

Bodduru Nagaraju and ors. Vs. Gudla Narasimha Murthy

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Court : Andhra Pradesh

Decided On : Mar-04-2005

Reported in : 2005(2)ALT465

Judge : K.C. Bhanu, J.

Acts : Code of Civil Procedure (CPC) - Order 2, Rule 2 and 2(3)

Appeal No. : C.R.P. No. 793 of 2004

Appellant : Bodduru Nagaraju and ors.

Respondent : Gudla Narasimha Murthy

Advocate for Def. : P.R. Prasad, Adv.

Advocate for Pet/Ap. : G. Rama Gopal, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

K.C. Bhanu, J.

1. This Civil Revision Petition is filed challenging the order, dated 5-1-2004 in LA. No. 1217 of 2003 in O.S. No. 2 of 1998 on the file of the Senior Civil Judge, Vizianagaram.

2. The brief facts that are necessary for the disposal of this revision petition are as follows:

Originally, the respondent-plaintiff filed O.S. No. 80 of 1993 on the file of the District Munsif's Court, Cheepurapalli for recovery of interest for the years 1990 to 1993 due under the mortgage deed. Thereafter, the respondent herein filed another O.S. No. 90 of 1996 on the file of the Senior Civil Judge, Vizianagaram for recovery of the entire amount due under the same mortgage deed with subsequent interest from 1993 onwards. The cause of action in both the suits is one and the same. Thereafter, I.A. No. 1217 of 2003 is filed under Order 2 Rule 2 of Civil Procedure Code seeking permission to institute further suit for recovery of the entire amount due under the mortgage with subsequent interest. The said petition was allowed. Challenging the same, this revision petition is filed.

3. Heard the learned counsel for both the parties and perused the material on record.

4. The learned counsel for the petitioners-defendants has contended that the order under challenge is contrary to the scope and the spirit of Order 2 Rule 2 CPC and the respondent-plaintiff should have applied for leave while instituting the first suit, but the interlocutory application was filed after a lapse of 10 years and hence, the impugned order is contrary to the Order 2 Rule 2(3)CPC.

5. On the other hand, the learned counsel for the respondent-plaintiff has contended that during the pendency of the first suit, at any time, the plaintiff can seek for leave of the Court to claim for the remaining part of the amount. As the first suit is pending, the respondent-plaintiff rightly filed an application, which was allowed by the lower Court and the order under challenge does not suffer from any legal infirmities so as to call for interference by this Court.

6. In the exercise of jurisdiction under Article 227, the High Court can set aside for ignoring the findings of fact of an inferior Court if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the Court has come to or any other words, it is a finding which was perverse in law. Now it has to be seen whether the trial Court keep itself

within the bounds of its authority in reaching the findings.

7. It is not disputed before this Court that originally, O.S. No. 80 of 1993 was filed for recovery of interest for the years 1990 to 1993 based on the mortgage deed, dated 24-2-1990. The said suit was later transferred to Senior Civil Judge, Vizianagaram and numbered as O.S. No. 2 of 1998. Admittedly, the said suit is pending. It is also not disputed before this Court that subsequently another suit in O.S. No. 90 of 1996 was filed for recovery of principal amount and interest based on the very mortgage deed, dated 24-2-1990.

Order 2 Rule 2 (3) reads as follows:

'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.'

8. This rule is directed against two evils that split up all the claims and the splitting up of the remedies. To make the rule applicable, three conditions must be satisfied namely, the previous and the present suits must arise out of the same cause of action and secondly, they must be between the same parties, thirdly, for filing subsequent suit for omission of any relief, leave should have been obtained. Now, the point is that at what stage or at what point of time, the plaintiff who fails to sue in respect of claims but omits can file an application to grant leave of the Court.

9. The learned counsel for the respondent-plaintiff has relied upon a decision reported in *Inacio Martins v. Narayan Hari Naik*, : [1993]2SCR1015 wherein it is held as follows:

'However, Sub-rule (3) of Rule 2 provides that 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 relief he shall not afterwards sue for any relief so omitted. It is well known that Order 2, Rule 2 CPC is based on the salutary principle that a defendant or defendants should not be twice vexed for the same cause by splitting the claim and the reliefs. To

preclude the plaintiff from so doing it is provided that if he omits any part of the claim or fails to claim a remedy available to him in respect of that cause of action, he will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the Court.'

