

Ayodhya Prasad Vs. Chhedilal

Ayodhya Prasad Vs. Chhedilal

SooperKanoon Citation : sooperkanoon.com/499543

Court : Madhya Pradesh

Decided On : Nov-05-1999

Reported in : AIR2000MP184; 2000(1)MPHT452

Judge : V.K. Agarwal, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 2, Rule 2; [Limitation Act, 1963](#) - Schedule - Article 69

Appeal No. : F.A. No. 146 of 1996

Appellant : Ayodhya Prasad

Respondent : Chhedilal

Advocate for Def. : Prashant Mishra, Adv.

Advocate for Pet/Ap. : Alok Aradhe, Adv.

Disposition : Appeal dismissed

Judgement :

V.K. Agarwal, J.

1. The plaintiff/appellant by this first appeal has challenged the order dated 18-9-1995, in Civil Suit No. 13-B/93, by District Judge, Raigarh, whereby the suit of the plaintiff/appellant for recovery of amount of damages and the price of boring

machine was dismissed, as barred under Order 2, Rule 2 of CPC.

2. Undisputably, the plaintiff/appellant had executed the work of boring a tube-well by his boring machine in the 'Poha' mill of the defendant/respondent. According to the plaintiff/appellant after boring for about 120 ft., the work had to be abandoned for want of adequate water supply. The defendant/respondent had agreed to pay boring charges @ Rs. 20.00 per foot. The plaintiff/ appellant demanded from the defendant/ respondent the amount for the work executed by him as per the above agreement between the parties. However, the defendant/respondent did not pay the said charges and also did not permit the plaintiff/appellant to take away his boring machine. Therefore, the plaintiff/appellant served a notice dated 22-1-1986 on the respondent/defendant. Thereafter, he filed a suit registered as Civil Suit No. 17-A/86 (hereinafter referred to as earlier suit for convenience), claiming damages amounting to Re. 50.00 for wrongful retention of the boring machine for a day i.e. for 23-1 -1986. The said suit was decreed and damages was granted to him. The appeal against the said decree was also unsuccessful.

3. Subsequently another suit registered as Civil Suit No. 13-B/93, was filed by the plaintiff/appellant In the Court of District Judge claiming the amount of damages for three years, prior to the filing of the suit amounting to Rs. 54,750/- for wrongful retention of boring machine, as also Rs. 50,000/- towards the cost of the boring machine, wrongfully retained by the defendant/respondent.

4. The suit was resisted by the defendant/respondent inter alia on the ground that as the plaintiff/appellant in the earlier Civil Suit No. 17-A/86 did not claim the relief of return of boring machine or its price. It would be deemed that he has relinquished and given up that relief. Therefore, the subsequent suit claiming such a relief was barred under Order 2, Rule 2. CPC.

5. The learned trial Court by the impugned order has upheld the objection of the defendant/respondent as above and held that subsequent suit is barred under Order 2, Rule 2 of CPC. It was accordingly dismissed.

6. The learned counsel for the plaintiff/ appellant has urged that the earlier suit was filed claiming damages for one day i.e. for 23-1-86 only, while the present suit

C.S. No. 13-B/93, was for damages for the subsequent period which was not barred under Order 2, Rule 2, CPC as there was continuing cause of action on account of wrongful detention of the boring machine. It was therefore submitted that as the causes of action of two suits were different, therefore, subsequent suit was not barred under Order 2. Rule 2, CPC. Reliance has been placed by the learned counsel for the appellant on *Bengal Waterproof Ltd. v. Bombay Waterproof Manufacturing Company*, AIR 1997 SC 1398 and *Sumerchand Hukumchand v. Hukumchand Mathurdas*, 1965 MPLJ 829 : AIR 1965 MP 177.

7. As against this, the learned counsel for the respondent has urged that the earlier suit was also based on the same cause of action. In both the suits damages for wrongful detention of the boring machine was claimed. The earlier suit C.S. 17-A/91 in which damages for a day i.e. for 23-1-86 was claimed, was Based on the averment that the machine was wrongfully detained, causing loss to the plaintiff/appellant. Similarly, the present suit registered as Civil Suit No. 1-3-B/93 was also based on the similar averments. However, in the earlier suit the relief of return of boring machine or its price though could be prayed for, was not claimed. Therefore, the claim regarding that relief in the subsequent suit No. 13-B/93, would be barred under Order 2, Rule 2, CPC, as having been relinquished or given up by the plaintiff/appellant. It has therefore been urged that the subsequent suit for damages also would not lie, because the appellant was debarred from claiming the relief of return of boring machine. Therefore, the impugned order holding the subsequent suit as barred, was justified.

8. To appreciate the controversy, it would be useful to reproduce Order 2, Rule 2 of Civil Procedure Code which reads :

'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.

Relinquishment of part of claim-- (2) : 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.

Omission to sue for one or 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. It would thus be clear that in order to attract the bar of Order 2, Rule 2. CPC, the earlier suit should be founded on the same cause of action on which the subsequent suit is based, and if in the earlier suit the plaintiff has omitted to such in respect of or intentionally relinquished any portion of his claim, he will not subsequently be entitled to sue in respect of the portion of his claim so omitted or relinquished.

10. The question for consideration therefore is as to whether the reliefs claimed in the subsequent Suit No. 13-B/93 is based on the same cause of action on which the earlier suit was based, and therefore would be barred under Order 2, Rule 2, CPC?

