

Chhotabhai Jethabhai Patel and Co. Vs. the Union of India (Uoi)

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Court : Kolkata

Decided On : Dec-24-1969

Reported in : AIR1971Cal221

Judge : Salil Kumar Datta, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 2, Rules 2 and 3

Appeal No. : A.F.A.D. No. 1368 of 1959

Appellant : Chhotabhai Jethabhai Patel and Co.

Respondent : The Union of India (Uoi)

Advocate for Def. : Ajoy Kumar Basu, Adv.

Advocate for Pet/Ap. : Charu Chandra Ganguly and ;Aruna Mukherjee, Adv.

Disposition : Appeal dismissed

Judgement :

ORDER

Salil Kumar Datta, J.

1. The only point for consideration in this appeal is whether the suit is barred under provisions of Order 2, Rule 2 of the Code of Civil Procedure. The plaintiff consigned 250 baskets of beedies on June 16, 1947, through the railways for their

transport from Sealdah Railway Station to Ransapore Railway Station in Assam on the basis of agreement contained in the Railway Receipt No. 857964 of even date. Out of 250 baskets, 209 baskets were delivered on or about September 6, 1947, in damaged condition and contents from some baskets were pilfered while 41 baskets were not delivered at all. For the recovery of the damage caused by short delivery and also delivery of the beedies in damaged condition the plaintiffs instituted in the Court of Small Causes. Calcutta on February 20. 1948, a suit valued at Rs. 1890/ 11/- and the suit was decreed. For damages for non-delivery of 41 baskets the plaintiffs filed a suit on September 1, 1948, in the High Court at Calcutta. On February 29, 1956, the High Court dismissed the suit on the ground that it had no jurisdiction to try the suit. Thereafter on March 1. 1956, the present suit was instituted. The suit was valued at Rs. 6560/- as compensation for non-delivery of the said 41 baskets of beedies, Rs. 59/12/- was claimed for refund of railway freight paid and Rs. 50/- as legal expenses in all for Rs. 6619-12 annas.

2. Union of India, the defendant, contested the suit and denied the liability for compensation and it was further contended that the suit was barred under provision of Order 2, Rule 2 of the Code of Civil Procedure.

3. At the hearing of the suit, the only objection which was urged on behalf of the defendant was that the suit was barred by Order 2, Rule 2 of the Code. The trial Court accepted the said contention and dismissed the suit and the appeal therefrom was also dismissed. The present second appeal arises out of the said appellate decree.

4. Mr. Charu Chandra Ganguly, the learned Advocate, appearing for the plaintiff has contended firstly that the suit was not barred under provision of Order 2. Rule 2 of the Code as the first court which tried the suit for recovery of damages due to rain water and pilferage in respect of the baskets delivered was filed in the Presidency Small Causes Court, Calcutta. Under Section 18 of the Presidency Small Causes Courts Act (Act XV of 1882) the pecuniary jurisdiction of the Presidency Small Causes Courts did not extend beyond Rs. 2,000/-. As the suit for recovery of the whole claim could not be instituted in such court, there could be, it was contended, no bar under Order 2, Rule 2 of the Code. Mr. Ajoy Kumar Basu,

the learned Advocate appearing for the respondent, has contended that as no leave was obtained of the Presidency Small Causes Courts for filing a subsequent suit in respect of the damages for baskets not delivered, it must be held that such suit was barred under Order 2, Rule 2 as the plaintiff must be deemed to have abandoned its claim for the amount claimed in present suit. Mr. Basu further contended that the question of jurisdiction of the first court was immaterial and could not affect the provision of law and there was no bar in the plaintiff instituting its suit in the proper court having jurisdiction for the entire claim.

5. On a consideration of the respective contentions of the parties. I am of opinion that the contention of Mr. Ganguly has no substance. Order 2, Rule 2 in Sub-rule (1) states that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the causes of action but at the same time it gave liberty to the plaintiff to relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. Here the plaintiff elected, to bring the suit in the Presidency Small Causes Court when there was no bar in its instituting the suit for the entire claim in the court having jurisdiction. When such suit is filed in a court, not having the requisite pecuniary jurisdiction, it must be deemed, in absence of any leave of the court to sue for the other reliefs, that the plaintiff has intentionally relinquished that portion of the claim which was beyond the jurisdiction of the first court. Under Rule 3 of Order 2 it is provided that if the plaintiff omits to sue for all such reliefs to which he is entitled, he shall not afterwards sue for any relief so omitted. Merely because the first court had no jurisdiction to try the suit for all reliefs to which the plaintiff was entitled, it cannot be held that there is no bar in his instituting a subsequent suit in another court for other reliefs not claimed for by him in the first court. On the contrary it must be held that Order 2, Rule 2 of the Code operated as a bar to the second suit, if no leave therefor was obtained. It is again not the plaintiff's ease that any such leave was obtained and the copy of the plaint of the suit in the Court of Small Causes exhibit A does not indicate so. The first contention of Mr. Ganguly must be overruled.

