

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.329/2007

Dhall Traders Pvt. Ltd.

.....Appellants through
Mr. K.K. Malhotra, Adv.

versus

United Breweries Ltd.

.....Respondent through
Ms. Gurkamal Hora &
Ms. Tatini Basu, Advs.

%

Date of Hearing: February 02, 2010

Date of Decision: March 17, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE MANMOHAN SINGH

- | | |
|--|-----|
| 1. Whether reporters of local papers may be allowed to see the Judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J.

1. This Appeal assails the Order of the learned Single Judge dated 18.05.2007, rejecting an application of the Defendants (Appellants before us) wherein it was urged that the Suit filed by Plaintiff stood barred by Order II Rule 2 of the Code of Civil Procedure, 1908 ('CPC' for short).

2. The Plaintiff is engaged in the manufacture, distribution and sale of beer under various brand names. The Defendants were an exclusive *del credere* agent appointed by the Plaintiff

for sales in the states of Uttar Pradesh and Uttarakhand. The Defendant was transacting business under the name and style of Max Trading Company which reconstituted to form Dhall Traders Pvt. Ltd.

3. The Plaintiff/Respondent has filed the Suit to recover the amounts paid by it to the Defendant against the Debit Claims/Bills which are alleged to have been wrongly and illegally raised by the Defendants in September, 2001.

4. Paragraph 18 of the Plaint discloses that the Plaintiff had filed O.S. No.8952/2001 before the City Civil Judge, Bangalore. It states that the cause of action in relation to the said Suit was the alleged illegal act of the Defendant to enter into *del credere* agreements with another company, called South Africa Breweries Ltd.

5. On a Preliminary Objection of the Defendants as to the maintainability of the Suit in the light of the bar under Order II Rule 2 of the CPC, a Preliminary Issue was struck vide Order dated 7.8.2006 which reads as follows:-

Whether the Suit is barred under Order II Rule 2 of CPC?

6. The Issue has been decided in favour of the Plaintiff and against the Defendants.

7. The Defendants have urged that the Order of the learned Single Judge is erroneous in law on the ground that since the Plaintiff had already filed a Suit against the Defendants in Bangalore, which was withdrawn under Order XXIII Rule 1 without liberty to file a fresh suit on the same cause of action, the present Suit is not maintainable in the light of the specific bar under Order II Rule 2. For this proposition of law, the Learned Counsel for the Appellants/Defendants has placed reliance on judgments of the Hon'ble Supreme Court and various High Courts. In *N.V. Srivasa Murty -vs.- Mariamma*, AIR 2005 SC 2897, the Plaintiff had filed a suit seeking permanent injunction restraining the Defendants therein from interfering in the possession of the suit property. Subsequently, while the earlier suit was pending, another suit was brought seeking a declaration that the Plaintiffs were the absolute owners thereof and were entitled to Orders restraining the Defendants from entering upon the said property and from interfering with the Plaintiff's right of peaceful enjoyment of the property. Their Lordships held that the bar of Order II

Rule 2 applied to the subsequent suit, and made these observations:-

13. In para 11 of the plaint, the plaintiffs have stated that they had earlier instituted Original Suit No. 557 of 1990 seeking permanent injunction against the defendants and the said suit was pending when the present suit was filed. Whatever relief the petitioners desired to claim from the civil court on the basis of averment with regard to the registered sale deed of 1953 could and ought to have been claimed in original Civil Suit No. 557 of 1990 which was pending at that time. The second suit claiming indirectly relief of declaration and injunction is apparently barred by Order 2 Rule 2 of the Code of Civil Procedure.

14. After examining the pleadings of the plaint as discussed above, we are clearly of the opinion that by clever drafting of the plaint the civil suit which is hopelessly barred for seeking avoidance of registered sale deed of 5-5-1953, has been instituted by taking recourse to orders passed in mutation proceedings by the Revenue Courts.

8. Reliance has also been placed on a judgment of a single Judge of this Court, viz., *Jaideep Bajaj -vs.- Smt. Shanti Bajaj*, AIR 2006 Delhi 335. In that case, the Plaintiff had earlier instituted a suit for injunction which was withdrawn under Order XXIII Rule 1 without the leave of the Court to file fresh

suit on same cause of action. A subsequent Suit for partition was filed which the Court held was barred by Order II Rule 2, noting that even the pleadings in the two Suits were identical but for the prayer.

9. From a perusal of the Plaint before the learned City Civil Judge, Bangalore and the Orders passed by the Court, it appears that the said Suit was filed against the Defendants for relief of damages, rendition of accounts, declaration and injunction. It was filed on the ground that the contract between them was subsisting. The Plaintiff had not sought any recovery of any amount allegedly due from the Defendants.

10. While allowing the withdrawal of the Suit under Order XXIII Rule 1(iii) but denying any liberty to file a fresh suit on the same cause of action, the learned City Civil Judge returned the following findings:-

....No doubt, it is for the plaintiff to file a suit against the defendants for recovery of the amount due in the appropriate Court and the plaintiff is entitled to file a suit. But no liberty can be granted to the plaintiff to file the suit for recovery of the amount on the present cause of action.

