**P.V. Kothandarama Raju Vs. the Common Fund Belonging to Senguntha Mudaliar Through Its President T. Sornavelu Mudaliar**

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**Court** : Chennai

**Decided On :** Nov-13-1987

**Reported in** : (1988)1MLJ242

**Appellant** : P.V. Kothandarama Raju

**Respondent** : The Common Fund Belonging to Senguntha Mudaliar Through Its President T. Sornavelu Mudaliar

**Judgement** :

**Srinivasan, J.**

1. S.A. No. 510 of 1984-This appeal arises out of a suit for possession and recovery of damages from January, 1978 to April, 1978. The title of the plaintiff is not in dispute. The only defence to the suit was that it was barred by the provisions of Order 2, Rule 2, C.P.C. Admittedly the plaintiff had filed a suit earlier as O.S.A. No. 17 of 1978 on the file of the District Munsif of Srivilliputhur. In that suit the prayer was for recovery of Rs. 3,045 with interest thereon by way of damages for use and occupation. The cause of action for the suit was stated to be the trespass committed by the defendant on 10.1.1975. The present suit is filed for recovery of possession as well as damages for the subsequent period.

2. The trial Court took the view that the suit was barred by Order 2, Rule 2, C.P.C., and dismissed the same. On appeal that conclusion was reversed and the learned appellate Judge held that the suit was not barred by Order 2, Rule 2, C.P.C.

3. In this second appeal learned Counsel for the appellant relied on a decision of this Court in Gnanaprakasam v. Sabasthi Ammal : (1980)1MLJ182 . In that case a suit was filed for recovery of possession and for past and future mesne profits. That suit was dismissed and a subsequent suit was filed for cancellation of a document on the ground that it was vitiated by fraud and misrepresentation. After setting out the principles relating to the bar of suit under Order 2, Rule 2, C.P.C., and after referring to the decision of the Supreme Court in Gurbux Singh v. Bhooralal : [1964]7SCR831 , V. Ratnam, J, held that the second suit was barred by Order 2, Rule 2, C.P.C. He observed that the omission of the plaintiff in the earlier suit to sue for all the reliefs arising on the same cause of action viz., the execution of the document in question could not be got over either by stating that the cause of action of the later suit was different or that it arose only after the declaration that the document should be set aside. He held that the transaction was one and indivisible and when once such a transaction was set at naught all things done thereunder must also be restored and therefore the plaintiff should have sought for cancellation of the document also in the earlier suit. Learned Counsel relies upon the principles enunciated in that judgment. In fact, those principles were laid down by the Supreme Court in Gurbux Singh v. Bhooralal : [1964]7SCR831 . They are as follows:

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

4. Learned Counsel also drew my attention to the judgment of Nainar Sundaram, J., in Dominic Ammal and Anr. v. Muthuswami and Anr. : (1987)1MLJ124 . There the learned Judge negatived the plea of bar under Order 2, Rule 2, C.P.C., on the facts of that case. I do not think that either of the cases referred to by learned Counsel for the appellant would help him in the present appeal. The matter is not Res Integra and there is direct authority on the point. A Division Bench of this Court as early as in Tirupati v. Narasimha I.L.R. Mad. 210, held that a suit for recovery of possession was not barred by an earlier suit filed for recovery of mesne profits only. Dealing with the provision of the Code of Civil Procedure then in existence, viz., Section 43, the Bench observed that:

In the case before us it is argued by the appellants' pleader that, when a tenant holds over in opposition to the landlord the latter is under an obligation to eject him at once and has not the option of suing simply for mesne profits on the ground of adverse occupancy until either the tenant gives up possession or he desires to eject him; but in applying Section 43, it should be remembered that there is a distinction between splitting of the same cause of action into two or more suits and instituting different suits upon distinct causes of action. Though it is true that claims, such as those mentioned in the illustration to Section 43, are referable to the same cause of action on the ground that, when the rent remains unpaid for several years, the debts due, though consisting of several items, are so connected as to form one entire demand, yet it cannot be held that, when the causes of action are distinct and independent, the plaintiff is bound to unite all the claims founded upon them in one suit. We are of opinion that the suit to recover mesne profits and the suit to eject are not parts of a claim founded on the identical cause of action within the meaning of Section 43, and that if mesne profits are alone claimed in the first suit as damages due for adverse occupancy, a second suit can be maintained to recover possession of the land.

