SUPREME COURT OF INDIA

Raptakos, Brett & Co.Ltd.

Vs.

Ganesh Property

C.A.No.1464 of 2008

(R.K.Agrawal and R.Banumathi,JJ.,)

05.09.2017

JUDGMENT

R.K.Agrawal,J.,

1. The above appeal has been filed against the judgment and order dated 22.08.2006 passed by the High Court at Calcutta in A.P.O. No. 350 of 2004, G.A. No. 3808 of 2004 and A.P.O.T. No. 556 of 2004 in Civil Suit No. 457 of 1998 whereby the Division Bench of the High Court partly allowed the appeal filed by the appellant-Company.

2. Brief facts:

> " (a) The respondent herein leased out the premises bearing No. 6, Marquis Street, Calcutta to the appellant-Company for a term of 21 years commencing from 16.03.1964 to 15.03.1985 under a registered Lease Deed dated 16.03.1964 at a monthly rent of Rs. 2,045/-.
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> (b) Before the expiry of the lease period, the respondent filed a suit for recovery of possession being Suit No. 1023 of 1982 before the City Civil Court, Calcutta, Third Bench for bona fide use. Vide order dated 06.08.1986, Suit No. 1023 of 1982 for recovery of possession was dismissed by the City Civil Court with costs.
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> (c) On 11.08.1986, the respondent filed a Title Suit being No. 1481 of 1986 before the 8th Bench, City Civil Court, Calcutta for recovery of possession and mesne profit. Vide order dated 18.04.1991, learned single Judge of the City Civil Court decreed the suit in favour of the respondent while declining the claim of mesne profit as the said claim was not pressed.
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> (d) Being aggrieved by the order dated 18.04.1991, the appellant-Company preferred an appeal being F.A.T. No. 1786 of 1991, re-numbered as First Appeal No. 253 of 1992. Vide order dated 09.07.1991, the Division Bench of the High Court, restrained

the respondent from executing the decree on the condition that the appellant-Company will continue to pay rent at the rate of Rs. 2,500/- per month. Further, on 11.08.1997, First Appeal No. 253 of 1992 was dismissed, however, the appellant-Company was granted 6 (six) months' time to vacate the suit premises.

(e)Feeling aggrieved by the order dated 11.08.1997, the appellant-Company filed a petition for special leave to appeal being No. 19695 of 1997 before this Court which was converted into Civil Appeal No. 1657 of 1998. This Court, vide order dated 09.09.1998, had dismissed the appeal with certain directions. However, on an application filed by the appellant-Company seeking modification in the said order, this Court, vide order dated 25.09.1998 had passed the following order on the said application:-

"On mentioning the IA is taken on Board. Having heard learned counsel for the parties further directions are issued as under:-

If the appellants hand over peaceful vacant possession of the premises in question on or before 08th October, 1998 then they will have to pay for the use and occupation charges only Rs. 2,500/- only, for the month of October. If they fail to deliver possession by that time they will have to pay use and occupation charges for the month of October at the rate of Rs. 50,000/- only, as fixed by us earlier. Rest of the order remains as it is. IA is disposed of accordingly."

(f) After a long drawn litigation between the parties at all levels, the appellant-Company handed over the possession of the suit premises to the respondent on 08.10.1998.

(g) The respondent filed a fresh suit being Civil Suit No. 457 of 1998 before the High Court against the appellant-Company for loss and damages caused to the respondent due to wrongful possession to the tune of Rs. 3,23,56,695/- . The appellant-Company preferred G.A. No. 3380 of 2003 in Civil Suit No. 457 of 1998 under Order VII Rule 11(a) of the Code of Civil Procedure, 1908 (in short 'the Code') for dismissing the suit. Learned single Judge of the High Court, vide order dated 28.07.2004, dismissed the application filed by the appellant- Company

(h) Aggrieved by the order dated 28.07.2004, the appellant-Company preferred APOT No. 556 of 2004 in Civil Suit No. 457 of 1998 before the High Court. The Division Bench of the High Court, vide judgment and order dated 22.08.2006, partly allowed the appeal holding that the suit is maintainable while leaving the question of mesne profit open for the decision by the trial court.

