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Court : Allahabad

Decided On : Jan-04-2011

Judge : Shri Narayan Shukla, J.

Appeal No. : Writ Petition No.7256 of 2010 (MS)

Appellant : Rameshwar Singh and Another

Respondent : District Judge, Faizabad and Others

Advocate for Def. : C.S.C., Adv

Judgement :

1. Heard Mr.D.C.Mukherjee, learned counsel for the petitioners as well as Mr.R.S.Pandey, learned counsel for the opposite parties.

2. The petitioners have challenged the order dated 20th of July, 2010, passed by the Additional Civil Judge (Senior Division) Faizabad in Original Suit No.241 of 2004 as also the order dated 10th of November, 2010, passed by the District Judge, Faizabad in Civil Revision No.215 of 2010.

Before the trial court the issue for decision was; Whether the suit is barred by Order 2 Rule 2 C.P.C.?

3. Before making any discussion on the facts and circumstances of the case in order to appreciate the correct interpretation of Order 2 Rule 2 of the Civil

Procedure Code, the same is extracted here-in-below:-

"Order 2 Rule 2:-

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but if 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 relinquishment.

(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 relief, but he omits except with the leave of the court, to sue for all such relief he shall not afterwards sue for any relief so omitted.

4. Mr. Mukherjee, learned counsel for the petitioners submits that basically the dispute between the parties is for the propriety of Sarvarahkar of Thakur Vijay Raghav Bhagwan Virajman Ranopali, Faizabad, which is pending consideration at the stage of second appeal being second appeal No.461 of 2006 before this court arising out of orders passed in the Appeal as well as in suit No.324 of 1987, filed by one Mr. Rajveer Singh, in which the petitioners as well as present respondents 3 and 4 are the respondents. In 2004, the respondent No.3 Mahant Ramesh Das and Rajdeo Das @ Rajveer claiming themselves as Sarvarahkar of Thakur Vijay Raghav Bhagwan Virajman Ranopali filed a suit being suit No.141 of 2004 for permanent injunction, against the petitioners, which is pending consideration. Subsequently they also filed a suit being suit No.241 of 2004 in the court of Civil Judge (Senior Division), Faizabad seeking a decree for declaration of a sale deed executed in favour of the petitioners as void. The petitioners raised objection against the maintainability of the suit on the ground that suit is barred by Order 2 Rule 2 C.P.C. They submitted that when in 1987 they filed the suit bearing Suit No.324 of 1987 raising the dispute of Sarvarahkar, in paragraph 6 of the plaint they alleged that they had already instituted a suit for declaration of sale deed as illegal, which indicates that they were aware with the sale deed executed in favour

of the petitioners at that very time and being aware with the said facts, they could have sought the relief for cancellation of sale deed, but they relinquished their claim and now in the light of the provisions of Order 2 Rule 2 C.P.C., it is not open for them to sue the petitioners for such a relief, which they have already omitted.

5. In support of his submissions learned counsel for the petitioners Mr. Mukherjee cited several cases, decided by this court as well as by the Hon'ble Supreme Court, some of them are cited hereunder:-

(1) Ganpat Lal Gupta and others versus 5th Additional District Judge, Deoria and others, reported in 2003 (21) LCD 977, relevant paragraphs 30, 31 and 32 of the same are quoted here-in-below:-

"30. The learned revisional court has set aside the order of the trial court allowing the amendment on the basis of the provisions of Order 2, Rule 2 CPC which provides that if a party could seek a particular relief at the time of the institution of the plaint and does not ask for the said relief, it would amount to waiver, relinquishment of such right and subsequent suit shall be barred for grant of such relief. In *Mohammad Khalil Khan & ors. v. Mahbub Ali Mian & ors.*, AIR 1949 PC 78 the scope of application of the provisions of Order 2, Rule 2 CPC was considered by the Privy Council. The Court held that if the occasion for a particular *lis* arises subsequent to the institution of the suit, it cannot be barred by the provisions of Order 2, Rule 2 CPC and in order to determine as to whether the said provisions are attracted or not, the court has to consider as what was the cause of action in the earlier suit on which the plaintiffs founded their claim and whether they included all the claims which they were entitled to make in respect of that cause of action in that suit, or if they failed to include all the claims then by force of Order 2, Rule 2 CPC they are precluded to include the same by bringing the subsequent suit. The court placed reliance upon its earlier judgment in *Moonshee Buzloor Ruheem v. Shumsunnissa Begum* (1887) 11 MIA 551, wherein it has been held as under:-

"The correct test in all cases of this kind is whether the claim in the new suit which in fact founded on a cause of action distinct from that which was the foundation of the foremost suit."

