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Court : Kolkata

Decided On : Mar-22-2004

Reported in : 2004(3)CHN1

Judge : Ajoy Nath Ray and ;Tapan Kumar Dutt, JJ.

**Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 2, Rule 2 - Order 6, Rule 17; ;
[Limitation Act, 1963](#) - Section 3**

Appeal No. : F.A. No. 101 of 2000 with T.A. No. 7 of 2000 with CAN No. 1992 of 2004

Appellant : Multiversity

Respondent : Vidhan Educational Society and ors.

Advocate for Def. : Siddhartha Chowdhuri, ;Gora Chand Dey and ;Basudeb Ghosh, Advs.

Advocate for Pet/Ap. : Sudhis Dasgupta, ;Debasish Roy and ;Sabyasachi Bhattacharya, Advs.

Judgement :

Ajoy Nath Ray, J.

1. The appeals before us have to be partly disposed of as a point of a preliminary nature has been urged at great length before us.
2. The two appeals are from two decrees. The first decree was passed on a suit primarily instituted for the relief of injunction. The appellant/plaintiff averred to have entered into a contract with the respondent No. 1 for purchase of about 8 cottahs of their land. That piece of property along with the other property of the respondents was allegedly being threatened to be sold off to third party promoters; thus the first suit was filed.
3. A second suit was thereafter filed for specific enforcement of the contract of sale. Both the suits have resulted in decrees of dismissal in the Court below.
4. The first suit failed on the ground that the plaintiff should have claimed further reliefs and had not.
5. The second suit failed on merits and the learned Judge could not be persuaded to come to the conclusion that there was a final and binding contract.
6. However, in the written statement to the second plaint, the respondents took a point that the suit was also barred under the provision of Order 2 Rule 2 of the Code of Civil Procedure. During the trial, however, it was conceded that the second suit was maintainable although objections to the first suit were not given up. As the maintainability of the second suit was expressly conceded, the first plaint was not sought to be amended either, so as to include further and fuller reliefs. The judgment under appeal says this is too.
7. Mr. Dasgupta appearing for the appellant has resisted the preliminary point of Order 2 Rule 2 of the Code of Civil Procedure on two grounds. The said rule is set out below :

'2. (1) Suit to include the whole claim.--Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.(2) Relinquishment of part of claim.--Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he

shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.--A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted'.

8. The first point urged by Mr. Dasgupta is that the cause of actions in the two suits are distinct. In the second suit readiness and willingness had to be averred to satisfy the requirements of Section 16(c) of the Specific Relief Act. Also, the plaintiff had to pay attention to the Urban Land (Ceiling and Regulation) Act, 1976 so that the plaintiff might get a registered conveyance if it could persuade the Court about the binding nature of the contract in the first place.

9. The second point urged is that the objection based on Order 2 Rule 2 being once expressly conceded in the Court below, it should not be allowed to be urged once again in appeal. The argument was, that the Courts do not encourage this type of practice; if a party gives up a point expressly it is not to be encouraged to take up the point once again in the later stages of the same proceeding like an appeal.

10. About the first point, we have some hesitation. We do not wish to base our decision on that first argument. Since reliefs of injunction and specific performance are both equitable reliefs, the plaintiff has to show that the plaintiff deserves such reliefs, whether the suit is for injunction or for specific performance. The matter, in our opinion, is much more doubtful in this regard, than in regard to the second point.

11. The language of Order 2 Rule 2 is mandatory. It says, no suit shall be filed afterwards. But the mandatory language of the section is not decisive of the matter. The respondents can succeed if only the bar created by Order 2 Rule 2 is of such a nature, as could not be waived by any act or concession on the part of the defendant/respondent. If on the other hand, the said rule creates a right in favour of the defendant, which the defendant was at liberty to waive if it so chose, then the objection cannot now be raised once again before us, after expressly

conceding the point in the Court below.

12. On the authority of the highest Courts, Mr. Dasgupta submitted that if the bar has been created for protecting the interest of defendants, then it would be open for a particular defendant to waive its objection as to the bar. In case of such bars, seeking to protect private rights, the private party is always free to waive away his advantage and his right. If, on the other hand, the law creates a bar to a suit in the interest of public policy, and the policy encompasses intentions of the Legislature which are beyond the rights of the private individuals only, then a defendant could not waive such a bar. In that event, its waiver, if any, in the lower Court would be ineffectual, and it can urge the point before us in the Court of Appeal, once again.

13. The authorities in this regard are quoted in the case of Dhirendra Nath Gorai, Reported at : [1964]6SCR1001 . The case itself is also an authority for the above propositions. It mentions the case of Chattiar, 74 Indian Appeals 223, where the Judicial Committee opined that there was no inconsistency between the propositions that the provisions of Section 80 of the Code of Civil Procedure (as those then stood) were mandatory, and that they might be waived by the authority (i.e. the Government) for whose benefit they were provided.

14. The Supreme Court also extracted dicta from two Calcutta cases dealing with the Bengal Money-lenders Act, where it was similarly opined that the provision inserted for the private benefit of a judgment debtor could have waived by him if so chose.