6. Mr. Ganguly has next argued that the causes of action of the two suits are wholly different and accordingly there cannot be any bar of the present suit under Order 2, Rule 2 of the Code, According to him the first suit was for damages

caused by rain water and pilferage while the second suit was for damages for non-delivery of the baskets. It will appear that different sets of evidence will be necessary for establishing the two different Claims of the plaintiff. Relying on the decision of the Judicial Committee of the Privy Council in *Md. Khalil Khan v. Mahubub Mian*, AIR 1949 PC 78, he contended that causes of action in the suits may be considered to be same if in substance they are identical, one of the tests laid down being that if the evidence to support the two claims is different, then the causes of action are also different. In the second suit, according to Mr. Ganguly, the evidence has to be led on the issue of the non-delivery whereas in the earlier suit, the evidence was confined to establish damage by rain water and pilferage. This will also be evidenced by the two certificates granted by the Railway Administration in regard to the two separate claims, one for short delivery in damaged condition, and the other for non-delivery exhibits 2 and 2(a) dated September 6 and 1, 1947, respectively.

7. Mr. Basu has contended that the foundation of the claim of the plaintiff against the railways is based on one contract, namely the contract of carriage of the consignment in question on the basis of one railway receipt and the liability of the administration is provided in Section 72 of the Indian Railways Act (Act IX of 1890), the railway's responsibility being that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872 (Act IX of 1872). Mr. Basu also relied on the decision in the case of *Governor-General in Council v. Musaddilal*, : [1961]3SCR647 , and it was held in that case that the railway administration in India is not an insurer of goods, but it is merely a bailee of goods entrusted to it for carriage. Section 72 of the Railways Act prescribes that the measure of the general responsibility to a railway administration for loss, destruction or deterioration of goods is subject to other provisions of the Act, governed by Sa 152 and 161 of the Indian Contract Act. 1872. Mr. Basu has also relied on the decision in *Duncan Brothers & Co. v. Jeetmull*, (1891) ILR 19 Cal 372 where it was held that when a contract for sale and purchase of goods is broken by the purchaser, in part by the refusal to take delivery, and in part by refusal to pay for goods delivered both breaches having occurred before any suit is brought the vendor is debarred by Section 43 of the Code of Civil Procedure, 1882, (similar to Order 2. Rule 2 of the Code of Civil Procedure, 1908) from bringing two suits against such

purchaser, his claim being one arising out of one cause of action and based on one and the same contract. Mr. Basu also drew my attention to the case of *Muhammad Hafiz v. Mirza Muhammad* 26 Cal WN 297 = (AIR 1922 PC 23) where it was held that when a creditor obtained a decree in a suit for interest on loan arising from hypothecation bond and thereafter brought a suit for the principal sum and arrears of interest, the subsequent suit was held as not maintainable under provision of Order 2, Rule 2 of the Code. It was held that the cause of action is the cause of action which gives occasion for and forms the foundation of the suit and if that cause of action enables a man to ask for a larger and wider relief than that to which he limits his claims, he cannot afterwards seek to recover the balance by independent proceedings. In *Kanhaiyalal v. Union of India*, : AIR 1958 Pat 565 it was held that when out of a single consignment there is a non-delivery of part and delivery of the balance in damaged condition, the two circumstances do not constitute two different causes of action for the plaintiff and two suits on them are not maintainable. It was further held that the claims cannot be bifurcated as to constitute two different causes of action and accordingly the subsequent suit is held as not maintainable.

8. It appears to me, as is obvious, that the liability of the respondent arises out of one contract namely the contract for carriage which is the foundation of all the claims arising out of its breach. The claim is against the railways here is on two counts, one arising out of short delivery and the other out of delivery in damaged condition, but, that does not alter the foundation of the cause of action of the plaintiff against the railway--namely the liability of the railway administration under Section 72 of the Railways Act arising out of the contract of carriage under Railway Receipt dated June 16, 1947. Though different evidence may be necessary to establish non-delivery and delivery in damaged condition the same is not the sole test, though it is one of the tests, for determining the nature of the causes of action. In view of the fact that the contract of carriage was a single transaction, in my view, the plaintiff is not entitled to split up his claims as different causes of actions for different suits and the two or more claims arising from the identical contract will not form different causes of action. The plaintiff having done so which is expressly prohibited by Order 2, Rule 2 of the Code must suffer the consequence and accordingly it must be held that the present suit is not

maintainable in law and was rightly dismissed by the courts below.

9. The appeal in the circumstances is dismissed without any order as to costs.

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