SUPREME COURT OF INDIA

S.Nazeer Ahmed

Vs.

State Bank of Mysore

S.L.P(C) No.20624 of 2004

(H.K.Sema and P.K.Balasubramanyan JJ.)

12.01.2007

JUDGMENT

P.K.Balasubramanyan, J.

1. Leave granted.

2. Defendant No. 1, the appellant, borrowed a sum of Rs.1,10,000/- from the plaintiff Bank for the purchase of a bus. He secured repayment of that loan by hypothecating the bus and further by equitably mortgaging two items of immovable properties. The Bank first filed O.S. No. 131 of 1984 for recovery of the money due. The said suit was decreed. The Bank, in execution, sought to proceed against the hypothecated bus. The bus could not be traced and the money could not be recovered. The Bank tried to proceed against the mortgaged properties in execution. The appellant resisted by pointing out that there was no decree on the mortgage and the bank could, if at all, only attach the properties and could not sell it straightaway. That objection was upheld. The Bank thereupon instituted the present suit, O.S. No. 35 of 1993, for enforcement of the equitable mortgage. The appellant resisted the suit by pleading that the suit was barred by Order II Rule 2 of the Code of Civil Procedure, that the transaction of loan stood satisfied by a tripartite arrangement and transfer of the vehicle to one Fernandes, that there was no valid equitable mortgage created and no amount could be recovered from him based on it and that the suit was barred by limitation.

3. The trial court held that the suit was not hit by Order II Rule 2 of the Code. It also held that the appellant has not proved that the loan transaction has come to an end by the claim being satisfied. But, it dismissed the suit holding that the suit was barred by limitation. It also held that there was no creation of a valid equitable mortgage since the memorandum in that behalf was not registered. The Bank filed an appeal in the High Court. The High Court held that the memorandum did not require registration and that a valid and enforceable equitable mortgage was created. The suit was held to be in time. It held that the suit was hit by Order II Rule 2 of the Code. But, since the appellant had not challenged the finding of the trial court that the suit was not hit by Order II Rule 2 of the Code by filing a memorandum of cross objections, the plea in that behalf could not be and need not be upheld. It purported to invoke

Order XLI Rule 33 of the Code to grant the Bank a decree against the appellant though it refused a decree to the Bank against the guarantor. It did not disturb the finding of the trial court on the tripartite arrangement set up by the appellant based on the alleged transfer of the vehicle.

4. Being aggrieved by the decree, the appellant approached this Court with the Petition for Special Leave to Appeal. This Court while issuing notice, confined the appeal to two questions. They were:

> "1) Why the second suit would not be hit by Order 2 Rule 2, C.P.C.?; and 2) In view of the finding arrived at vide para 19 of the judgment (Annexure P-2), why defendant No.1 should not have been held to have been discharged from the liability?"

5. We do not think it necessary to broaden the scope of challenge in this appeal in the light of the findings entered and in the circumstances of the case. We are therefore inclined only to examine the two questions posed by this Court at the stage of issuing notice in the Petition for Special Leave to Appeal.

6. We will first consider whether the suit is barred by Order II Rule 2 of the Code. Whereas the trial court held that the suit on the equitable mortgage filed by the Bank was not barred by Order II Rule 2 of the Code especially in the context of Order XXXIV Rules 14 and 15 of the Code, the High Court was inclined to the view that the suit was barred, though it did not accede to the prayer of the appellant to dismiss the suit as being hit by Order II Rule 2 of the Code. The High Court seems to have been of the view that since the Bank in the prior suit omitted to sue on the equitable mortgage without the leave of the court, the present suit was barred. But it proceeded to rely on Order XLI Rule 33 of the Code and ended up by granting the Bank a decree against the appellant. It is not very clear to us why Order XLI Rule 33 of the Code or the principle embodied therein has to be invoked in the case, since the plaintiff Bank had filed an appeal against the decree dismissing its suit and was claiming the relief claimed in the suit..

7. The High Court, in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order XLI Rule 22 of the Code, could not challenge the finding of the trial court that the suit was not barred by Order II Rule 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross- objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negatived to him by the trial court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned counsel for the appellant that the High Court was in error in proceeding on the basis that the appellant not having filed a memorandum of cross-

objections, was not entitled to canvass the correctness of the finding on the bar of Order II Rule 2 rendered by the trial court.