(i)Aggrieved by the order dated 22.08.2006, the appellant-Company has preferred this appeal by way of special leave before this Court.

3. Heard Mr. Shyam Dewan, learned senior counsel for the appellant-Company and Mr. Pranab Kumar Mullick, learned counsel for the respondent and perused the records.

Point(s) for consideration :-

4. Whether in the facts and circumstances of the present case, the subsequent suit filed by the respondent for mesne profits is maintainable?

Rival submissions :-

5. Learned senior counsel for the appellant-Company strenuously contended that the appellant-Company vacated the property on 08.10.1998 pursuant to the order passed by this Court on 25.09.1998 in Civil Appeal No. 1657 of 1998. In Suit No. 1481 of 1986, the respondent had not pressed the issue of mesne profit and accordingly the court had held that "the Respondent-plaintiff was not entitled to mesne profits for occupation of the premises. In appeal also, the issue of mesne profit was not pressed. Thus, the issue of mesne profit being not pressed nor challenged has attained finality and the respondent is estopped from raising the same by way of fresh suit. Further, this Court, vide order dated 25.09.1998, had directed that if the appellant-Company hands over peaceful vacant possession of the premises in question on or before 8th October, 1998, then they will have to pay Rs. 2,500/- for the use and occupation charges for the month of October, 1998, otherwise, Rs. 50,000/- for the same which order has been complied with by the appellant-Company and, indisputably, the possession has been handed over on 08.10.1998. In any case, the respondent, after getting possession of the suit premises, has filed a subsequent action being Suit No. 457 of 1998 for mesne profit. Learned senior counsel contended that the suit is not maintainable at all and is barred by res-judicata and the claim of mesne profit had already attained finality. There is bar on the respondent to raise the point of mesne profit in a subsequent suit when the same had not been pressed before the courts below. Learned senior counsel finally submitted that the suit is not maintainable and is contrary to law and facts and expressly hit by Order II Rule 2 of the Code and also barred by the principles of estoppel and res-judicata. In support of his submissions, learned senior counsel has relied upon a decision in the case of *Bhanu Kumar Jain vs. Archana Kumar and Another*[1].

6. Learned counsel for the respondent submitted that the present appeal is misconceived and is an abuse of the process of law. The issue sought to be raised by the appellant-Company, including the grounds of res judicata, limitation etc. were never raised in the written statement nor in the applications challenging maintainability of the suit. He further submitted that the issue raised relates to mesne profits after the decree for eviction has been passed on the ground of wrongful occupation after expiry of lease. The cause of action is entirely different. It was further submitted that the respondent had waived its claim of mesne profits before the City Civil Court at Calcutta only up to the date of disposal of suit being Title Suit No. 1481 of 1986 and was not debarred from claiming mesne profits after the date of decree, i.e. 18.04.1991. It is well settled by a catena of judgments that a landlord can maintain a second suit for mesne profits. Hence, claim for mesne profits for the period after the decree

constitutes a distinct and separate cause of action. Learned counsel finally submitted that the appeal is not maintainable and the respondent is entitled to mesne profits. In support of his submissions, learned counsel has relied upon the decisions in the case of *Ram Karan Singh and Others vs. Nakchhad Ahir & Others*[2] *and State Bank of India vs. Gracure Pharmaceuticals*[3].

Discussion:-

7.The continuance in possession of the premises by the appellant-Company on or after the passing of the decree in Suit No. 1481 of 1986 was on the basis of the order passed by the High Court of Calcutta in F.A. No. 253 of 1992 dated 09.07.1991 and orders dated 03.11.1997 in SLP (C) No. 19695 of 1997 and 25.09.1998 in Civil Appeal No. 1657 of 1998 passed by this Court. Thus, the appellant-Company was paying the amount as directed by the Courts, as a condition for continuing in possession of the leased premises. The appellant-Company was thus in occupation of the premises from 18.04.1991 till possession was surrendered on 08.10.1998, pursuant to the court's orders. Further, it is also evident on record that in Suit No. 1481 of 1986, the issue of mesne profit was not pressed by the respondent and the same was also not pressed before the High Court in appeal nor was it raised before this Court.