11. Clause(3) of Rule 1 of Order XXIII makes it discretionary to the Judge that where he is satisfied that either the suit of the plaintiff will fail by reason of some formal defect, or that there is sufficient grounds for the Plaintiff to institute a fresh suit for the same subject matter of some part of the claim raised in the suit before him, he may grant leave to withdraw the entire suit or a part of the claim, with liberty to institute a fresh suit in respect of the same subject matter or part of the claim that has been withdrawn.

12. This provision is in the form of an exception to the bar under Order II Rule 2 which mandates the plaintiff to include all the claims which he is entitled to make in the same suit. It further ordains that a person who is entitled to more than one relief in respect of the same cause of action may sue for all or any such relief; but if he, except with the leave of the Court, omits to sue all or any of these claims, he shall be barred from suing in respect of any relief so omitted. This bar is specific to reliefs arising out of the same cause of action. The abiding rationale is that multiplicity of proceedings should be abjured not only from the standpoint of an avoidable proliferation in Court dockets, but also to minimize the possibility of conflicting verdicts.

13. The learned Counsel for the Appellants/Defendants has further contended that since the relief claimed by the Respondent in this suit was available at the time of the filing of the previous suit, and that both pertained to the same dealings between the parties, that is, the contract of dealership, the cause of action in both the suits has to be construed to be common. Therefore, the omission to claim the entire relief in the Bangalore case has disentitled him from raising the unprayed for relief before the Court. To buttress his argument, reliance has been placed on *Raptakos Brett – vs.- M/s Modi Business Centre*, AIR 2006 Madras 236, where the learned Single Judge holds thus:

13. From the materials available, it is quite clear that those causes of action were very well available on the stated facts at the time of the filing of the earlier suit. It remains to be stated that both the causes of action refer only to the agreement in question, and it is not a new agreement entered into in 1999 as put forth by the plaintiffs side; but, it is only a confirmation of the earlier agreement, as per the plaint averments. Hence, it would be abundantly clear that cause of action was very well available, but knowingly and deliberately omitted to be mentioned. This Court is of the view that here is a clear case where Order 2, Rule 2 has got to be applied, and accordingly, the plaint has got to be rejected.

14. *Per Contra*, the learned Counsel for the Respondent has submitted that the bar of Order II Rule 2 will be attracted only in case of commonality of cause of action and not mere coexistence of two separate causes of action. Coexistence of causes of action does not perforce make it mandatory for the Plaintiff to institute a common suit for both under Order II Rule 2. He relies on *Kunjan Nair Sivaraman Nair -vs- Narayan Nair*, (2004) 3 SCC 277, which holds as under:

6. We shall first deal with the question regarding applicability of Order 2 Rule 2 of the Code. The said provision lays down the general principle that suit must include whole claim which the plaintiff is entitled to make in respect of a cause of action, and if he does not do so then he is visited with the consequences indicated therein. It provides that all reliefs arising out of the same cause of action shall be set out in one and the same suit, and further prescribes the consequences if the plaintiff omits to do so. In other words Order 2 Rule 2 centres round one and the same cause of action.

...

8. A mere look at the provisions shows that once the plaintiff comes to a court of law for getting any redress basing his case on an existing cause of action, he must include in his suit the whole claim pertaining to that cause of action. But if he gives up a part of the claim based on the said cause of action or

omits to sue in connection with the same, then he cannot subsequently resurrect the said claim based on the same cause of action. So far as sub-rule (3) is concerned, before the second suit of the plaintiff can be held to be barred by the same, it must be shown that the second suit is based on the same cause of action on which the earlier suit was based and if the cause of action is the same in both the suits and if in the earlier suit the plaintiff had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press into service in that suit cannot be subsequently prayed for except with the leave of the court. It must, therefore, be shown by the defendants for supporting their plea of bar of Order 2 Rule 2 sub-rule (3) that the second suit of the plaintiff filed is based on the same cause of action on which its earlier suit was based and that because it had not prayed for any relief and it had not obtained leave of the court in that connection, it cannot sue for that relief in the present second suit. A Constitution Bench of this case of *Gurbux Singh v. Bhoorala*; AIR 1964 SC 1814, in this connection has laid down as under:

“6. In order that a plea of a bar under Order 2 Rule 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 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. 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. It is for this reason that we consider that a plea of a bar under Order 2 Rule 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 CS No. 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2 Rule 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 the 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 Order 2 Rule 2, Civil Procedure Code was not maintainable."

9. The above position was again illuminatingly highlighted by this Court in *Bengal Waterproof Ltd. v. Bombay Waterproof Mfg. Co.* (1997) 1 SCC 99.

