

Madan Lal Arora Vs. Shiv Kumar

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Court : Delhi

Decided On : Mar-22-2007

Reported in : 2007(95)DRJ395

Judge : Swatanter Kumar and; H.R. Malhotra, JJ.

Acts : Code of Criminal Procedure (CrPC) - Sections 107 and 151; Code of Civil Procedure (CPC) - Sections 11 - Order 2, Rule 2 - Order 6, Rule 17 - Order 7, Rule 11

Appeal No. : RFA 679/2006

Appellant : Madan Lal Arora

Respondent : Shiv Kumar

Advocate for Def. : NEMO

Advocate for Pet/Ap. : B.U. Barqui, Adv

Disposition : Appeal dismissed

Judgement :

Swatanter Kumar, J.

1. In furtherance to our order dated 9th February, 2007, Learned Counsel appearing for the appellant had placed on record the requisite documents

including pleadings of the suit.

2. We have heard Learned Counsel appearing for the appellant at some length.

3. The plaintiff/appellant filed a suit for declaration, possession and in the alternative suit for redemption with possession and other reliefs being Suit No. 3/2006. He claimed these reliefs on the basis of the fact that he had purchased a shop measuring 8' X 30' forming part of property bearing No. X/140 (New) and Old No. 274/1, out of Khasra No. 72 situated in the abadi of Tagore Gali, Gandhi Nagar, Delhi, for the consideration of Rs.95,000/- from one Shri Amarnath Nagpal S/o Shri Ram Narain Nagpal, who had executed General Power of Attorney, Agreement to Sell, Affidavit, Receipt, Possession Letter and Deed of Will all dated 26th March, 1999 in favor of the plaintiff. He claimed absolute right and title in the said property/shop. The plaintiff claimed that apart from the said property, he also purchased a flat on the first floor and another flat on the 2nd floor forming part of property bearing No. 63 at Gobind Park, Delhi-51 through the defendant. According to the plaintiff, the respondent/defendant had induced him and made him drug addicted in course of the period. Resultantly, the plaintiff had to go for medical treatment during the period March-April, 2000. The plaintiff was admitted in All India Institute of Medical Science, New Delhi on 15th April, 2000 and was discharged on 23rd June, 2000. He became a person of an unsound mind as a result of drug addiction and was incapable of understanding any documents. According to him, the entire original documents pertaining to the said property were lying with the defendant from the day of the purchase of the said property as the plaintiff had extreme trust in the defendant. However, the defendant had acted in a manner unbecoming of a friend and claimed himself to be the mortgagee of the said property. The plaintiff claimed in possession of the flat at first floor, 63, Gobind Park, Delhi but all the original documents pertaining to said flat were lying with the defendant. The defendant also claimed himself to be the mortgagee of the flat at 2nd floor, 63, Gobind Park, Delhi-53. The defendant got a case registered against the plaintiff in connivance with the police under Section 107/151 Cr.P.C. The defendant before the Special Executive Magistrate, East District, Delhi on 3rd May, 2001 deposed that he had, in pursuance of the Agreement dated 4.4.2000, advanced an amount of Rs.3,71,000/- on interest to the plaintiff. It was the case of

the plaintiff that possession of the property was being taken by the defendant illegally. He was of an unsound mind at the time of execution of Agreement dated 4.4.2000. The plaintiff had requested the defendant to treat the said agreement dated 4th April, 2000 as null and void but the defendant was adamant to create third party interest and delivering the possession of the said property to a third party. In the plaint the plaintiff had stated that he had earlier filed a suit for possession, cancellation of documents in the Court of Senior Civil Judge, Delhi but the said suit was dismissed by Civil Judge, Delhi vide judgment and decree dated 28th March, 2005. It was specifically pleaded by the appellant that he had never sold the property to the defendant and the agreement-cum-mortgage deed was inconsequential. He gave details of aforesaid properties in the plaint. The plaintiff claimed redemption of the property as well as relief of possession in terms of order 34 CPC. It was stated that no interest was payable on the sum of Rs.3,71,000/-. The following reliefs were prayed for in the plaint:

(i) To pass a declaratory decree in favor of the plaintiff and against the defendant declaring agreement cum mortgage dt. 4.4.2005 as null and void without consideration with further decree of possession directing the defendant to handover possession of both properties shown in red colour in both the site plans and detailed in para 19 of the plaint, with cost.

