF.)	(DEFT.2)
MAHANTESH (DEFT.3)		

The plaintiff had instituted against the defendants, O.S. No.249/2000 (hereinafter referred to as the first suit), to pass decree of partition and separate possession in respect of 1/3rd share in the property bearing No.31/1+2+3+4A and another item of land bearing Sy. No.337 measuring 1 acre 31 guntas and the house properties bearing Nos.614 and 516/10, situated at Dharwad. The suit was contested. After trial, suit was decreed in respect of the property bearing No.31/1+2+3+4B and in respect of other items, the suit was dismissed. Assailing the said decree, defendant No.1 filed R.A. No.99/2007. By a Judgment dated 10.02.2010, the appeal was allowed and suit was dismissed. Assailing the said Decree, the plaintiff filed RSA No.5343/2010. An application seeking amendment of the plaint, for insertion of the property bearing No. 31/1+2+3+4B , in place of property bearing No. 31/1+2+3+4A , was filed. By a Judgment dated 06.09.2013, both the application and appeal were dismissed. SLP (Civil) No.1223/2016 filed in the Supreme Court was dismissed on 05.01.2016.

3. On 11.07.2014, the plaintiff filed O.S. No.277/2014 (hereinafter referred to as the second suit) to pass a decree of partition and separate possession in respect of property bearing No.31/1+2+3+4B. Defendant No.1 filed I.A.2, under Order II

Rule 2 CPC and sought dismissal of the suit as not maintainable, by referring to the proceedings of the previous suit, stated supra. By filing statement of objections, the application was resisted by the plaintiff. The Trial Court by raising a point for consideration whether defendant No.1 has made out grounds for dismissal of the suit? allowed I.A.2 vide Order dated 23.04.2015 and dismissed the suit as not maintainable. Assailing the said Order, R.A. No.77/2015 was filed in the Dist. Court, Dharwad. By Judgment dated 27.11.2015 it was held the suit is hit by Order II Rule 2 CPC and the appeal was dismissed. This second appeal is directed against the said order and decree.

4. This appeal was admitted to consider the following substantial questions of law:-

(1) Whether the Courts below are justified in dismissing the suit and appeal respectively, in the absence of pleading by the defendants with regard to suit being barred by Order II Rule 2 of CPC and in the absence of an issue thereon?

(2) Whether the bar under Order II Rule 2 of CPC is attracted when the second suit is instituted for grant of relief in respect of a property, which was not the subject matter of the first suit and, with reference to a different cause of action?

(3) Whether the second suit is barred by the principles of res judicata as per S.11 of CPC?

(4) Whether the dismissal of the suit without trial was permissible?

5. Sri B.S. Kamate, learned advocate submitted that the subject-matter of the first suit being not the subject-matter in the second suit and there being no adjudication with regard to the subject property, the courts below have misunderstood the scope and ambit of Order II Rule 2 CPC. He contended that the lower Appellate Court has erred in affirming the order passed by the Trial Court, on the ground that the second suit is hit by S.11 read with Order II Rule 2 of CPC, although the subject-matter of the second suit was not the subject-matter of the first suit.

6. Sri R.V. Itagi, learned advocate, on the other hand, submitted that having regard to the findings recorded in the Judgments passed in R.A. No.99/2007 and RSA No.5343/2010, the second suit is hit by the principles of res judicata and the bar

under Order II Rule 2 of CPC also being attracted, Courts below are justified in passing the impugned Order and the Judgment respectively and this appeal being devoid of merit is liable to be dismissed.

7. Considered the rival contentions. The short question for consideration is, whether the dismissal of the second suit as barred by the provisions of Order II Rule 2(2) CPC is justified?

8. The object of Order II Rule 2 of CPC, firstly is to ensure that no defendant is sued and vexed twice in regard to the same cause of action and secondly, to prevent a plaintiff from splitting the claims and remedies based on the same cause of action. Thus, Order II Rule 2 of CPC bars a plaintiff who had earlier claimed certain reliefs in regard to a cause of action from filing a second suit in regard to the other relief(s), on the same cause of action.

9. In GURBUX SINGH Vs. BHOORALAL, AIR 1964 SC 1810, the requirements to be established by the defendant to succeed by raising the plea of bar under S.11 and also Order II Rule 2 of CPC, it has been held by the Apex Court as follows:

6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out: (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action, but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2 of CPC can be established only

if the defendant files in evidence, the pleading in the previous suit and thereby proves to the court the identity of the cause of action in the two suits.

(emphasis is supplied)

From the said Judgment it is clear, that unless defendant pleads the bar under Order II Rule 2 CPC and an issue is framed focussing the parties to that bar to the suit, the Court cannot examine and reject the suit on the ground of bar under Order II Rule 2 CPC. It is also clear from the said decision, that pleading(s) in the earlier suit should be exhibited or marked by consent or at least admitted by both parties i.e., in order to enable the plaintiff to explain or show that the second suit is based on a distinct and different cause of action, by providing an opportunity.

10. In BENGAL WATERPROOF LTD. Vs. BOMBAY WATERPROOF MFG. CO., (1997) 1 SCC 99, Apex Court, while considering the plea of bar under Order II Rule 2(3) of CPC, in respect of claim of relief in subsequent suit, has held, that plea is maintainable only if defendant files in evidence before Trial Court pleadings in the previous suit to prove identity of cause of action in two suits and that inference about the bar under Order II Rule 2(3) cannot be culled merely from the plaint in the second suit.

11. To answer an issue or point, as to whether a second suit by the plaintiff is barred under Order II Rule 2 of CPC, the Court is required to see, as to whether the relief(s) claimed in both the suits arise from the same cause of action.

