

RAJASTHAN HIGH COURT

Dharam Chand

Vs.

Jogeshwar

S.B. Civ. Rev. Petn. No.3 of 2007

(Dr. Vineet Kothari, J.)

12.12.2008

ORDER

Dr. Vineet Kothari, J.

1. This revision petition has been filed by the defendants aggrieved by the order dated 28th September, 2006 passed by the learned Dist. Judge, Jalore rejecting the application of the defendants under Order 7, Rule 11, Civil Procedure Code seeking dismissal of the Civil Suit No. 14/2006 on the ground that the earlier civil suit filed by the plaintiff Jogeshwar, namely, Civil Suit No. 3/2003 was withdrawn by him under Order 23, Rule 1, Civil Procedure Code on 21- 11-2005 without seeking any liberty from the Court to institute a fresh suit and therefore, the present suit subsequently filed was barred in view of Order 23, Rule 1, Civil Procedure Code and therefore, the suit deserved to be dismissed at the threshold on an application under Order 7, Rule 11, Civil Procedure Code.

2. Mr. R.K. Thanvi, learned counsel appearing for the petitioners-defendants submitted that in the application seeking withdrawal of earlier Suit No. 3/2003, in which the plaintiff Jogeshwar claiming the same relief, namely, declaration of his adoption by the defendant Dharam Chand and the injunction against him from alienating his property was withdrawn simpliciter and the said suit was dismissed as withdrawn under Order 23, Rule 1, Civil Procedure Code without any liberty on 21-11-2005 and therefore, the present Suit No. 14/2006 could not be instituted by the same plaintiff again claiming the similar relief of declaration of adoption and injunction and also cancellation of sale-deed of the property sold by the defendant Dharam Chand in favour of the petitioners No. 2 to 9 and therefore, the said suit was barred and the learned Court below ought to have allowed the application filed by the

defendants under Order 7, Rule 11, Civil Procedure Code and dismissed the said suit. He has, therefore, prayed that the present revision petition deserves to be allowed and the impugned order dated 28-9-2006 deserves to be quashed and set aside and the Suit No. 14/2006 deserves to be dismissed.

3. He relied upon the decision of the Allahabad High Court in the case of *Budh Prakash Rastogi v. Santosh Pal Dublith*, reported ¹ in wherein the Allahabad High Court held that right of a partner of a partnership firm to ask for accounting from other partner of the firm is a substantive right. It can be enforced in law Courts. However, once a suit is filed in pursuit of that right by the partner then withdrawal of the suit by that partner for one or the other reason amounts to abandonment of that vested right, which once abandoned cannot be claimed over again by filing another suit. He also relied upon the decision of Delhi High Court in the case of *M/s. Shoes East Limited v. Jainender Jain*, reported in ² in which Delhi High Court held that where the subsequent suit was filed seeking almost similar relief as sought for in the suit earlier filed which was withdrawn without liberty from the Court to institute fresh suit, the said suit was barred under Order 23, Rule 1, Civil Procedure Code and in the facts of the case obtaining before Delhi High Court, the suit came to be dismissed under Order 7, Rule 11, Civil Procedure Code by Delhi High Court exercising original jurisdiction.

4. On the other hand Mr. Vivek Shrimali, learned counsel appearing for the respondent-plaintiff vehemently urged that the subsequent suit filed by the plaintiff was neither for the same cause of action nor the subject-matter was same as involved in the earlier suit and therefore, such subsequent suit was not barred under Order 23, Rule 1 Civil Procedure Code. He submitted that in the subsequent suit since soon after withdrawal of earlier suit on 21-11-2005, which was withdrawn on account of assurance given by the defendants that the plaintiff would be treated as adoptive son and would be given his due share in the property, though said factum was not mentioned in the application withdrawing earlier suit, which was done upon counseling between the parties, the defendant sold the property to the defendants No. 2 to 9, the present petitioners before this Court, therefore, in the present suit filed by the plaintiff not only the plaintiff claimed those reliefs as claimed in the earlier suit, but has also claimed for cancellation of the sale-deed dated 21-4-2006 executed by the defendant No. 1 Dharam Chand in favor of other defendants and therefore, the present suit cannot be said to be either for the same subject-matter or for the same relief and therefore, the application under Order 7, Rule 11, Civil Procedure Code was not maintainable and the Court below has not erred in rejecting the said application of the

defendants and the present revision petition deserves to be dismissed. He relied upon the judgment of Hon'ble Supreme Court in the case of *Vallabh Das v. Dr. Madan Lal reported* ³ in which the Hon'ble Supreme Court dealing with the provisions of Order 23, Rule 1 Civil Procedure Code has held as under :

" "Subject-matter" in Order 23, Rule 1 means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit.

Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits.

Where in the first suit the plaintiff sought to enforce his right to partition and separate possession and in the second suit, he sought to get possession of the suit properties from a trespasser on the basis of his title;

Held that the subject-matter in the two suits was not the same although the factum and validity of adoption of the plaintiff in both the suits came up for decision."