8. We also see considerable force in the submission of learned counsel for the appellants that the High Court has misconceived the object of Order XLI Rule 33 of the Code and has erred in invoking it for the purpose of granting the plaintiff Bank a decree. This is a case where the suit filed by the plaintiff Bank had been dismissed by the trial court. The plaintiff Bank had come up in appeal. It was entitled to challenge all the findings rendered against it by the trial court and seek a decree as prayed for in the plaint, from the appellate court. Once it is found entitled to a decree on the basis of the reasoning of the appellate court, the suit could be decreed by reversing the appropriate findings of the trial court on which the dismissal of the suit was based. For this, no recourse to Order XLI Rule 33 is necessary. Order XLI Rule 33 enables the appellate court to pass any decree that ought to have been passed by the trial court or grant any further decree as the case may require and the power could be exercised notwithstanding that the appeal was only against a part of the decree and could even be exercised in favour of the respondents, though the respondents might not have filed any appeal or objection against what has been decreed. There is no need to have recourse to Order XLI Rule 33 of the Code, in a case where the suit of the plaintiff has been dismissed and the plaintiff has come up in appeal claiming a decree as prayed for by him in the suit. Then, it will be a question of entertaining the appeal considering the relevant questions and granting the plaintiff the relief he had sought for if he is found entitled to it. In the case on hand therefore there was no occasion for applying Order XLI Rule 33 of the Code. If the view of the High Court was that the suit was barred by Order II Rule 2 of the Code, it is difficult to see how it could have resorted to Order XLI Rule 33 of the Code to grant a decree to the plaintiff in such a suit. In that case, a decree has to be declined. That part of the reasoning of the High Court is therefore unsustainable.

9. Now, we come to the merit of the contention of the appellant that the present suit is hit by Order II Rule 2 of the Code in view of the fact that the plaintiff omitted to claim relief based on the mortgage, in the earlier suit O.S. No. 131 of 1984. Obviously, the burden to establish this plea was on the appellant. The appellant has not even cared to produce the plaint in the earlier suit to show what exactly was the cause of action put in suit by the Bank in that suit. That the production of pleadings is a must is clear from the decisions of this Court *in Gurbux Waterproof Manufacturing Co. & Anr*[1]. From the present plaint, especially paragraphs 10 to 12 thereof, it is seen that the Bank had earlier sued for recovery of the loan with interest thereon as a money suit. No relief was claimed for recovery of the money on the foot of the equitable mortgage. In that suit, the Bank appears to have attempted in execution, to bring the mortgaged properties to sale. The appellant had objected that the suit not being on the mortgage, the mortgaged properties could not be sold in execution without an attachment. That objection was upheld. The Bank was therefore suing in enforcement of the mortgage by deposit of title deeds by the appellant.

10. From this, it is not possible to say that the present claim of the plaintiff Bank has arisen out of the same cause of action that was put forward in O.S. No. 131 of 1984. What Order II Rule 2 insists upon is the inclusion of the whole of the claim which the plaintiff is entitled to

make in respect of the cause of action put in suit. We must notice at this stage that in respect of a suit in enforcement of a mortgage, the bar under Order II Rule 2 has been kept out by Order XXXIV Rule 14 of the Code. Rule 15 of Order XXXIV makes the rules of Order XXXIV applicable to a mortgage by deposit of title deeds. We may quote Order XXXIV Rule 14 hereunder:

> "Suit for sale necessary for bringing mortgaged property to sale (1) Where a mortgage has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II Rule 2.
>
> 2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882 (4 of 1882), has not been extended."

11. It is clear from sub-rule (1) of Rule 14 of Order XXXIV of the Code that notwithstanding anything contained in Order II Rule 2 of the Code, a suit for sale in enforcement of the mortgage can be filed by the plaintiff Bank and in fact that is the only remedy available to the Bank to enforce the mortgage since it would not be entitled to bring the mortgaged property to sale without instituting such a suit. Be it noted, that Rule 14 has been enacted for the protection of the mortgagor. In the context of Rule 14 of Order 34 of the Code, it is difficult to uphold a plea based on Order II Rule 2. If the appellant wanted to show that the causes of action were identical in the two suits, it was necessary for the appellant to have marked in evidence the earlier plaint and make out that there was a relinquishment of a relief by the plaintiff, without the leave of the court. Even then, the effect of Rule 14 will remain to be considered.

12. That apart, the cause of action for recovery of money based on a medium term loan transaction simpliciter or in enforcement of the hypothecation of the bus available in the present case, is a cause of action different from the cause of action arising out of an equitable mortgage, though the ultimate relief that the plaintiff Bank is entitled to is the recovery of the term loan that was granted to the appellant. On the scope of Order II Rule 2, the Privy Council in Payana Reena Saminatha 142] has held that Order II Rule 2 is directed to securing an exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they may arise from the same transactions. In Mohammad Khalil Khan Council 78 (75 Indian Appeals 121)], the Privy Council has summarised the principle thus:

> "The principles laid down in the cases thus far discussed may be thus summarized:
> (1) The correct test in cases falling under O.2, R.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." *Moonshee Buzloor Ruheem V. Shumsunnissa Begum*, (1867-11 M.I.A. 551 : 2 Sar. 259 P.C.) (supra) (2) 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. Read V. Brown, (1889-22 Q.B.D. 128 : 58 L.J.Q.B. 120)