12. In the present case, the defendants having not filed written statement, issues were not raised and there is no trial. The pleadings, evidence and the Judgment passed in the first suit was not exhibited or marked by consent. What was produced was only the Judgments and Decrees passed in the aforesaid first appeal and the second appeal and thus, the plaintiff had no opportunity to explain or show that the subject-matter of the second suit is different and is based on a distinct or different cause of action. Thus, in the absence of pleading, issue raised and proof by the defendants, Trial Court has committed illegality in dismissing this suit i.e., while allowing I.A.No.2 and, the First Appellate Court has committed error in upholding the erroneous decision of the Trial Court.

13. To succeed with regard to attraction of principles of res judicata as per S.11 CPC, there must be a pleading by the defendant and an issue raised, thereby, giving opportunity to the plaintiff to make out the case. The issue of res judicata being not a pure question of law, but a mixed question of fact and law, the parties should have opportunity to put forth their contentions and produce the proof. (vide ALAMENGADA MUDDAPPA Vs. ALAMENGADA KUTTAPPA, 2011 (1) Kar.L.J. 303)

14. In SYED MOHD. SALIE LABBAI (DEAD) BY L.Rs. Vs. MOHD. HANIFA (DEAD) BY L.Rs., (1976) 4 SCC 780, Apex Court has held, that before a plea of res judicata can be given effect, the following conditions must be proved:

- (1) that the litigating parties must be the same;
- (2) that the subject-matter of the suit also must be identical;
- (3) that the matter must be finally decided between the parties; and
- (4) that the suit must be decided by a court of competent jurisdiction.

It has been held, that the best method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the judgments which operate as res judicata.

It has been further held that, it is well settled that pleadings can not be proved merely by recitals of the allegations mentioned in the Judgment

15. It is trite that in order to apply the bar of res judicata, under S.11 CPC, to any suit or issue, the essential requirements to be fulfilled are: (i) The matter must be directly and substantially in issue in the former suit and in the later suit. (ii) The prior suit should be between the same parties or persons claiming under them. (iii) Parties should have litigated under the same title in the earlier suit. (iv) The matter in issue in the subsequent suit must have been heard and finally decided in the first suit. (v) The court trying the former suit must have been competent to try the particular issue in question.

16. In V.RAJESHWARI (Smt.) Vs. T.C. SARAVANABAVA, (2004) 1 SCC 551, with regard to Rule of res judicata, Apex Court has held, that the foundation for the plea must be laid in pleadings and then an issue must be framed and tried and that the plea taken should be substantiated by producing the copies of the pleadings, issues and the judgment in the previous case. It has been further held, that it is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the Judgment. That apart, it has been held as follows:

13 Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.

17. The difference between the doctrine of res-judicata and the principle underlying Order II Rule 2 of CPC has been made clear by the Apex Court, in KUNJAN NAIR SIVARAMAN NAIR Vs. NARAYANAN NAIR AND OTHERS, (2004) 3 SCC 277 and the same reads as follows:

The doctrine of res judicata differs from the principle underlying Order 2 Rule 2 in that the former places emphasis on the plaintiff's duty to exhaust all available grounds in support of his claim, while the latter requires the plaintiff to claim all reliefs emanating from the same cause of action. Order - 2 concerns framing of a suit and requires that the plaintiff shall include whole of his claim in the framing of the suit. Sub-rule (1), inter alia, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the very same cause of action. If he relinquishes any claim to bring the suit within the jurisdiction of any court, he will not be entitled to that relief in any subsequent suit. Further sub-rule (3) provides that the person entitled to more than one reliefs 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 such relief he shall not afterwards be permitted to sue for relief so omitted.

18. In the present case, in the absence of production of the pleadings of First Suit, the Courts below, without any discussion and assigning reasons, have abruptly concluded, that S.11 CPC is attracted and the suit is not maintainable.

19. Undisputedly, written statement to the second suit was not filed and consequently the issues were not raised and the trial was not conducted. The plaint was not rejected in exercise of power under Order VII Rule 11 CPC, or for non compliance of an order to answer interrogatories, or for discovery or inspection of documents under Order XI Rule 21 CPC.

20. By giving a go-by to the procedure prescribed in the Code, Trial Court has dismissed the suit and First Appellate Court by its failure to notice the error committed by the Trial Court has dismissed the appeal. The impugned Order and the Judgment tested on the touch-stone of the principles laid down in the decisions, noticed supra-are wholly erroneous.

21. Fundamental rules governing the exercise of Jurisdiction in terms of the provisions made in Civil Procedure Code, 1908 has not been kept in view and followed by both the Courts below. There being flawed approach to the case, the impugned Order and Judgment respectively are vitiated and, therefore, cannot be sustained.

In the result, the appeal is allowed and the impugned Order and the Judgment are set aside. O.S. No.277/2014 having not been decided in accordance with law, is restored to the file of Trial Court. To expedite the proceedings of the case, the parties are directed to appear before the Trial Court, on 23.07.2016 and receive further orders.

The defendants are permitted to file the written statement, before 27.08.2016. The issues shall be raised within a period of two weeks from the date on which the written statement is filed. As the parties are before the Court(s) for nearly 16 years, there is need to decide the suit early. Hence, the plaintiff shall adduce and complete her side of evidence within a period of 6 weeks from the date the suit is posted for trial and the defendants shall adduce and complete their side of evidence within a period of 6 weeks from the date the plaintiff closes her case. The suit shall be decided within a period of two months from the date the trial is complete. To facilitate the same, the Trial Court shall see to it, that neither of the parties shall adopt any delay tactics and unnecessary adjournment(s) shall be refused.

It is made clear that no view has been expressed herein on the merits of the case and all the pleas and contentions of both the parties are left open to be urged before the Trial Court.

In the facts and circumstances of the case the parties shall bear their respective costs.

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