5. That decision was approved by a Full Bench of this Court in Ponnammal v. Ramamirda Iyer and two Ors. : (1915)28MLJ127 . The Full Bench placed reliance upon the provisions of Section 44 of the then Code, which corresponds to Order 2, Rule 4, of the present Code, it would be useful to set out the following observations of the Full Bench:

It seems to us that claims for possession and claims for mesne profits have always been treated as separate causes of action in the Code of Civil Procedure following in this English law. At common law claims for ejectment and for mesne profits were separate causes of action for mesne profits did not lie until judgment had been recovered in ejectment. Section 10 of the Code of 1959 expressly provided that a claim for the recovery of land and a claim for mesne profits arising out of such land should be deemed to be distinct causes of action within the meaning of the two preceding Sections which dealt with joinder of causes of action in the same suit. When the Code was remodelled in 1877 after the Judicature Act and the Rules of Practice framed thereunder had come into force in England, the language of these rules was in many instances substituted for the language of the Code of 1859, and in this way Section 10 dropped out and was replaced by Section 44 (now Order 2, Rule 4, of the Civil Procedure Code, 1908) the language of which was taken from Order 17, Rule 2, of the English rules. The effect however is the same because, when the rule says that no cause of action shall, unless with the leave of the Court be joined with a suit for the recovery of immovable property except (a) claims for mesne profits or arrears of rent in respect of the property claimed, or any part thereof, it is quite clear that the legislature considered claims for the recovery of land and claims of action, and that it was not intended to depart from the express provisions to that effect in Section 10 of the Code of 1859. We have also been referred to Pavana Reena Saminathan v. Pana Lana Palaniappa (1913)41 I.A. 142 : 1914 A.C. 618 a decision on Section 34 of the Ceylon Code of Civil Procedure which is in the same terms as Section 43 of the Code of 1882, in which their Lordships discuss the scope of that rule, and lay down that it is not intended to secure the inclusion in one and the same action of different causes of action, even if they arise out of the same transactions, and point out that the provision that an obligation and a collateral security for the performance should be deemed to constitute but one cause of action is a substantive enactment making what would otherwise be two independent causes of action one cause of action for the purposes of the Section. This shows that the distinction between different causes of action must be strictly observed. For the foregoing reasons and following the decisions quoted in the reference, Monohur Lal v. Gouri Sunkur I.L.R.(1883) Cal. 283 : 12 C.L.R. 434; Tirupati v. Narasimha I.L.R.(1888) Mad.

210, Lalessor Babui v. Janki Bibi I.L.R.(1892) Cal. 615 and Gutta Saramma v. Maganti Raminedu I.L.R.(1908) Mad. 406 : 8 C.W.N. 329.

6. Recently a Full Bench of the Punjab High Court had occasion to consider the matter at some length. After referring to the decisions of the various High Courts, the Full Bench of the Punjab High Court held that Order 2, Rule 2, of the Code of Civil Procedure does not bar a suit for mesne profits filed subsequently to a suit for possession of the property, because the claim for those accrued mesne profits had not been earlier included therein. The Full Bench has made a specific reference to the Division Bench judgment of this Court in Tirupati v. Narasimha I.L.R. Mad. 210 and the Full Bench decision of this Court in Ponnammal v. Ramamirda Aiyer and Two Ors. : (1915)28MLJ127 , to which I have already referred.

In view of these decisions, the petition is beyond doubt that the present suit for recovery of possession is not barred by the provisions of Order 11, Rule 2, C.P.C. The conclusion arrived at by the lower Appellate Court is correct and the second appeal has to fail and it is dismissed.

7. S.A. No. 511 of 1984 : In this second appeal the only question which arises for consideration is whether the sum of Rs. 8,200 admittedly paid by the appellant to the respondent in instalments on various occasions is a deposit or a loan. The trial Court took the view that it was a deposit and the suit was not barred by limitation. The lower Appellate Court reversed that conclusion and held that it was a loan and the suit was barred by limitation as it was filed beyond the period of three years from the date of last advance. For arriving at that conclusion the lower Appellate Court has taken the view that the issue was concluded by the judgment in the prior suit filed by the plaintiff viz., O.S. No. 21 of 1975 on the file of the Sub Court, Ramanathapuram. That suit was filed by the appellant for (1) permanent injunction restraining the respondent from in any manner interfering with his possession of the suit property; (2) for a mandatory injunction directing the respondent to remove the locks put up on either side of A1 C1 B D and failing compliance for removal thereof through Court; (3) for a mandatory injunction directing the respondent to demolish the dividing wall at A1 C1 and failing compliance for demolition of the same through court; (4) for recovery of possession of the portion marked A A1 C