10. Order 2 Rule 2 sub-rule (3) requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based. Therefore, there must be identical cause of action in both the suits, to attract the bar of Order 2 sub-rule (3). The illustrations given under the rule clearly brings out this position. Above is the ambit and scope of the provision as highlighted in *Gurbux Singh case*¹ by the Constitution Bench and in *Bengal Waterproof Ltd.* The salutary principle behind Order 2 Rule 2 is that a defendant or defendants should not be vexed time and again for the same cause by splitting the claim and the reliefs for being indicted in successive litigations. It is, therefore, provided that the plaintiff must not abandon any part of the claim without the leave of the court and must claim the whole relief or

entire bundle of reliefs available to him in respect of that very same cause of action. He will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the court.

15. It is held in *S. Nazeer Ahmed -vs- State Bank of Mysore*, (2007) 11 SCC 75 that Order II Rule 2 is directed to securing an exhaustion of 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 arise from the same transaction. What must be appreciated is that but for Order XXXIV Rule 14, it may not have been open to the Plaintiff Bank to sue upon the mortgage executed by the borrower, having omitted to proceed on the mortgage in the first suit which was for recovery of money. The Bank endeavoured to proceed on the mortgage in execution, on an objection being raised by the Judgment Debtor as found to be entitled to file a second suit because of the CPC. We should not forget that law abhors foreclosure of mortgages and instead postulates and favours redemption.

16. In the case in hand, the test to be applied for the applicability of Order II Rule 2 is to see whether the claims under the two Suits, first before the Bangalore City Civil

Judge and the second before the learned Single Judge, are generic, that is, sprouting from the same cause of action.

17. The Hon'ble Supreme Court in *ABC Laminart -vs- A.P. Agencies*, AIR 1989 SC 1239 succinctly defined cause of action thus:-“A cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence, no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a judgment/decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff”. In *Swamy Atmananda -vs- Sri Ramakrishna Tapovanam*, AIR 2005 SC 2392, after recounting various precedents, the Supreme Court defined cause of action in these words:-“Cause of action means every fact, which, if traversed, would be necessary for the plaintiff

to prove in order to support his right to a judgment of the Court. It is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act, no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all material facts on which it is founded". In *Om Prakash Srivastava -vs- Union of India*, (2006) 6 SCC 207, the Hon'ble Supreme Court gave a simple formula to determine the identity of cause of action. The Court observed that:-"The rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action or different causes of action, even though they arise from the same transaction. One great criterion, when question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit is whether the same evidence will maintain both actions".

18. Applying the legal erudition and ratio of the above noted precedents, it is difficult to sustain the arguments of the learned counsel for the Appellants/Defendants that the cause of action in the two Suits is common. The Suit in

Bangalore for relief of damages, rendition of accounts, declaration and injunction was predicated on the grievance of alleged violation of the *del credere* agency agreement by entering into a similar agreement simultaneously with another company which was in direct competition with the Plaintiff. The Suit before the learned Single Judge is a Suit for recovery based on the payments made against the Debit Claims/Notes raised by the Defendant in September, 2001. The cause of action for this Suit is thus the 'Debit Claims' raised by the Defendants, which is totally distinct from the one in the previous Suit. We may also add that the Suit for accounts, declaration and injunction was filed by the Plaintiff on the basis that the dealership was continuing and subsisting at the relevant date of filing of the Bangalore Suit. There would have been no occasion for the Plaintiff to raise claims for recovery on the basis of bills raised by the Defendants during the currency of the dealership unless there was a clear intendment of settling the accounts with the Defendants finally at the time of the filing of the previous Suit. For a cause of action to fructify in the legal sense, the bundle of facts giving rise to the claim have to be so conclusively manifest as to leave no alternative to one of the

parties to take resort to legal recourse for its redressal. In a continuing or subsisting contract, the mere fact that some squabbles arose between the parties will not necessarily be a strong enough compulsion for one to move the courts. Thus, the courts, while determining the cause of action in a given suit, have to perspicuously look at the events or facts which, out of the entire gamut of averments, have, in fact, led the Plaintiff to institute the Suit before them. In the case in hand, the facts which form the basis of cause of action are the payment made towards Debit Claims which the Plaintiff alleges to be unlawful and which it wants to recover from the Defendants. Thus, the cause of action for raising the same fructified only on the termination of the agreement which is an event subsequent and distinct from the dispute which gave rise to the earlier Suit.

19. The argument of the refusal to grant leave to file fresh suit by the learned City Civil Judge, Bangalore is only to be raised to be rejected, as the learned Judge there has refused to grant leave to file a fresh suit on the premise that no liberty to file a fresh suit for recovery of amount could be granted on the cause of action of that suit, though the Plaintiff was entitled to do so on a separate cause of action.

20. In light of the above observations, the Appeal is held to be without merit and is dismissed with costs of Rupees Twenty Five Thousand.

21. Trial Court records be sent back.

(VIKRAMAJIT SEN)
JUDGE

March 17, 2010

(MANMOHAN SINGH)
JUDGE