Gurbux Singh

Vs

Bhooralal

Civil Appeal No. 583 of 1961

(CJI P. B. Gajendragadkar, K. N. Wanchoo, M. Hidayatullah, K. C. Das Gupta, N. Rajgopala Ayyangar, JJ)

22.04.1964

JUDGMENT

AYYANGAR, J. –

The facts giving rise to this appeal, by special leave, are briefly as follows : The respondent - Bhooralal - brought a suit - Civil Suit 20 1954 - in the Court of the Subordinate Judge, First Class, Kekri against the appellant claiming possession of certain property which was described in the plaint and for mesne profits. The allegation in the plaint was that the plaintiff was the absolute owner of the said property of which the defendant was in wrongful possession and that in spite of demands he had failed to vacate the same and was therefore liable to pay the mesne profits claimed. In the plaint he made reference to a previous suit that had been filed by him and his mother (C.S. 28 of 1950) wherein a claim had been made against the defendant for the recovery of the mesne profits in regards the same property for the period ending with February 10, 1950. It was also stated that mesne profits had been decreed in the said suit. In the Written Statement that was filed by the present appellant, besides disputing the claim of the plaintiff to the reliefs prayed for on the merits, a technical plea to the maintainability of the suit was also raised in these terms :

> "That O. 2. r. 2, Civil Procedure Code is a bar to the suit. When the suit referred to in paragraph 2 of the plaint was filed the plaintiff had a cause of action for the reliefs also. He having omitted to sue for possession in that suit, is now barred from claiming relief of possession. No second suit for recovery of mesne profits is maintainable in law.
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> Since the plaintiff had lost his remedy for the relief of possession he cannot seek recovery of mesne profits also."

On these pleadings the learned Subordinate Judge framed issues and of these the 4th issue ran :

Some of the High Courts, notably Madras, have in this connection, referred to the terms of O. 2, r. 4 which runs :

> "R. 4. No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except -

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action :

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property".

as an aid to the construction of the term 'cause of action' and the expression 'relief based on the same cause of action' in O. 2. r. 2(3). Reading these two provisions together it has been held that the cause of action for suits for possession of immoveable property and the cause of action for a suit respect of mesne profits from the same property are distinct and different. On the other hand, it has been held, particularly by the High Court of Allahabad that the basis of a claim for mesne profits is wrongful possession of property and so is a claim for possession and thus the cause of action for claiming either relief is the same viz., wrongful possession of property to which the plaintiff is entitled. On this reasoning it has been held that a plaintiff who brings in the first instance a suit for possession alone or for mesne profits alone is afterwards debarred from suing for the other relief under O. 2. r. 2(3). The learned trial Judge had, after referring to the conflict of authority, expressed his preference for the Allahabad view and had, therefore, upheld the defence. At the stage of the appeal the learned District Judge had, as already pointed out, expressed his preference for the other view. The learned Single Judge expressed his concurrence with the learned District Judge in preferring the Madras view as against the decisions of the Allahabad High Court.

Learned counsel for the appellant sought to argue that the Allahabad view was more in accordance with principle and with proper construction of O. 2, r. 2(3), Civil Procedure Code. We do not consider it necessary to examine this conflict of judicial opinion in this case as, in our opinion, the learned District Judge was right in holding that the appellant had not placed before the Court material for the purpose of founding a plea of O. 2. r. 2, Civil Procedure Code.

In order that a plea of a bar under O. 2. r. 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 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 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 estblished satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under O. 2. r. 2 Civil Procedure Code can be established only if the defendant files 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 O. 2. r. 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 appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion rightly, that without the plaint in the previous suit being on the record, a plea of a bar under O. 2. r. 2, Civil Procedure Code was not maintainable. Learned counsel for the appellant, however, drew our attention to a passage in the judgment of the learned Judge in the High Court which read :

> "The plaint, written statement or the judgment of the earlier court has not been filed by any of the parties to the suit. The only document filed was the judgment in appeal in the earlier suit. The two courts have, however, freely cited from the record of the earlier suit. The counsel for the parties have likewise done so. That file is also before this Court."

It was his submission that from this passage we should infer that the parties had, by agreement, consented to make the pleadings in the earlier suit part of the record in the present suit. We are unable to agree with this interpretation of these observations. The statement of the learned Judge "the two courts have, however, freely cited from the record of the earlier suit" is obviously inaccurate as the learned District Judge specifically pointed out that the pleadings in the earlier suit were not part of the record and on that very ground had rejected the plea of the bar under O. 2. r. 2, Civil Procedure Code. Nor can we find any basis for the suggestion that the learned Judge had admitted these documents at the second appeal stage under O. 41. r. 27, Civil Procedure Code by consent of parties. There is nothing on the record to suggest such an agreement or such an order, assuming that additional evidence could legitimately be admitted in a second appeal under O. 41. r. 27, Civil Procedure Code. We can therefore proceed only on the basis that the pleadings in the earlier suit were not part of the record in the present suit.

Learned counsel for the appellant, however, urged that in his plaint in the present suit the respondent had specifically referred to the previous suit having been for mesne profits and that as mesne profits could not be claimed except from a trespasser there should also have been an allegation in the previous suit that the defendant was a trespasser in wrongful possession of the property and that alone could have been the basis for claiming mesne profits. We are unable to accept this argument. In the first place, it is admitted that the plaint in the prsent suit was in Hindi and that the word 'mesne profits' is an English translation of some expression used in the original. The original of the plaint is not before us and so it is not possible to verify whether the expression 'mesne profits' is an accurate translation of the expression in the original plaint. This apart, we consider that learned counsel's argument must be rejected for a more basic reason. Just as in the case of a plea of res judicata which cannot be established in the absence on the record of the judgment and decree which is pleaded as estoppel, we consider that a plea under O. 2. r. 2, Civil Procedure Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. As the plea is basically founded on the identity of the cause of action in the two suits the defence which raises the bar has necessarily to establish the cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. It is not impossible that relies were claimed without the necessary averments to justify their grant. From the mere use of the words 'mesne profits' therefore one need not necessarily infer that the possession of the defendant was alleged to be wrongful. It is also possible that the expression 'mesne profits' has been used in the

present plaint without a proper appreciation of its significance in law. What matters is not the characterisation of the particular sum demanded but what in substance in the allegation on which the claim to the sum was based and as regards the legal relationship on the basis of which that relief was sought. If is because of these reasons that we consider that a plea based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. We therefore consider that the order of remand passed by the learned Additional Distract Judge which was confirmed by the learned Judge in the High Court was right. The merits of the suit have yet to be tried and this has been directed by the order of remand which we are affirming.

The appeal fails and is dismissed. In the circumstances of the case there will be no order as to costs.

Appeal dismissed.

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