C1 of the suit property from the respondent; and (5) for a permanent injunction restraining the respondent from leasing the suit property marked A B C D to third parties. That claim was made by the plaintiff on the footing of an agreement alleged to have been entered into between him and the defendant under which the defendant had requested financial accommodation to an extent of Rs. 8,200 on condition that the said amount had to be advanced without any liability for payment of interest and that the appellant would be put back in possession of the newly constructed portion for his business and the amount would be repaid at the time when he vacated the premises. There was no issue before the Court whether the amount advanced was a loan or a deposit. However, the question, whether the agreement put forward by the plaintiff was true or not, was considered. The Court held that the agreement pleaded by the plaintiff was not true. That finding was affirmed by the appellate court in A.S. No. 277 of 1976. While dealing with the question, the appellate court made the following observations:

Exs. A-1 to A-8 are the stamped receipts issued by the 1st respondent for the receipt of cash to a total sum of Rs. 8,200 from the appellant on various dates from 14.3.1974 to 18.11.1974, All these receipts are described only as. As a matter of fact, it is admitted in the plaint itself that in March, 1974, the 1st respondent represented that the community would like to put up new construction in line with Door No. 351 and 353 and requested the appellant to vacate temporarily and also requested financial accommodation to an extent of Rs. 8,200 from him, that it was agreed between the parties at that time, that the appellant should advance the loan without any interest and the rents should be adjusted in the loan and after reconstruction, the loan less the rent had to be repaid without any interest and the appellant gave Rs. 8,200 as loan in eight instalments ranging from 13.3.1974, to 16.11.1974, under receipts, to the 1st respondent for the purpose of putting up the construction in the suit property. There is absolutely nothing in these receipts to show that the payments under them were made either by way of advance or loan in pursuance of any agreement between the parties as alleged in plaint. If really there was any agreement between the parties, in all probabilities, the appellant should have made mention of the same in the receipts, more especially at least in the receipts which he had obtained immediately after the alleged agreement between the parties or in the receipts, which he had

obtained subsequent to his vacating the suit premises.

9. Thus it is seen that the question, whether the amount advanced was a loan or a deposit, was not in issue in those proceedings. Hence, the conclusion of the lower appellate court that the appellant is barred by the principle of Res Judicata from advancing the contention that the amount advanced by him was only a deposit is not correct.

10. Considering the question independently of the judgment in the prior proceedings, it is seen from Ex. B-8 which is a notice issued by the respondent's counsel to the appellant the following case has been advanced on behalf of the respondent:

My client states that they you are also occupying the rest of the portions in the eastern side in Door No. 352 upto Ambalpuli Bazaar which is a subject-matter of H.R.C. No. 8/75 on the file of the District Munsif Court, Srivilliputhur. Regarding that portion also you are perfectly aware that eviction has been ordered and you are directed to pay the cost. For that portion also, you have not paid any amount either towards rent or damages towards use and occupation and you are in arrears to the tune of Rs. 3,575. So the total amount due from you comes to Rs. 6,550. Your money to the tune of Rs. 8,200 is available with the common fund. The understanding is that so far as the eastern portion is concerned the arrears of rent or damages for use and occupation is to be deducted from out of Rs. 8,200.

This averment shows that the amount advanced by the appellant to the respondent was only intended to be a deposit and not a loan simpliciter. Reliance is placed upon the averments in the plaint in O.S. No. 21 of 1975 wherein the appellant had characterised the advance as loan. There was no occasion for the appellant to put forward the case that it was a deposit as in that suit he did not seek recovery of the money. That suit related only to the recovery of possession and mandatory injunction. The amounts found in the plaint in O.S. No. 21 of 1975 cannot conclude the case against the appellant. At best they could only amount to an admission on the part of the appellant that it was a loan, but, that admission has been sufficiently explained in the present proceedings.

11. As the amount advanced by the appellant to the respondent is only a deposit the suit is not barred by limitation. The appellant will be entitled only to a sum of Rs. 8,200 as admittedly he is not entitled to get any interest on the said amount until he vacates the premises. The trial Court has granted interest from the date of the plaint on the said amount of Rs. 8,200. Even on his own showing the appellant will not be entitled to claim interest on the said amount until he vacates the premises in his possession and hands over the same to the respondent. Hence the appellant will be entitled only to a decree for a sum of Rs. 8,200 from the respondent. He will not be entitled to any interest on the said amount until he hands over possession of the property, which is the subject-matter of O.S. No. 81 of 1978 from which the Second Appeal No. 510 of 1984 arises.

12. In the result the second appeal No. 511 of 1984 is allowed to the extent indicated above. The judgment and decree of the lower appellate court are set aside and the judgment of the trial Court is partially restored. Both the parties will bear their respective costs in both the appeals.