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Court : Chennai

Decided On : Jul-30-1929

Reported in : 123Ind.Cas.1

Judge : Anantakrishna Iyer, J.

Appellant : Narayanaswamy Udayan and ors.

Respondent : Mannar

Judgement :

Anantakrishna Iyer, J.

1. The only question that has been argued in this case by the defendant, who is the appellant before me, is whether the present suit is barred under the provisions of Order XXIII. Rule 1(3), Civil Procedure Code. The Court of first instance held it was, while the lower Appellate Court held it was not.

2. The circumstances under which the plea of bar under Order XXIII, Rule 1 (3), Civil Procedure Code, was raised are these. The plaintiff's father Sabapathi Udayan died in 1913 when the first plaintiff was a minor. On the allegation that the defendant (the maternal uncle of the plaintiff) was appointed as trustee by the plaintiff's father to manage the suit properties and to render account to the plaintiff on plaintiff's attaining majority, the plaintiff instituted O.S. No. 329 of 1918 on the file of the Ami District Munsif's Court against the defendant to recover possession

of the suit properties and for an account of his management of the properties as a trustee of the plaintiff. The defendant denied that he was appointed trustee by the plaintiff's father and also of his liability to account. Before that suit came on for hearing, the plaintiff applied for leave to withdraw the suit and it was ordered that the suit be withdrawn, and that the parties do bear their own costs. No permission of Court was obtained as contemplated by Order XXIII, Rule 1(3), Civil Procedure Code. Subsequently the plaintiff brought O.S. No. 476 of 1923 which gave rise to the present second appeal. This second suit is, as I read the plaint, based on the allegation that the defendant is a trespasser, who took possession of the properties on the death of the plaintiff's father without any right to do so, the plaintiff having been a minor at the time. Paragraph 9 of the plaint alleged that the plaintiff was misled by the representations made by the defendant and hence framed the former suit on the footing that the defendant was a trustee on behalf of the plaintiff, and that it was after the filing of the written statement by the defendant that the plaintiff found out that the defendant had misled him, and that he accordingly withdrew the prior suit and filed the present suit on the footing that the defendant was a trespasser. Paragraph 15 stated that the cause of action arose in November 1913, when the defendant trespassed on the suit properties on the death of the plaintiff's father, and the plaint prayed for delivery of possession of the properties and for payment of mesne profits for the three years prior to the date of the suit. The defendant raised the plea of bar under Order XXIII, Rule 1(3), Civil Procedure Code. The question for consideration is whether the present suit is so barred.

3. The plaint in the former suit is very material to decide this question, and though it was not filed as an exhibit in the first Court. I am informed by the learned Advocates for the parties that the same was filed and marked as Ex. V by the lower Appellate Court. I find that Ex. V is referred to in para. 8 of the appellate judgment; but it would be better if the lower Appellate Courts would append to their judgments a list of new exhibits filed by parties for the first time in the Appellate Court (see Rule 84 of the Civil Rules of Practice and Circular Order Vol. I, page 99). I think this is generally done, but in the present case the appellate judgment contains no such list, and so there was some difficulty in ascertaining the exact facts relating to Ex. V. But it is clear that the plaint in the prior suit was accepted

(and I think rightly) by the lower Appellate Court and marked as Ex. V. Without reference to the plaint in the prior suit it would be difficult to decide questions of bar under Order XXIII, Rule 1(3), satisfactorily. Though Ex. V has not been translated and printed, the same was read out in Court and I have no doubt that it was a suit filed on the basis that the defendant, the maternal uncle of the plaintiff, was shortly before the death of the father of the plaintiff appointed as trustee of the properties (which are said to be the properties of the plaintiff's father). Paragraphs 4,7,8 and 9 of Ex. V, in my opinion, make this position clear. There are the allegations that the defendant is plaintiff's trustee, that all properties were entrusted to the defendant--that the defendant is bound to keep proper accounts, and render accounts to the plaintiff, the plaintiff valued the amount likely to be found due to him as the result of accounting at a particular figure, offering to pay additional Court-fee should the amount decreed exceed, that amount. As I read it, the previous plaint was framed on the footing that the defendant was appointed by the plaintiff's father as trustee of the plaintiff in respect of the properties and that as such the defendant was bound to render accounts to the plaintiff. The present suit is framed on the footing that the defendant had no rights of any sort to the properties and that he unlawfully took possession of the same on the death of the plaintiff's father when the plaintiff was a minor, and that the defendant is a trespasser--pure and simple--and also mesne profits are claimed for three years prior to the suit.