AND IN ALTERNATIVE

(ii) (a) To pass a preliminary decree for redemption ordering that an account be taken of what was due to the defendant at the date of such decree for -

(i) Principal Rs.3,71,000/- and no interest on the mortgage, (ii) the costs of suit, if any, awarded to him, and (iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount of Rs.3,71,000/- so due at that date; and

(c) directing -

(i) that, if the plaintiff pays into Court the aforesaid amount so due on or before such date as the Court may fix within six months from the date on which the Court confirms and counter signs the account taken under Clause (a), or from the date on which such amount is declared in Court under Clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in Rule 10, together with subsequent interest on such sums respectively as provided in Rule 11, the defendant shall deliver up to the plaintiff or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property i.e. One Flat on First Floor out of Property No. 63 at Gobind Park, Delhi-51, shown in Red Colour in the site plan; One Shop measuring 8 ft X 30 ft. (up to the extent of ceiling level) bearing shop, out of property No. X-140, and Mpl. No. 274/1, situated at abadi of Tagore Gali, Gandhi Nagar, Delhi-31, shown in Red Colour and the ownership documents of the Flat on First Floor out of Property No. 63 at Gobind Park, Delhi-51, shown in Yellow Colour in the site plan, and shall, if so required, re-transfer the above said property to the plaintiff at his cost free from the mortgage and from all encumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amounts adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree -

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under Sub-rule(1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

4. Any other relief or order deem fit and proper also be passed in favor of the plaintiff and against the defendant.

5. The suit was contested by the defendant, who had taken preliminary objections with regard to maintainability of the suit as the suit was filed without any cause of action and the plaint was liable to be rejected under Order 7 Rule 11 CPC. An objection with regard to payment of court fee was also taken. It was stated that shop in question was purchased by the plaintiff from one Sh. Amar Nath Nagpal on 26th March, 1999 on the basis of General Power of Attorney, Agreement to Sell, Registered Will and other allied documents for the sale consideration of Rs.95,000/-. Thereafter, the plaintiff had sold the said shop on 2nd September, 1999 in favor of Sh. Harbhajan Bhola for a total sale consideration of Rs.1,10,000/- and he executed various documents in favor of Sh. Harbhajan Bhola. The plaintiff had also delivered the vacant possession as well as all previous title deeds of the shop in question to said Harbhajan Bhola. The plaintiff had nothing to do with the said shop thereafter. It was further the case of the defendant in relation to the other property, that the plaintiff had taken a loan of Rs.3,71,000/- on 4.4.2000. The plaintiff was required to pay the same within 3 months. It was agreed upon between the plaintiff and defendant to pay the accrued interest by 5th of every month. However, the plaintiff failed to pay the said amount as well as the interest accrued thereupon. It was prayed that the said suit be dismissed. It was also contended that the respondent reserves its right to take appropriate action against the plaintiff. On the pleadings of the parties, the trial Court framed the issues on 20th March, 2006. By order dated 17th May, 2005, it was directed that issue No. 2 shall be decided as a preliminary issue. This issue was answered against the plaintiff/appellant and in favor of defendant/respondent. The Trial Court while referring to Section 11 and Order 2 Rule 2 of Code of Civil Procedure found that the suit was hit by principles of res-judicata and that the subsequent suit cannot lie

because of abandonment of claim by the plaintiff/appellant in the previous suit. The contention raised before us was that neither the principles of res-judicata or constructive res-judicata are applicable nor bar contained under Order 2 Rule 2 CPC would be attracted in the present case. It is contended that the subsequent suit is based on a distinct cause of action, which was not dependant nor could arise on the basis of earlier plaint. The Learned Counsel appearing on behalf of the appellant has relied upon the judgments of the Supreme Court in the cases of State of Gujarat and Ors. v. Meghji Pethraj Shah Charitable Trust and Ors. : [1994]3SCR163 , Deva Ram and Anr. v. Ishwar Chand and Ors. : AIR 1996 SC378 , Marwari Kumhar and Ors. v. Bhagwanpuri Guru Ganeshpuri and Anr. : AIR 2000 SC2629 , Dalip Singh v. Mehar Singh Rathee and Ors. : (2004)7SCC650 , Kunjan Nair Sivaraman Nair v. Narayanan Nair and Ors. : AIR 2004 SC1761 and State of Maharashtra and Anr. v. National Construction Company, Bombay and Anr. : [1996]1SCR293 .