8. In the light of the above indisputable facts, the plaint now filed cannot be considered as one disclosing a cause of action for maintaining a suit for mesne profits or damages for the same period for which a claim was raised in the earlier suit and deliberately withdrawn or given up by the respondent before the Court.

9. In the interim orders dated 09.07.1991 passed by the High Court in appeal and this Court in SLP (C) No. 19695 of 1997 dated 03.11.1997, the respondent has not raised any objection and has allowed the said orders to become final and binding. Both parties have acted upon the said orders as fully valid and binding on them. The amount fixed as a condition for allowing the appellant-Company to occupy the premises was fixed at Rs. 2,500/- which was fixed by the court taking note of the fact that the appellant-Company is being allowed to continue even after the expiry of the lease period. If the respondent was not satisfied with the amount fixed as occupation charges, then it should have raised an objection praying for varying the amount specified as a condition precedent for continuing in possession of the said premises. This is particularly relevant as the respondent has without any objection accepted the interim orders allowing the appellant-Company to continue in possession.

10. In this connection, it is relevant to note that the respondent herein, in Suit No. 457 of 1998, has allowed the decree passed by the Court in T.S. No. 1481 of 1986 to become final, thus accepting the finding of the trial court that the landlord is not entitled to claim mesne profits for the occupation on or after 15.03.1985, i.e., the date of termination of the lease deed. It is pertinent to note that such a decree was passed mainly on the ground that the respondent in that suit had consciously given up the claim for mesne profits from the expiry of the lease period till recovery of possession. Therefore, the respondent is estopped from

claiming any mesne profits for the period after 15.03.1985, i.e. the period for which mesne profits were claimed in Suit No. 457 of 1998.

11. Further, the appellant-Company, while complying with the order dated 25.09.1998 passed by this Court in Civil Appeal No. 1657 of 1998, handed over the vacant possession of the premises to the respondent on 08.10.1998 as is evident by the receipt issued by the respondent. From the above, it can be said that the Respondent, by his own conduct, accepted the orders passed by this Court in allowing the appellant to occupy the premises conditionally on payment of Rs. 2,500/- from the disposal of the appeal by the High Court till the disposal of the SLP in this Court. It would suggest that the averments in the plaint in Suit No. 457 of 1998 would not disclose any cause of action and, therefore, the suit is not maintainable.

12. Further, on and after 18.04.1991, the date of decree in T.S. No. 1481 of 1986, the continuation of possession by the appellant-Company was fully on the basis of the orders passed by the City Civil Court in F.A.T. No. 1786 of 1991, later re-numbered as F.A. No. 253 of 1992. It was a conditional order allowing the appellant-Company to continue in possession on condition of paying an amount of Rs. 2,500/- . The amount so fixed by the Court after considering the claim of the Respondent for enhancement of the amount of compensation for continuation of possession after the expiry of the lease period. Though this order has not been challenged by the respondent, it was allowed to stand for about six years until the appeal was finally heard and dismissed on 11.08.1997. It was on the basis of the above conditional order that the appellant-Company had acted upon and enjoyed the benefits conferred by the order on both parties. In the circumstances, the respondent is estopped from claiming any amount as mesne profits during the period from 18.04.1991 to 11.08.1997, i.e., the date on which F.A. No. 253 of 1992 was finally disposed off.

13. In view of the above, we are of the opinion that the High Court erred in not appreciating that the respondent having the subsequent suit being Suit No. 457 of 1998 is clearly hit by Order II Rule 2 of the Code. For ease of reference, Order II Rule 2 is extracted hereunder:

> "2.Suit to include the whole of the claim:
>
> (1) xxxxx
>
> (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) xxxxx"

14. In Ram Karan Singh (supra), a Full Bench of the Allahabad High court while examining the issue of maintainability of second suit for pendente lite and future mesne profits where

earlier suit for possession and past mesne profits has already been decided has held as follows:-