4. On these facts. I have to decide the plea of bar under Order XXIII, Rule 1(3), Civil Procedure Code, raised by the defendant. Order XXIII, Rule 1(3) runs as follows: 'Where the plaintiff withdraws from a suit or abandons part of a claim, without the permission referred to in Sub-rule (2), he shall be precluded from instituting any fresh suit in respect of such subject-matter or part of the claim.' The decision of the question would thus turn on the meaning to be attached to the words, 'subject matter' or 'the claim' referred to in the section. As pointed out by the Full Bench of this High Court in the case reported as *Pandillapalli Singa Reddi v. Yeddula Subba Reddi* 35 Ind. Cas. 185 : 39 M. 987 : 31 M.L.J. 48 : 20 M.L.T. 62 : (1916) 2 M.W.N. 1 : 4 L.W. 1: "The terms 'subject matter' and the same matter' which occurred in the corresponding Section 373 of the old Code have not been defined, and must, we think, be construed strictly in a penal provision of this

character. Without attempting an exhaustive definition of ell that may be included in the term 'subject-matter', we are of opinion that where, as in the present case, the cause of action and the relief claimed in the second suit are not the same as the cause of action and the claim in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit. This was expressly decided in *Gopal Chandra Banerjee v. Purna Chandra Banerjee* 4 C.W.N. 110 with which we agree.' The Full Bench was composed of the learned Judges Sir John Wallis, Chief Justice, Abdur Rahim and Srinivasa Iyengar, JJ., and the opinion of the Full Bench was delivered by Sir John Wallis, C.J., Applying the test enunciated by the Full Bench, I am of opinion that the present suit is not barred by reason of the previous suit. The main allegations, the causes of action and the reliefs claimed are, in my opinion, substantially different in the two suits. No doubt the immoveable properties sought to be recovered are common to both. But they were claimed in the prior suit on the footing of the defendant being trustee of the plaintiff, the cause of action in the first suit being based on the appointment of the defendant by the plaintiff's father as a trustee of the plaintiff, the defendant was asked to render accounts of his management as a trustee, looking into the present plaint, the allegations are different. The defendant is described as a mere trespasser, and it is claimed that the plaintiff became owner of properties on the death of his father. The suit is filed within 12 years from the death of his father, and treating the defendant as trespasser, mesne profits are claimed against him for three years prior to the suit. Thus the main allegations in the plaints the causes of action and the reliefs claimed are, I think, substantially different in the two suits and that the 'subject-matter' in the two suits is different.

5. But it was argued by the learned Advocate for the defendant that the two suits must be taken to be substantially the same, and he took me through the several paragraphs in the two plaints. But after considering the allegations in the two plaints carefully, I think that the two plaints are substantially different in respect of the Several particulars I have mentioned above. The learned Advocate for the appellant, in ' support of his contention that the present suit is not maintainable referred me to the decision of the Privy Council in the case reported as *Srimut Rajah Mootoo Vijaya Raganadha Bodha Goorooswamy Periya Odaya Tavar v. Katama Natchiar* 11 M.I.A. 50 : 10 W.R.P.C. 1 : 2 Sar.P.C.J. 212 : 20 E.R. 20 and