31. In State of Rajasthan and another v. Nav Bharat Construction Co., (2002) 1 SCC 659 the Hon'ble Supreme Court held that in respect of dispute regarding subsequent claims arisen after the first reference cannot be held to be barred by the provisions of Order 2 Rule 2 CPC for the reason that subsequent claim may be founded on a different cause of action. Similar view has been reiterated by the Apex Court in Commissioner of Income Tax, Bombay v. T.P.Kumaran, (1996) 10 SCC 561; 1996 (11) SCC 112:Ladu Ram v. Ganesh Lal, (1999) 7 SCC 50; and Maharashtra Vikrikar Karmchari Sangathan v. State of Maharashtra, AIR 2000 SC 622.

32. Thus, the settled legal proposition in respect of the provisions of Order 2, Rule 2 CPC emerges is that if a party does not ask for a relief for which he was entitled to at the time of the institution of the suit it would amount to waiver of that right and cannot be claimed later in a subsequent suit."

(2) Dadu Dayalu Mahasabha, Jaipur (Trust) versus Mahant Ram Niwas and another, reported in (2008) 11 Supreme Court cases 753, relevant paragraph 28 of which is quoted here-in-below:-

"28. Similarly the provisions of Order 2 Rule 2 bars the jurisdiction of the court in entertaining a second suit where the plaintiff could have but failed to claim the entire relief in the first one. We need not go into the legal philosophy underlying the said principle as we are concerned with the applicability thereof."

6. Under the strength of the aforesaid observations of the court, it is stated that since the issue in question was involved substantially or incidentally in the earlier suit and respondents failed to claim said relief at that time, the present suit is barred by Order 2 Rule 2 CPC.

7. On the other hand the learned counsel for the opposite parties Mr.R.S.Pandey submitted that the aforesaid principle shall apply only when the cause of action is the same, but since in both the suits the cause of action is different, it is open for the respondents to sue the relief for declaration of sale deed as void in the subsequent suit. He also cited a case of State of Maharashtra and another versus M/s.National Constuction Company, Bombay and others reported in JT 1996 (1)

SC 156, in which the Hon'ble Supreme Court has referred its earlier decision rendered in the case of Sidramappa v. Rajashetty 1970 (1) SCC 186. In the aforesaid case the Hon'ble Supreme Court held that where the cause of action on the basis of which the previous suit was brought, does not form the foundation of the subsequent suit, and in the earlier suit, the plaintiff could not have claimed the relief which is sought in the subsequent suit, the plaintiff's subsequent suit is not barred by Order 2 Rule 2 CPC.

8. After hearing the learned counsels for the parties as well as upon perusal of the record, I find that the dispute in Suit No.324 of 1987 relates to the Propriety of Sarvarahkar. Since the respondents/plaintiffs filed the suit to declare them as Sarvarahkar even being fully aware with the sale deed executed by the petitioners, unless they are declared as Sarvarahkar, there had no locus to challenge the sale deed executed by the petitioners being null and void.

9. In the suit No.324 of 1987 they succeeded to get declared themselves as Sarvarahkar by means of judgment and decree dated 6th of May, 2003. Subsequently they instituted suit No.241 of 2004 seeking the decree for declaration of the sale deed as void as by that time being declared as Sarvarahkar they have achieved the locus to challenge the sale deed, therefore, in the light of the aforesaid facts I am of the view that at the time of institution of Suit No.241 of 2004, the cause of action was illegal transaction of sale done by the petitioners, thus it is all together different from the cause of action of Suit No.324 of 1987.