> "It seems to us that the cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits. The provisions of order II Rule 4, indicate that the legislature thought it necessary to provide specially for joining a claim for mesne profits with one for recovery of possession of immovable property, and that but for such an express provision, such a combination might well have been disallowed. A suit for possession can be brought within twelve years of the date when the original dispossession took place and the cause of action for recovery of possession accrued. The claim for mesne profits can only be brought in respect of profits within three years of the institution of the suit and the date of the cause of action for mesne profits would in many cases be not identical with the original date of the cause of action for the recovery of possession. Mesne profits accrue from day to day and the cause of action is a continuing one, and arises out of the continued misappropriation of the profits to which the plaintiff is entitled. In many cases, the plaintiff may not be in a position to anticipate the exact amount of mesne profits to which he may become entitled after the institution of the suit. The object of Order II, Rule 2 is the prevention of the splitting up of one cause of action and not to compel the plaintiff to seek all the remedies which he can claim against the same defendants on account of several causes of action in one and the same suit. In one case, the multiciplicity of suits is to be avoided and, in the other, multifariousness of the causes of action. It is also clear that the bundle of facts which would constitute the cause of action in favour of the plaintiff would not necessarily be identical in a suit for recovery of possession and in a suit for mesne profits. In a suit for possession, the plaintiff need only prove his possession within twelve years and the defendant's occupation of the property without right. In a suit for mesne profits he has, in addition, to prove the duration of the whole period during which the dispossession continued, including the date on which it terminated, as well as the amount to which he is entitled by way of damages. Evidence to prove these latter facts would undoubtedly be different from that which would be required to prove the first set of facts. Again, if there are a number of defendants who are in possession of different portions of the property, there may be considerable difficulty in ascertaining the amount which, each is liable to pay and the plaintiff may think it convenient to postpone an inquiry of such a complicated nature to a suit after his right to possession has been fully established."

15. In Bhanu Kumar Jain (supra), this Court has considered the distinction between "issue estoppels" and "res judicata" and has held as follows:-

> "29. There is a distinction between "issue estoppel" and "res judicata". (See Thoday v. Thoday.)

30. Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord.

31. In a case of this nature, however, the doctrine of "issue estoppel" as also "cause of action estoppel" may arise.

In Thoday Lord Diplock held:

"... 'cause of action estoppel', is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist i.e. judgment was given on it, it is said to be merged in the judgment.. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam.

32. The said dicta was followed in Barber v. Staffordshire County Council. A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. [See C. (A Minor) v. Hackney London Borough Council.]"

16. In the case of State Bank of India (supra), this Court has examined the provisions of Order II, Rule 2 of the Code and has held as under:-

"7. We may, before examining the rival contentions, extract the relevant provisions of Order 2 Rule 2 CPC for easy reference which reads as under:
"2. Suit to include the whole claim.−(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 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 scope of the abovementioned provisions came up for consideration before this Court in several cases. The earliest one dealt by the Privy Council was reported in Naba Kumar Hazra v. Radhashyam Mahish wherein the Privy Council held that the plaintiff cannot be permitted to draw the defendant to court twice for the same cause by splitting up the claim and suing, in the first instance, in respect of a part of claim only. In Sidramappa v. Rajashetty this Court held that if the cause of action on the basis of which the previous suit was brought, does not form the foundation of subsequent suit and in the earlier suit the plaintiff could not have claimed the relief which he sought in the subsequent suit, the latter, namely, the subsequent suit, will not be barred by the rule contained in Order 2 Rule 2 CPC.

9. In Gurbux Singh v. Bhooralal the scope of the abovementioned provision was further explained as under: (SCC p. 1812, para 6) "6. In order that a plea of a bar under Order 2 Rule 2(3) of the 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 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. 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."

10. In Sandeep Polymers (P) Ltd.. case the abovementioned principles were reiterated and this Court held as under: (SCC p. 158, para 13)

"13. '22. Under Order 2 Rule 1 of the Code which contains provisions of mandatory nature, the requirement is that the plaintiffs are duty-bound to claim the entire relief. The suit has to be so framed as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. Rule 2 further enjoins on the plaintiff to include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If the plaintiff omits to sue or intentionally relinquishes any portion of his claim, it is not permissible for him to sue in respect of the portion so omitted or relinquished afterwards.' -"

11. The abovementioned decisions categorically lay down the law that if a plaintiff is entitled to seek reliefs against the defendant in respect of the same cause of action, the plaintiff cannot split up the claim so as to omit one part to the claim and sue for the

other. If the cause of action is same, the plaintiff has to place all his claims before the court in one suit, as Order 2 Rule 2 CPC is based on the cardinal principle that the defendant should not be vexed twice for the same cause.