also to the decision of Mr. Justice Krishnan and Mr. Justice Ramesam reported as Naina Muhammad Rowther v. Abdul Raman Rowther 72 Ind. Cas. 207 : 46 M. 135 : (1922) M.W.N. 845 : 17 L.W. 188 : 32 M.L.T. 82 : A.I.R. 1923 Mad. 257. On the other hand, the learned Advocate for the plaintiff-respondent referred me to the decision of the Full Bench of this High Court reported as Thrikaikat Madathil Raman Thiruthiyil Krishnen Nair 29 M. 153 : 16 M.L.J. 48 and to the decision of the Privy Council reported as Raja of Pittapur v. Venkata Mahipathi Surya 8 M. 520 : 12 I.A. 116 : 4 Sar. P.C.J. 638(P.C.). He also referred me to the decision of the Calcutta High Court in Kamini Kant Roy v. Ramanath Chuckerbutty 21 C. 265 and Gopal Chandra Banerjee v. Purna Chandra Banerjee 4 C.W.N. 110 and to the decision of the Bombay High Court in Rakhmabdi Piraji Sapkol v. Mahadeo Narayan Bundre 43 Ind. Cas. 752 : 42 B. 155 : 20 Bom. L.R. 35. He also referred me to the decision of the Privy Council reported as Saminathan Chetty v. Palaniappa Chetty 26 Ind Cas. 228 : 41 I.A. 142 : 18 C.W.N. 617 : 17 L R 56 : 83 L.J.P.C. 131 : (1914) A.C. 618 : 110 L.T. 913 (P.C.).

6. On a careful consideration of the question and of the authorities placed before me by the learned Advocates on either side, I have come to the conclusion that the plaintiff's present suit is maintainable and that there is no bar to the present suit by virtue of the provisions of Order XXIII, Rule 1 (3), Civil Procedure Code. The present is not a case where the plaintiff being owner of the properties and the defendant being a trespasser, the plaintiff claimed relief in the first suit tracing his ownership to, say, a Will in his favour, and in the second suit tracing his ownership to, say, his being the heir of the last holder. In such cases, both the suits are based upon plaintiff's titles as owner, and the defendant is no more concerned with any one source of the plaintiff's title than with another. In cases where the cause of action alleged is that the defendant got possession of the properties from the plaintiff by virtue of a contract entered into by the defendant with the plaintiff the question is different. Prima facie the plaintiff is entitled to file separate suits against the defendant when they are based upon separate contracts. If a suit based on a contract. alleged to be made by the plaintiff with the defendant fails for proof of such contract, a second suit based on plaintiff's title as owner and alleging the defendant to be a trespasser would prima facie not be barred by reason of the prior suit. Ramesam, J., at page 144 formulates the propositions that may [be

gathered from the decisions on the point. The second proposition laid down by his Lordship is 'where the first suit was to redeem one mortgage, it does not bar a suit to redeem a mortgage of a different date, though the property sought to be redeemed and the principal, amount of mortgage are identical *Ramaswami Ayyar v. Vythinatha Ayyar* 26 M. 760 : 13 M.L.J. 448, *Veerana Piliai v. Muthukumara Asary* 27 M. 102, *Thrikaikat Madathil Raman v. Thiruthiyil Krishnen* 29 M. 153 : 16 M.L.J. 48.' The third proposition is 'where the first suit was based merely on the relationship of landlord and tenant between the plaintiff and the defendant (and not on plaintiff's title as owner or otherwise), a second suit based on title is not barred.' *Mangalathammal v. Veerappa Goundan* 52 Ind. Cas. 813 : (1919) M.W.N. 287. The fourth proposition is where the plaintiff sought to recover a property as owner, a second suit to recover the same property also as owner is barred, even though the details for the ownership are different from those in the first.' Thus the decision of Ramesam, J., as I understand the same supports the view I take of the law on the point, and I am unable to see how that decision helps the defendant in the present case. The decision of Bashyam Iyengar, J., in *Ramaswami Ayyar v. Vythinatha Ayyar* 26 M. 760 : 13 M.L.J. 448 has been the subject of much discussion. I wish to quote a passage from the judgment of the learned Judge which occurs at page 775 of the report 'Every transaction of lease imposes on the lessee the obligation of delivery to the landlord of possession of the property at the expiration of the lease... Such obligation on the part of the lessee or mortgagee arises from the transaction of lease or mortgage which in respect of such obligation operates as an executory contract. The cause of action, therefore, in a suit based on a lease or mortgage arises ex contract and is based upon a contract. Such a suit, therefore, could be no bar to a subsequent suit based upon the plaintiff's title against the same defendant as a trespasser, the real test is whether the cause of action, or transaction on which the two suits are based, is the same, and not where the transaction is sought to be established in different modes or by different means.'

