

Ramasamy and 4 ors. Vs. Ramasamy

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Court : Chennai

Decided On : Dec-24-1996

Reported in : 1997(3)CTC634

Judge : S.S. Subramani, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 10 and 100 - Order 2, Rule 2 - Order 6, Rules 1 and 2; Evidence Act - Sections 101

Appeal No. : Second Appeal No. 445 of 1995

Appellant : Ramasamy and 4 ors.

Respondent : Ramasamy

Advocate for Def. : A. Kothandaraman, Adv.

Advocate for Pet/Ap. : S. Subbiah, Adv.

Judgement :

ORDER

S.S. Subramani, J.

1. Plaintiff in O.S. No. 171 of 1985, who lost in both the Courts below have come upto with this second appeal, challenging the correctness of the judgments of both the Courts.

2. Between the same parties, there was another suit as O.S. No. 212 of 1982, for declaration of title and consequential injunction. In that property, there were few trees which were cut and removed by the defendant. That suit was decreed and it was confirmed in appeal. By the time of institution of this suit, it was said that a second appeal is pending before this Court. Even at the time of filing the earlier suit, some of the trees were cut and removed by the defendants. Damages was not claimed, and plaintiff in that case reserved his right to file a suit separately, claiming the same.

3. After decree, the present suit was filed to recover the damages to the extent of Rs. 6,000. Defendant admitted that he cut and removed the trees. But the only point he urged before Court below was that the suit is barred under Order 2, Rule 2, C.P.C. According to the defendant, the claim for damages is also based on the same cause of action, and the second suit for the said purpose is not maintainable. The claim for damages also ought to have been taken in the earlier suit, and plaintiffs having failed to do so, they are not entitled to file the present suit and recover the amount. Regarding the quantum, defendant contended that Rs. 6,000 claim by the plaintiffs is excessive or exaggerated. He has sold the timber only for Rs. 750.

4. Both the Courts below have held that the suit is barred under Order 2, Rule 2, C.P.C. and dismissed the suit. But for the technical plea, plaintiffs are entitled to a decree.

5. At the time of admission of the second appeal, the following substantial questions of law were raised for consideration:-

'Whether the suit for damages for the recovery of the value of the trees cut and removed by the defendant would be hit under Order II Rule 2 of the Code of Civil Procedure, when the claim for damages was not included in the earlier suit, for declaration of title and for permanent injunction?'

6. According to me, the procedure adopted by the Courts below in accepting the contention of the defendant that the suit is barred under Order 2, Rule 2, C.P.C. is not sustainable.

7. Courts below failed to note that the plaintiffs are entitled to enforce their right through Court, and if that suit is to be dismissed on a technical ground, the technicality will have to be proved by the best possible evidence.

8. The mode of proof regarding contention in respect of Order 2, Rule 2, C.P.C. is settled by the Supreme Court in the decision reported in *Gurbux Singh v. Bhooralal*, : [1964]7SCR831 wherein their Lordships said that the mode of proof regarding the plea of Order 2, Rule 2, C.P.C. is the production of the pleadings itself in the earlier case, and not by any other mode, the relevant portion of the decision reads thus:-

'In order that a plea of a bar under Order 2 Rule 2 (3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) 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. No doubt, a relief which is sought in a plaint would ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule, as the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on the basis of inferential reasoning, it is for this reason that we consider that a plea of a bar under Order 2 Rule 2, Civil Procedure Code can be established only if the defendant filed in evidence the pleadings in the previous suit and thereby proves to the court the identity of the cause of action in the two suits. It is common ground that the pleadings in C.S.28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2, Rule 2, Civil Procedure Code. The learned trial judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of

deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, *our opinion, rightly that without the plaint in the previous suit being on the record, a plea of a bar under Order 2, Rule 2, Civil Procedure Code, was not maintainable.*' (Italics supplied)

9. In this case, the only piece of evidence is the oral evidence of the parties. The best evidence before Court which could have been filed is not before the Courts below. The said Principle was reiterated by the Supreme Court in the Courts below. The said principle was reiterated by the Supreme Court in the decision on reported in *Deva Ram v. Ishwar Chand*, : AIR 1996 SC378 wherein their Lordships held thus:-