10. In the case of Gurbux Singh v. Bhooralal, reported in AIR 1964 SC 1810, the Constitution Bench of the Hon'ble Supreme Court held that for the success of the plea of a bar under Order 2 Rule 2(3) the defendant raising the plea must make out (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (ii) that in respect of that cause of action the plaintiff was entitled to more than one relief; (iii) 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. 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 could 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 basis of inferential reasoning.

11. In the case of Marwari Kumhar and others versus Bhagwanpuri Guru Ganeshpuri and another reported in (2000) 6 Supreme Court Cases 735, firstly the Marwari Kumhar community filed a suit for declaration of their title against the son and wife of Pujari of Temple, who started claiming ownership to the property. The suit was decreed in favour of community. The respondents were held merely Pujaries. The respondents filed the appeal which was allowed, but the second appeal filed by the community was again allowed in favour of the community, thus the decree of the trial court was restored by the High Court. Thereafter the Pujaries again started asserting their title, therefore, the suit for possession of the property was filed by the community. The heirs of the Pujari contended that their father was the owner of the property and claimed the title as his heirs. They also contended that their father as well as they themselves, had been in open hostile and adverse possession for a very long time and had acquired title on that basis. They also contended that the suit was barred under Order 2 Rule 2 CPC, as the relief of possession had not been claimed. The trial court decreed the suit relying upon the earlier judgment and held that title in property vested with the community and the suit was not barred by Order 2 Rule 2 CPC. The defendants filed appeals, which were allowed holding therein that the defendants had been able to prove that they had been in possession for a long period of time and that they perfected the title by adverse possession. In this manner the appellate court dismissed the suit. The Plaintiff filed the second appeal, which was dismissed by holding therein that the defendants have acquired title by adverse possession. The matter reached the Hon'ble Supreme Court. The Hon'ble Supreme Court held that both the courts below erred in law and facts in coming to the conclusion. The Hon'ble Supreme Court held that the respondents were parties to the earlier proceeding. The earlier judgment was, therefore, binding on both the respondents, in which it had clearly been held that the title to the property vested in the appellants and the respondents were declared merely Pujaries, thus they were in possession merely as Pujaries. Their claim to title had been negated by the competent court. That

finding was binding on the respondents. Both the First Appellate Court and the Second Appellate Court failed to appreciate that on principles of resjudicata the respondents were precluded from denying the appellant's title to the suit property. Accordingly the suit was maintained and decreed.

12. Keeping in view the facts of the present case, it is obvious that the proprietorship of Sarvarahkar of the petitioners was disputed nevertheless the other claimants (respondents) of suit No.324 of 1987 executed sale deed in favour of the petitioners. The Sarvarahkar always keeps the status of Trustee and it is the Deity who is beneficiary of the offerings as well as the property attached thereto, therefore, being Trustee, the Sarvarahkar has had no right to transfer the property.

13. Upon perusal of the contents of the paragraph 6 of the plaint of suit No.324 of 1987, it appears that it was stated that one suit for declaration of the sale deed as unauthorized and to declare the tenure holder of the land was instituted by Mahant Bhagwan Das before the Revenue court, which was pending consideration at that very time, the present position of the suit is not disclosed, however, I am of the view that for declaration of any document as void, it is only the civil court, who is competent not the revenue court.

14. After being successful in the suit the respondents filed the subsequent suit before the Civil Court for declaration of sale deed as void. Though the earlier dispute is still pending before this court in the second appeal, but the decree passed by the trial court as well as the appellate court has not been interfered with till date, therefore, under the strength of the said decree having been attained the locus to challenge the sale deed, the respondents filed the suit, which cannot be rejected merely on the basis of a technical plea raised by the petitioners. The cause of action of the present suit is the illegal transaction of sale, which is altogether different to the earlier cause of action of suit No.324 of 1987, therefore, in the light of the observations of the Constitution Bench of the Hon'ble Supreme Court in the case of Gurbux Singh v. Bhooralal (Supra), I am of the considered opinion that the suit is not barred by Order 2 Rule 2 CPC. Therefore, the writ petition is dismissed.