7. Applying the above reasoning, adopted by learned Judges in the various cases cited above, to the present case, I think that the first suit, based on the contract of trusteeship, could not bar the present suit brought on the footing that the defendant is a trespasser. The learned Advocate for the appellant, however,

sought to distinguish the above cases on the footing that in a suit for ejectment based on an expired lease the scope of the suit is limited to the proof of the lease, since when once the lease is proved, the defendant, the tenant--is estopper from denying, the landlord's title and is bound to surrender possession, and he argued that in a suit based on plaintiff's title as owner against the defendant as trespasser, the scope of the suit is not in any way thus restricted. With all respect I fail to see how that distinction helps him, in the present case; for, following the same reasoning, the plaintiff may say that the former suit was based on the contract of trusteeship and was, in the same way, of a limited scope, since a trustee could not deny the title of the cestui que trust. As remarked by the Privy Council in the case reported as *Srinivasa Moorthy v. Venkatavarada Iyengar* 11 Ind. Cas. 447 : 34 M. 257 : 15 : C.W.N. 741 : 8 A.L.J. 774 : 13 Bom.L.R. 520 : (1911) 2 M.W.N. 375 : 14 C.L.J. 64 : 21 M.L.J. 669 : 10 M.L.T. 263 : 38 I.A. 129 (P.C.): 'No person who has accepted the position of trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself.' If a suit brought on a specific lease is no bar to a subsequent suit brought to recover possession of the same properties based on the plaintiffs title as owner alleging the defendant to be a trespasser, (as the decided cases amply establish), I fail to see how a prior suit based on a contract of trusteeship would bar a subsequent suit to recover possession of the same properties based on plaintiff's title as owner and treating the defendant as a mere trespasser. 'The series of 'acts' or 'transactions' alleged to exist', giving rise to the reliefs claimed (see Order I, Rule 1, Civil Procedure Code) are, I think, different in the two suits, and I am of opinion that 'the subject-matter' and 'claim' in the two suits, are different within the meaning of Order XXIII, Rule 1 (3), Civil Procedure Code. I am supported in. this view by the decisions of this Court reported as *Pandillapalli Singa Reddi v. Jeddula Subba Reddi* 35 Ind. Cas. 185 : 39 M. 987 : 31 M.L.J. 48 : 20 M.L.T. 62 : (1916) 2 M.W.N. 1 : 4 L.W. 1, *Thrikaikat Madathil Raman v. Thiruhiiyl Krishnen Nair* 29 M. 153 : 16 M.L.J. 48 and *Mangalathammal v. Veerappa Goundan* 52 Ind. Cas. 813 : (1919) M.W.N. 287 and, as I understand the judgment, also by the decision in *Naina Muhammad Rowther v. Abdul Rahaman Rowther* 72 Ind. Cas. 207 : 46 M. 135 : (1922) M.W.N. 845 : 17 L.W. 188 : 32 M.L.T. 82 : A.I.R. 1923 Mad. 257.

8. The cause of action stated in the prior suit to recover immoveable property, some moveable property and for accounts treating defendant as a trustee is different from the cause of action stated in the present suit which is to recover possession of immoveable. property (the claim for moveables though included in the prior suit--is omitted in the present suit being barred by limitation) and mesne profits; the reliefs claimed are different. The present is based on the allegation that the defendant is a mere trespasser and that he trespassed on the property on the death of the plaintiff's father. I think that the 'subject-matter' and 'the claim' in the two suits are different. The withdrawal of the former suit without permission of the Court would not, in my view, constitute a legal bar to the plaintiff maintaining the present Suit, under Order XXIII, Rule 1 (3), Civil Procedure Code.

9. For the above reasons, I think that the contention of the appellant should be overruled; the second appeal is accordingly dismissed with costs.

10. I grant leave to appeal.