6. At the very outset it is necessary for us to notice that on identical facts, the appellant had filed the previous suit. The factual averments made in both the plaints are similar and in fact the dates, figures and even the factual matrix are identical, as stated in 11 paragraphs. The only distinction in both the plaints is that in the subsequent plaint, reference has been made in greater detail with regard to the agreement dated 4th April, 2000 and the relief of redemption and consequential possession have been claimed in relation to the property. Both the properties had been referred to in the said suit and even definite claim was made in that behalf. The reliefs claimed in the earlier suit read as under:

i) grant the decree for possession in respect to the suit premises bearing No. X/140 (New), and old No. 274/1, out of Khasra No. 72 situated in the abadi of Tagore Gali, Gandhi Nagar, Delhi as shown RED in the site plan;

ii) cancel the Agreement-cum-Mortgage Deed dated 4.4.2000 as null and void.

7. The earlier suit was dismissed by the Court vide judgment and, 2005. I decree dated 28th Marcht will be useful to refer to the relevant part of the judgment, which reads as under:

That earlier the plaintiff had filed the suit for possession and cancellation of documents against the defendant and during the course of the trial the plaintiff has been asked to file the advoluerum court fee but the plaintiff has failed to complied that and moved an application Under Order 6 Rule 17 of CPC in which an amendment has been sought to file a fresh plaint only as the suit for possession and the prayer of the cancellation of the document has been withdrawn.

8. After gone through the pleadings of the parties the following issues have been framed by this Court vide order dated 17.11.2004:

1) Whether the plaintiff is entitled for the decree of the possession of one shop against the defendant? OPP

2) Relief.

9. Having heard the Ld. Counsel for the parties and given my careful consideration to the material available on record my issue wise findings are as under:

ISSUE No. 1:

The onus to prove this issue was upon the plaintiff but the plaintiff has not led any evidence to prove the present suit in his favor despite several opportunities being granted by this Court and the plaintiff evidence was closed on 9.3.2005. Thereafter the case was fixed for defendant evidence and the defendant has also not led any evidence and the defendant evidence has also been closed vide order 21.3.2005.

During the course of the final argument it is argued by the counsel for the defendant that the alleged shop had been purchased by the defendant from one Sh. Harbhajan Bhola and he has filed the original Title Deed of the same.

Since the onus to prove this issue was upon the plaintiff and the plaintiff has failed to prove any of the allegation against the defendant hence this issue accordingly decided against the plaintiff.

RELIEF:

In the light of the aforesaid discussion, the plaintiff has completely failed to prove his case against the defendant, hence the suit of the plaintiff is hereby dismissed as no order to cost.

Decree sheet be prepared accordingly.

10. As is evident from the above findings recorded by the trial Court, the appellant/plaintiff had withdrawn even the relief of cancellation and had prayed only for a relief of possession, which was declined on merits as in the opinion of the trial Court, the appellant had failed to prove any of the allegations made in the plaint. This judgment had attained finality between the parties as the appellant did not file any appeal against the same. The conduct of the appellant itself clearly shows that he had abandoned the claim intentionally and there was no subsequent cause of action. The subsequent suit is entirely based upon the agreement dated 4.4.2000 and the relief of cancellation of the said document has specifically been prayed for in the subsequent suit. This relief for the reasons best known to the appellant was intentionally abandoned or given up in the earlier suit. The bar of Order 2 Rule 2 on its plain language would be applicable to the present case. It is obligatory upon a party to raise the whole claim available to the party at the time of institution of the suit. The suit must be based upon complete cause of action and the reliefs, which are available to the party, must be claimed unless relief was otherwise granted by the Court of competent jurisdiction. Abandonment or relinquishment of any portion of the claim would certainly operate as a bar for bringing a fresh suit. Reference in this regard can be made to a recent judgment of the Division bench of this case in the case of Shri Kartar Singh Yadav v. Shri Suresh Chand Arora (RFA No. 150/2006 decided on 27th April, 2006) where the Court in somewhat similar circumstances held as under:

12. At this very stage, it is pertinent to note that the order of the court dated 27th August, 2001 was not challenged by the present appellant in any proceedings and in fact even in the present appeal, there is no challenge to the said order. The subsequent suit filed by the plaintiff being suit No. 913/03 for recovery of money was also based upon the same averments and instead of filing a suit for specific performance for which the leave was sought, the suit for recovery was filed. As is

clear from the order of the court dated 27th August, 2001, no liberty or permission was granted by the court to the appellant to file a suit for specific performance. The court had clearly stated that no order either refusing or granting any liberty to file a fresh suit for specific performance is passed. The plaintiff in that suit was directed to be controlled by the law in force. It was for the appellant to challenge that order if he was aggrieved from the said order. That order has attained finality and correctness of that has not even been questioned even in the present case. Once an order attains finality its consequences in law must follow. Firstly, even if for the sake of argument, it is believed that the order dated 27th August, 2001 intended to give any concession or permission to the appellant for brining a fresh suit then the leave has to be construed as granted. The leave was for filing a suit for specific performance and the suit for recovery even would become barred by time as according to the plaintiff, the amount was payable in the year 2000 itself.