11. In the instant case, undisputably the earlier suit was founded on the averments to the effect that the respondent/ defendant had unlawfully detained the boring machine of the plaintiff/appellant. Based on the above averments, the plaintiff/appellant had filed the earlier suit for damages. However, in the said earlier suit though he claimed damages of Rs. 50/- for a day only, for wrongful detention of his boring machine, but did not claim the relief of return of the machine or the price thereof. It is clear that the claim for damages as above in the earlier suit, was based on the 'cause of action' of wrongful detention of his machine by the respondent/defendant. Therefore, in the earlier suit, it was open to the plaintiff/ appellant to ask for the wider relief of return of boring machine or the

price thereof, in addition to damages for its wrongful detention. However, the plaintiff/appellant did not do so; and as noticed earlier chose only to claim damages of Rs. 50/- for a day for wrongful detention of the machine. Thus having omitted to claim larger and further relief of return of machine or the price thereof, he must be deemed to have relinquished the said claim.

12. In *Sidramappa v. Rajashetty*, AIR 1970 SC 1059, it has been observed that at page 1060 :

The requirement of Order 2, Rule 2, Code of Civil Procedure is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a 'cause of action'. Cause of action 'means the cause of action for which the suit was brought'. It cannot be said that the cause of action on which the present suit was brought is the same as that in the previous suit. Cause of action is a cause of action which give occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings -- See *Mohd. Hafiz v. Mohd. Zakaria*, 49 Ind App 9 : AIR 1922 PC 23'.

13. In *Kewal Singh v. ML Lajwanti*, AIR 1980 SC 161 the Supreme Court has observed at page 163 :

'A perusal of Order 2, R. 2 would clearly reveal that this provision applies to cases where a plaintiff omits to sue a portion of the cause of action on which the suit is based either by relinquishing the cause of action or by omitting a part of it. The provision has, therefore, no application to cases where the plaintiff bases his suit on separate and distinct causes of action and chooses to relinquish one or the other of them. In such cases, it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he may have so relinquished.'

14. In the instant case, as has been noted earlier also, the cause of action as disclosed in the plaint in the earlier suit, was wrongful detention of boring machine by the respondent/defendant. In his subsequent Suit No. 13-B/93 also he complains of wrongful detention of his machine and has prayed for relief of return

of machine or price thereof along with the damages for the period preceding three years of the filing of aforementioned subsequent suit. Obviously therefore, in both the suits, the causes of action constitute and rest on the averments of wrongful detention of boring machine by the defendant/respondent.

15. In view of above, since the plaintiff/ appellant had omitted to sue for the relief of return of machine or the price thereof in the earlier suit, that relief would be deemed to have been relinquished by him. Therefore, the said relief of return of machine or the price thereof could not have been claimed by him in subsequent Civil Suit No. 13-B/93, as it was barred under Order 2, Rule 2, CPC.

16. Learned counsel for the appellant has contended that the wrongful detention of the machine constituted continuous cause of action, and therefore a relief in that regard could be prayed in the subsequent suit. To support his contention as above, the learned counsel has relied upon *Bengal Waterproof Ltd. v. Bombay Waterproof Manufacturing Company* (supra). In the said case, the first suit was based on infringement of trade mark and passing of action till date of the earlier suit. The second suit was regarding continuous act of infringement of trade mark and passing of action, on the part of the defendant subsequent to the filing of the earlier suit. It was held that such a subsequent suit was not barred. However, as noted earlier in the instant case, the wrongful detention as alleged took place prior to the filing of the first suit, and therefore, as mentioned earlier, the relief in that regard could have been claimed by the appellant in the earlier suit which he did not do. Therefore, the facts of the present case are distinguishable.

17. The learned counsel for the appellant has also relied upon *Sumerchand Hukum Chand v. Hukum Chand Mathurdas* (supra). In the said case the plaintiff had entered into an agreement of purchase of land. Earlier suit was brought for the refund of earnest money by the plaintiff/purchaser on the ground that the defendant did not have absolute title over the suit land, and could not therefore transfer the same. The finding in the case was that the defendant had title to convey. Thereafter a second suit was filed by the plaintiff for specific performance of the aforesaid contract of sale. The objection raised by the defendant that the suit was barred under Order 2. Rule 2 of Code of Civil Procedure, was not

accepted, observing that the two suits were based on two mutually exclusive grounds, and the cause of action in the two suits were different. However, the position, in the instant case, is different and as pointed out earlier, cause of action in both the suits filed by the plaintiff/appellant was the same.

18. It may also be noticed that the relief as above of return of machines or price thereof was also barred under the law of Limitation, in view of the fact that the machine was alleged to be wrongfully retained from 23-1-1986 while the present Suit No. 13-B/93 has been filed on 1-9-1993 i.e. after more than seven years. Article 69 of the Indian [Limitation Act, 1963](#) provides a limitation of three years commencing from the date on which the property was taken. Therefore, it is clear that the subsequent suit No. 13-B/93 for the relief of return of Boring machine was barred by limitation also.

19. That being so, the other relief of damages flowing from the basic relief was above, could also not be granted. Thus, the two suits having been based on the same cause of action the subsequent suit was barred under Order 2, Rule 2, CPC as has been held by the trial Court. Therefore, the contentions of the learned counsel for the appellant that the present suit was maintainable as there was continuing wrong and cause of action, cannot be accepted.

20. Accordingly, there is no justification for interference in the impugned order. The appeal is therefore dismissed. Parties shall however, bear their own costs of this appeal.