(supra) (3) If the evidence to support the two claims is different, then the causes of action are also different. Brundsden v. Humphrey, (1884-14 Q.B.D. 141 : 53 L.J.Q.B. 476) (supra) (4) The causes of action in the two suits may be considered to be the same if in substance they are identical. Brundsden v. Humphrey, (1884-14 Q.B.D. 141 : 53 L.J.Q.B. 476) (supra) (5) The causes of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers . to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. Muss. Chandkour v. Partab Singh, (15 I.A. 156 : 16 Cal. 98 P.C.) (supra). This observation was made by Lord Watson in a case under S. 43 of the Act of 1882 (corresponding to O.2 R.2), where plaintiff made various claims in the same suit."

13. A Constitution Bench of this Court has explained the scope of the plea based on Order II Rule 2 of be useful to quote from the Head note of that decision:

"Held: (i) A plea under Order 2 rule 2 of the Code based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. It is for this reason that a plea of a bar under O.2 r.2 of the 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. In other words a plea under O.2 r.2 of the 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. 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. On the facts of this case it has to be held that the plea of a bar under O.2 r.2 of the Code should not have been entertained at all by the trial court because the pleadings in civil suit No. 28 of 1950 were not filed by the appellant in support of this plea.

(ii) In order that a plea of a bar under O. 2. r. 2(3) of the Code should succeed the defendant who raises 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. It is not necessary to multiply authorities except to notice *Chand & Anr*[2]. and *State of Company, Bombay and Anr*[3]. have reiterated and re-emphasized this principle.

14. Applying the test so laid down, it is not possible to come to the conclusion that the suit to enforce the equitable mortgage is hit by Order II Rule 2 of the Code in view of the earlier suit for recovery of the mid term loan, especially in the context of Order XXXIV Rule 14 of the Code. The two causes of action are different, though they might have been parts of the same transaction. Even otherwise, Order XXXIV rule 14 read with rule 15 removes the bar if any that may be attracted by virtue of Order II Rule 2 of the Code. The decision of the Rangoon High Rangoon 158) relied on by learned counsel for the appellant does not enable

him to successfully canvass for the position that the present suit was barred by Order II Rule 2 of the Code, as the said decision itself has pointed out the effect of Order XXXIV Rule 14 and in the light of what we have stated above.

15. Then the question is whether the appellant has established that there was a tripartite arrangement come to, by which the bus was made over by him to one Fernandes and Fernandes undertook to the Bank to discharge the liability under the mid term loan. In support of his case, the appellant had only produced Exhibits D1 to D4 which only indicate an attempt to bring about an arrangement of that nature. But they do not show that there was any such concluded arrangement and there was a taking over of the liability by Fernandes as agreed to by the Bank. The fact that the Bank has paid the insurance premium for the bus in question, would not advance the case of the appellant since the Bank, as the hypothecatee of the bus was entitled to and in fact, as a prudent mortgagee, was bound to, protect the security and the insurance of the vehicle effected in that behalf cannot be taken as a circumstance in support of the plea put forward by the appellant. The trial court, after considering the evidence, rightly noticed that the burden was on the appellant to show that he had handed over the possession of the vehicle to one Fernandes on the intervention of the Bank and on the basis of a tripartite arrangement or taking over of liability by Fernandes and that the liability of the appellant had come to an end thereby. Learned counsel for the Bank rightly submitted that no novation was proved so as to enable the appellant to riggle out of the liability under the loan transaction.The High Court has not interfered with the reasoning and conclusion of the trial court on this aspect and has in fact proceeded to grant the plaintiff Bank a decree for the suit amount based on the equitable mortgage. We were taken through Exhibits D1 to D4 and even a fresh document attempted to be marked in this Court along with its counter affidavit by the Bank. On going through the said documents, the other evidence and the reasoning adopted by the trial court, we are satisfied that there is no evidence to show that there was a tripartite agreement on the basis of which the appellant could disclaim liability based on it. It is seen that the appellant has not even examined Fernandes in support of the plea of the tripartite arrangement and the taking over of the liability of the appellant, by him. In this situation, we see no reason to uphold the plea of the appellant that the liability has been transferred to Fernandes at the instance of the Bank and that the appellant was no more liable for the plaint amount.

16. Thus, on a consideration of all the relevant aspects, we are satisfied that the High Court was correct in granting the Bank a decree in the suit. There is therefore no reason to interfere with that decree. We therefore confirm the judgment and decree of the High Court and dismiss this appeal with costs.

Judgment Referred.

[1]*AIR 1964 SC 1810*
[2]*(1997) 1 SCC 0099*
[3]*(1970) 1 SCC 0186*
[4]*(1996) 1 SCC 0735*