'In the instant case the previous suit was filed for recovery of a sum of Rs. 6,300 as sale-price of the land in suit which was dismissed with the finding that the document on which the suit was filed was not a sale deed but was a mere agreement for sale and therefore, the amount in question could not be recovered as sale-price. That document, thus, constituted the basis of the suit. The subsequent suit was brought by the plaintiffs for recovery of possession on the ground that they were the owners of the. land in suit and were consequently entitled to recover its possession. The cause of action, in the subsequent suit was, therefore, entirely different. Since the previous suit was for recovery of sale-price, the respondents could not possibly have claimed the relief of possession on the basis of title as title in that suit had been pleaded by them to have been transferred to defendants. The essential requirement for the applicability of Order 2 Rule 2, namely, the identity of cause of action in the previous suit and the subsequent suit was not established. Consequently, the subsequent suit could not be said to be barred by Order 2, Rule 2.' (Italics supplied)

10. For one more reason, the decisions of the Courts below have to be set aside. The defendant in his written statement, contended that the present suit is to be stayed under Section 10, C.P.C. His contention was that in the earlier suit, the title of the property in question and the present suit is also based on the same cause of action. That contention has been repelled by the Courts below and they have held that there is no reason to stay the suit. After holding that there is no ground to stay

the suit, the suit was dismissed on the ground that the suit is barred under Order 2, Rule 2, C.P.C, which is inconsistent. The trial Court, for the same reason, rejected the contention put forward under Section 10, C.P.C. In this connection, it may be noted that when a plea under Section 10, C.P.C. is taken, all the ingredients under Section 11, C.P.C. have to be complied with. That means, it must be based on the same cause of action. If the cause of action is different, there cannot be any question of stay. The trial Court has held that there is no reason to stay the suit under Section 10, C.P.C. which implies that both the suits are of different cause of action.

11. To find out whether the two suits are based on the same cause of action, one of the best methods recognised is, whether the same evidence will be sufficient to support the second case. In *Md. Khalil Khan v. Mahrur Ali Mian* , their Lordships said thus:-

'The correct test in cases falling under Order 2, Rule 2, is whether the claim in the new, suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

If The Evidence To Support The Two Claims Is Different, Then The Cause of Action Are Also different.' (Italics Supplied)

In a suit for declaration of title to property title alone is the matter in dispute. In the suit for recovery of damages, illegal act of the defendants and the loss sustained by plaintiff is also to be added. So, on the basis of the same evidence, plaintiff will not be entitled to get a decree even if title is proved. In the decision reported in *Bipin v. Rudranarayan Misra* : AIR1978 Ori203 , a learned Judge of the Orissa High Court, following the decision reported in *Md. Khalil Khan v. Mahrur Ali Mian* , has said thus:-

'Further, in order to apply Rule 2 of Order 2, it is necessary that facts which would entitle the plaintiff to the right claimed in both the suits must be the same. If, apart

from that is required to be proved in the first case, some additional facts have to be proved in the second one, it cannot be said that the two suits are based on the same cause of action.'

12. For the above reasons, I have to hold that the decisions of the Courts below are perverse. The same are based on no evidence. The entire decision is based on assumptions and surmises, which is deprecated by the Supreme Court in the decisions referred to supra. Factually also, the suit cannot be dismissed as barred under Order 2, Rule 2, C.P.C.

13. Regarding the quantum, though plaintiff has claimed Rs. 6,000, that part of the claim has not been substantiated. The defendant admitted that he has sold the timber for Rs. 750. Naturally, a decree could be granted for the amount conceded by the defendant.

14. In the result, I set aside the judgments of the Courts below. The substantial question of law is found in favour of the appellant. There will be a decree in favour of the plaintiffs for the amount of Rs. 750 with interest thereon at 12% per annum from the date of suit till date of decree, and thereafter at 6% per annum till the amount is realised. Plaintiffs will be entitled to their costs in all the three Courts.