5. He also relied upon the judgment of the Hon'ble Supreme Court in the case of *Sidramappa v. Rajashetty, reported in* ⁴ the Hon'ble Supreme Court said that where the relief sought in the present suit could not have been claimed by the plaintiff in the earlier suit, mere withdrawal of the suit would not bar institution of subsequent suit. The relevant part of para 8 of the said judgment is reproduced here-under:

"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 he sought in the subsequent suit, the plaintiffs subsequent suit is not barred by Order 2, Rule 2."

6. In the case of *Shri Inacio Martins v. Narayan Hari Naik reported in* ⁵ the Hon'ble Apex Court held that where the earlier suit for injunction was dismissed on technical ground, subsequent suit for declaration of title and recovery of possession was not barred by *res judicata* under Order 2, Rule 2, Civil Procedure Code. In the case of *Jet Ply Wood Pvt. Ltd. v. Madhukar Nowlakha reported* ⁶ in the Hon'ble Apex Court held that in view of there being no specific provision in the Civil Procedure Code providing for filing of application for recalling order permitting withdrawal of suit, the provisions of Section 151, Civil Procedure Code can be resorted to in the interest of

justice.

7. The learned counsel for the plaintiff-respondent also relying upon the decision of Himachal Pradesh High Court in the case of *Smt. Nirmala v. Hari Singh, reported* ⁷ in submitted that the Order 2, Rule 2, Civil Procedure Code does not preclude second suit based on distinct and separate cause of action and to make this rule applicable, the defendant must satisfy three conditions : (a) the previous and second suit must arise of the same cause of action; (b) both the suits must be between the same parties and (c) the earlier suit must have been decided on merits. Thus, the learned counsel for the plaintiff-respondent submitted that since neither the parties were common in the subsequent suit nor the sale-deed dated 21-4-2006 was in existence at that point of time of which cancellation is sought in the present suit, therefore, the present suit cannot be said to be instituted for the same subject-matter and the same relief and therefore, the suit cannot be held to be barred under Order 23, Rule 1, Civil Procedure Code.

8. I have heard the learned counsel for the parties and given my thoughtful consideration to the submissions made at the Bar and perused the impugned order as well as the judgments cited at the Bar.

9. In the considered opinion of this Court, there is no substance in the present revision petition and the learned Dist. Judge cannot be said to have erred in rejecting the application under Order 7, Rule 11, Civil Procedure Code of the petitioners-defendants. The subsequent suit instituted by the plaintiff-respondent cannot be said to be either for the same cause of action and between the same parties or for the same reliefs. The purpose of bar of subsequent suit for the same subject-matter or the same relief contained in Order 23, Rule 1, Civil Procedure Code is obviously to avoid repetitive litigation for the same issues. However withdrawal of the earlier suit cannot bar the subsequent suit merely because there is some overlapping of the cause of action in the subsequent suit compared with earlier suit, which was withdrawn by the plaintiff. By withdrawal of suit, the lis or controversy is not really decided by the Court. In the present case also, the claim of relief of declaration of adoption is only an incidental to the main relief claimed in the subsequent suit, namely, cancellation of the sale-deed executed by the defendant Dharam Chand in favour of other defendants on 21-4-2006, soon after withdrawal of the suit by the plaintiff on 21-11-2005. The application filed by the plaintiff withdrawing the earlier suit indicates that the same was done on counseling of other members of the society and not to enter into litigation with the family members and therefore, the same was unconditional withdrawal by the

plaintiff. Thereafter since the property in question was sold by the defendants apparently depriving the plaintiff from his right in the said property, the plaintiff filed the subsequent suit *inter alia* seeking declaration of adoption and injunction against the defendants and also the main relief of cancellation of sale-deed in the present suit. The present suit was obviously filed on subsequent cause of action after the earlier suit was withdrawn and merely because there is some overlapping of relief claimed by the plaintiff in subsequent suit, the same cannot be held to be barred by provisions of Order 23, Rule 1, Civil Procedure Code. The said subsequent cause of action cannot be said to be part of earlier cause of action for which earlier suit was abandoned by the plaintiff and therefore the bar of fresh suit should apply against the plaintiff.

10. The judgments relied upon by the learned counsel for the plaintiff- respondent clearly support the submissions of the learned counsel for the plaintiff-respondent and the present suit could not be held to be barred by provisions of Order 23, Rule 1, Civil Procedure Code.

11. The learned trial Court, therefore, cannot be said to have committed any error in rejecting the application under Order 7, Rule 11, Civil Procedure Code of the petitioners-defendants. The impugned order dated 28-9-2006 is, therefore, found to be unassailable. Consequently, this revision petition filed by the petitioners-defendants is found to be devoid of merit and the same is accordingly dismissed. No order as to costs.

Revision dismissed.

Cases Referred.

1. AIR 1998 All 84
2. 2002 All India High Court Cases 4890
3. AIR 1970 SC 987
4. AIR 1970 SC 1059
5. AIR 1993 SC 1756
6. AIR 2006 SC 1260
7. AIR 2001 HP 1