There is no dispute about the proposition of law laid down by their Lordships in the above referred decision. In that decision, the first suit of the plaintiff was for an injunction and the same was dismissed on the technical ground that since the plaintiff was not in a de facto possession, no injunction could be granted. The subsequent suit was based on distinct cause of action not found in the former suit. Therefore, the above decision will not come to rescue of the petitioners herein.

10. The learned counsel for the respondent herein has relied upon another decision reported in *Osmania University v. Md. R.A. Humayun*, 1988 (2) ALT 787 wherein this Court held to the following effect:

'It is well settled that in order to sustain the bar under Order 2 Rule 2, the defendant who raised the plea must make out (i) the second suit was in respect of the same cause of action as that on which the previous cause of action is based: (ii) in respect of the same cause of action, the plaintiff is entitled to more than one relief; (iii) that being so, the plaintiff omitted to sue for relief for which the second suit has been filed.'

In another decision reported in *Edara Venkayya v. Edara Venkata*, AIR 1938 Mad. 979 Rao the following findings are recorded:

'It may be that as a matter of prudence, the plaintiff will do well to make the application for leave even before he files his plaint or at least along with his plaint, because he will otherwise be running the risk of the application being refused when it will be too late to set matters right. But that is different from saying that the Court has no power to grant leave unless the application is made before the institution of the suit or along with the presentation of the plaint. So far as I can see, the Court when called upon to deal with such an application will ordinarily have to consider whether the grant of leave to reserve certain remedies will in the circumstances be appropriate in the sense that it will not give an unfair advantage

to the plaintiff or impose an unfair burden on the defendant. A question of this kind can as well as dealt with by the Court during the pendency of the suit as before its institution.'

He also relied upon another decision reported in *Canning Mitra Phoenix Ltd. v. Popular Construction*, : AIR1993 Bom67 wherein it is held as under:

'The older Codes obviously contemplated that the application for leave might be made after the institution of the suit, though it fixed the time limit by prescribing that leave should be obtained before the first hearing. However, in reenacting this provision in the Code of 1908, the legislature has omitted the words 'obtained before the first hearing' between the words 'except with the leave of the Court' and 'to sue for any such reliefs'. The effect of this omission is that though such leave could earlier be obtained before the first hearing of the suit, it is now to be obtained at the time of institution of the suit and not afterwards.'

From the above decisions, it is clear that the plaintiff can obtain leave at the time of institution of the suit or during the pendency of the suit in view of the amendment of Order 2 Rule 2 because of the omission of the words 'obtained before the first hearing' between the words 'except with the leave of the Court' to sue for any such reliefs. So, before omitting those words it would clearly indicate that leave has to be obtained before the first hearing of the first suit because the words 'obtained before the first hearing' have been omitted which indicate that during the pendency of the first suit, the plaintiff can seek leave of the Court. So, during the pendency of O.S. No. 80 of 1993, later numbered as O.S. No. 2 of 1998, the plaintiff can seek leave of the court. If leave is granted, the 2nd suit in O.S. No. 90 of 1996 would be maintainable.

11. When Order 2 Rule 2 operates as a bar it only deprives the plaintiff of availing his remedy of filing the subsequent suit. It cannot have the effect of vesting of right as laid down in the decision reported in *Ahmad Zaman Khan v. Baldeo*, AIR 1933 All. 228 Das wherein it is observed as follows:

'We are unable to give effect to this argument. Order 2 Rule 2 C.P.C. when it operates as a bar, merely deprives the claimant of his remedy by suit founded on

the same cause of action. It cannot have the effect of vesting any right in any of the defendants.'

As a matter of fact, the plaintiff, at the time of filing O.S. No. 2 of 1998 reserved his right to file further proceedings for the number and he filed I.A. No. 1217 of 2003 in O.S. No. 2 of 1998 during the pendency of the suit. The trial of the suit has not been commenced.

12. Therefore, following the judgments of the Bombay High Court and Madras High Court respectively, I am of the considered view that during the pendency of the first suit, the plaintiff can seek leave of the Court for filing the suit for the remaining part of the relief which was so omitted in the first suit. The learned Senior Civil Judges, Vizianagaram has considered these aspects, in the right perspective and the findings are not shown to have been perverse. Hence, the order under challenge does not suffer from any incurable legal infirmities so as to call for interference by this Court. The revision petition is devoid of merits.

13. The Civil Revision Petition is accordingly dismissed. In the circumstances of the case, there shall be no order as to costs.