12. Order 2 Rule 2 CPC, therefore, requires the unity of all claims based on the same cause of action in one suit, it does not contemplate unity of distinct and separate causes of action. On the abovementioned legal principle, let us examine whether the High Court has correctly applied the legal principle in the instant case."

17. From a reading of the provisions of Order II, Rule 2 and Rule 4 of the Code and also the principles laid down in the aforementioned cases, it is clear that under Order II, Rule 2read with Rule 4, the plaintiff can also claim mesne profits or arrears of rent in a suit filed for ejectment of the tenant. The plaintiff can further file a fresh suit for claiming mesne profits or arrears of rent for the period subsequent to the decree passed in the earlier suit having become final. But in a case where the plaintiff has claimed mesne profits or arrears of rent in a suit filed for ejectment of the tenant and has relinquished his rights vis-a-vis mesne profits or arrears of rent in the suit proceedings itself, the provisions of Order II, Rule 2 will come into play and in comparison to the second suit for mesne profits or arrears of rent till the decree, the earlier suit will attain finality.

18. Applying the above principles to the facts of the present case, we find that the decree in the earlier Suit No. 1481 of 1986 filed for ejectment of the appellant-Company and mesne profits attained finality on 09.09.1998 and 25.09.1998 when this Court had dismissed Civil Appeal No. 1657 of 1998 and the application respectively filed by the appellant herein. However, vide order dated 25.09.1998, this Court had directed that if the appellant hands over the peaceful vacant possession of the premises in question on or before 08.10.1998 then they will have to pay Rs. 2,500/- for the use and occupation charges for the month of October 1998 otherwise Rs. 50,000/- as fixed earlier. It is not in dispute that in the present case, the appellant had handed over peaceful vacant possession to the respondent on 08.10.1998 and also that the respondent had relinquished the plea of mesne profits during the suit proceedings itself. Thus the prohibition contained in Order II Rule 2 would squarely apply.

19. Having regard to the earlier proceedings, as mentioned above, in Civil Suit No. 1481 of 1986, wherein a decree for possession was passed but the claim for mesne profits was relinquished by the respondent-landlord and in view of the subsequent orders of the Division Bench and this Court, the question of further payments on account of mesne profits which had been fixed and paid in the earlier suit did not arise. The subsequent suit claiming mesne profits for the very same period during which a fixed amount was paid by the appellant-Company and accepted by the respondent without objection is clearly not maintainable. The plaint does not disclose any cause of action or any clear right to sue and was liable to be rejected. The above facts would clearly show that the averments in the plaint read along with the orders and pleadings relied upon by the respondent in support of the reliefs prayed for in Civil Suit No. 457 of 1998 do not disclose any cause of action for the prayer for mesne profits made therein.

Conclusion :-

20. In view of the above, we are of the considered opinion that the possession of the appellant-Company for the period under consideration, pursuant to orders passed by the High Court and this Court, cannot in any view be considered as illegal or unauthorized or that of a trespasser. For that reason, the plaint in Civil Suit No. 457 of 1998 does not disclose any cause of action for filing a suit for mesne profits till surrender of possession. Therefore, the issue of mesne profit attained finality and the respondent is not entitled to raise the same issue now by way of filing a fresh suit. In other words, by not pressing the claim of mesne profits raised in a suit before the Court, unconditionally and without any reservation, the respondent cannot thereafter turn around and claim the same relief by filing a fresh suit.

21. In view of the foregoing discussion, we allow the appeal filed by the appellant-Company.

Judgment Referred.

[1]*(2005) 1 SCC 0787*
[2]*AIR 1931 All. 0429*
[3]*(2014) 3 SCC 0595*