15. Accordingly, the question becomes this. Is the bar of Order 2 Rule 2 inserted for the benefit of the defendant, or is there some wider public policy involved in it

16. In a Supreme Court case Justice Ahmadi (as His Lordship then was) said as follows :

'It is well known that Order 2 Rule 2 CPC is based on the salutary principle that a defendant or defendants should not be twice vexed for the same cause by splitting the claim and the reliefs'. See the case of Inacio Martins, : [1993]2SCR1015 .

17. In the case of Premchand Manickchand, reported at 64 CWN 103, Chief Justice Chakravarti, speaking for the Division Bench opined that when a party has raised a ground of illegality of a contract and then deliberately abandoned it, he cannot be allowed to raise it once again before the Court of Appeal. The abandonment had been made in that case by no less a person than Mr. Subimal C. Roy, as His Lordship was at that time very much at the Calcutta Bar. One would have thought that a point of illegality goes beyond the mere private rights of the defendant, but slow is the Court to allow a party to abandon a point expressly, and then take it up once again later on; that is why, as we respectfully read the case, the Division Bench went this far in this case. The illegality involved was the non-compliance with the provisions of the Forward Contracts (Regulation) Act, 1952 which surfaced often in the Arbitration Court in those days, involving Jute Traders in general.

18. Mr. Chowdhury appearing for the respondent said that a bar under Order 2 Rule 2 is like a bar of the Limitation Act. He relied on a Kerala Division Bench judgment reported at : (1971)ILLJ196Ker , a Full Bench decision of that High Court. Paragraph 17 from the said judgment was placed and that paragraph is set out below :

'The principles underlying statutory provisions like the Limitation Act and Section 11 and Order 2, Rule 2 of the CPC, are, we should think, applicable to petitions under Article 226 of the Constitution. These provisions are not to be regarded as embodying technical rules of procedure. They are based upon principles of public policy aiming at justice, the securing of which is the very object of Article 226. The principles are principles of repose and peace. 'Long dormant claims have often more of cruelty than of justice in them,' said Best C. J. in A Court V. Cross, 1825(130) ER 540. And so, we might add, has the fighting of the same legal battle over again with the same adversary, or, once a wrong has been suffered, the fighting of the battle for redress piecemeal'.

19. We are of the opinion that the bar of Order 2 Rule 2 is intended both to benefit the defendant and the Courts, which are Sovereign institutions, functioning for the benefit of the public. The reason is simple. As the Supreme Court has observed,

Order 2 Rule 2 prevents the same defendant from having to defend two suits where, in all fairness, he should have been called upon to defend at best one. But one should not lose sight of the fact, that the Court should not be burdened with two suits if one will suffice in place of two. In the present day of arrears and numerous litigation, the reason for this is not far to see.

20. We have to come across many cases where a bar to a suit has partaken of this double character, i.e., being inserted both for the private benefit and for the public. Where the bar is inserted with this double motive, it becomes a point of law, to be decided in each case, by the Court, whether the private benefit takes the upper hand or the public benefit does so. If the private benefit is of more importance, then a defendant who has waived that benefit or right should be held to his deliberate choice; otherwise the law might be used by defendants to approbate and reprobate, something which the Courts never like to see or approve.

21. Our opinion is that in Order 2 Rule 2, the private aspect is of much the greater importance than the public one. When both the parties are before the Court, it is for them to sort out their own rights; in practice, it will be a rare case, where the decision of two suits involving substantially the same parties will waste any extra time of the Court, if the substantial issues are covered in one suit, the next, suit simply cannot be dragged on for too long. Some extra time might indeed be lost, but that is not so important.

22. About the Kerala case, our respectful opinion is that in the present context, and for the present issue which we are examining, the Limitation Act and Order 2 Rule 2 cannot be placed in the same category. The wording of Section 3 of the Limitation Act makes it compulsory for the Court to order a dismissal whether the point of limitation has taken by the defendant or not. Also, at least in the old editions of Rustomji on Limitation, the following Latin maxim used to be quoted at the beginning : 'Interest rei publicae ut sit finis litium'. The phrase means that it is in the interest of the republic that there is a conclusion of litigation. Viewed in this light also, a bar of the Limitation Act would be more than a bar inserted only in the private interest of the particular defendant who is before the Court.

23. We are of the clear opinion that the objections based on Order 2 Rule 2 cannot now be urged before us, the point having been conceded once already in the Court below.

24. The preliminary issue being thus decided, we shall proceed to dispose of the amendment application and then fix an appropriate date for hearing of the appeals on merits.

Re : An application for amendment of plaint being CAN No. 1992 of 2004.

25. In view of the order we have already passed in the appeals opining that the second suit is maintainable and no objection can be taken to it on the ground of Order 2 Rule 2, the amendment application made for amending the plaint of the first suit is no longer necessary. Were we to permit amendment, the plaintiff would have two plaints for the same reliefs; that would be most undesirable; as such the amendment application is dismissed as unnecessary.

26. The dismissal will not in any manner prejudice the rights and contentions of the parties in the hearing of the two substantive appeals.

27. Both the appeals will appear for hearing Tuesday week.

28. Urgent xerox certified copy of this order, if applied for, be given as expeditiously as possible.

Tapan Kumar Dutt, J.

29. I agree.

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