13. The Learned Counsel appearing for the appellant heavily relied upon the judgment of the Allahabad High Court in the case of Bharat and Ors. v. Ram Pratap and Ors. : AIR1985 All61 to contend that in absence of specific order granting permission to file a suit, it cannot be construed that the prayer was refused. Firstly, the facts of that case are entirely different and have no application to the case in hand on known principles of ratio descendi. Furthermore, in this case, the court had specifically recorded in its order dated 27th August, 2001 that liberty is not granted. Once the language of the order is clear, it will be presumed that what is not specifically granted would be deemed to have been rejected. The plaintiff in the suit which he filed in the year 2001 had specifically referred to all circumstances or facts which gave him complete cause of action for suing the defendant for recovery of the amount. The appellant failed to ask for such a relief and made no attempt to seek permission of the court to bring a suit subsequently on the same cause of action.

14. We do not find any error in the approach of the learned trial court in rejecting the plaint and dismissing the suit under Order 7 Rule 11(d) of the Code as the subsequent suit being barred under the provisions of Order 2 Rule 2 of the CPC.

15. Consequently, we find no merit in this appeal. The same is dismissed while leaving the parties to bear their own costs.

11. The provisions of res-judicata would also be applicable in the present case as on identical facts, all the 3 reliefs i.e. redemption, possession and cancellation of documents along with other consequential reliefs were available to the appellant as on the date of institution of the first suit being Suit No. 21/2003. As already noticed, the appellant did not claim the relief of redemption and by amendment also withdrew the relief of cancellation with complete awareness of the law and facts. The issue of possession was answered on merits against the appellant. The findings recorded by the trial Court on that issue attained finality and it cannot be said that they are not the findings recorded on merits of the case. If a party to a suit fails to discharge its onus in relation to an issue burden of proving the same was on him cannot be permitted to turn back and argue that since no evidence was led, the findings cannot be said to be on merits of the case. If such an argument is accepted, it would straightway hit the basic principles underlining the principles of Order 11 CPC as well as doctrine of finality. In view of this reasoning we are of the considered view that the view taken by the trial Court cannot be faulted with either in law or facts.

12. In the case of State of Gujarat (supra), the Supreme Court had stated that same issue, already decided finally by the High Court earlier, should directly and substantially be in controversy in subsequent suit to attract these provisions. Firstly, this judgment has no application to the facts of the present case. The principles enunciated does not require any discussion. The issue of possession was decided in the first suit and in the subsequent suit no relief can be granted if the relief of possession cannot be granted. On that issue, the appellant is bound by the findings recorded by the trial Court in earlier suit. The principle of law enunciated by the Supreme Court in the case of Dalip Singh (supra) in relation to applicability of principles of Order 2 Rule 2 is hardly a matter of controversy. In fact it is the settled law that sine qua non for applicability of Order 2 Rule 2 is that a person entitled to more than one relief in respect of the same cause of action has omitted to sue for some relief without the leave of the Court. We have already noticed that the basic cause of action is the same i.e. agreement dated 4.4.2000

and the sale of shop in question. This is the essence and basic cause of action upon which the suit was framed by the appellant on the previous occasion and even in subsequent suit. This judgment in fact stairs the appellant in face and is squarely against the appellant.

13. Heavy reliance was placed by the counsel appearing on behalf of the appellant upon the judgment of the Supreme Court in the case of State of Maharashtra (supra) to contend that to attract principles of res-judicata and Order 2 Rule 2, the suit should be heard and finally decided by the Court and dismissal on technical ground would not attract this provision. The argument is misconceived as in that case the suit was dismissed on the ground of non-joinder of party without any adjudication on merits on any of the issues. We are unable to understand as to how this judgment is of any help to the appellant as in the judgment dated 28th March, 2005 the issue was decided on merits and the findings were recorded by the Court.

14. None of the judgments relied upon by Learned Counsel appearing for the appellant is of any help to the appellant. In fact, the principles stated in these judgments entirely demolish the arguments raised on behalf of the appellant.

15. In view of the aforesaid discussion, we do not find any merit in the present appeal. The same is accordingly dismissed.