

* **HIGH COURT OF DELHI: NEW DELHI**

CM (M) No. 1107/2010 & CM No.15576/2010

% Judgment reserved on: 17th September, 2010

Judgment delivered on: 27th September, 2010

Sh. Ganga Mahesh Katihar
S/o Sh.Dipti Lal
R/o B-2/227 Raghbir Nagar
(Near Ghorewala Tample)
New Delhi-110027

....Petitioner.

Through: Mr.Pramod Ahuja, Advocate.

Versus

1. Smt. Sudershan Khanna
W/o Sh. S.R. Khanna
9-B, 50 Saket Nagar, Bhopal MP.

2. Shri Ranjit
S/o Sh. Jagbhusan
B-2/277, Raghbir Nagar,
(Near Ghorewala Tample)
New Delhi-110027

....Respondents

Through: Nemo

HON'BLE MR. JUSTICE V.B. GUPTA

- | | |
|--|-----|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta, J.

Petitioner has filed this petition under Article 227 of the Constitution of India, challenging order dated 29.40.2010 passed by Additional District Judge, Delhi. Vide impugned order, trial court decided preliminary issues no.7 and 8 in favour of respondent no.1 (plaintiff in the trial court) and against petitioner (respondent no.1 in the trial court).

2. Brief facts which emerges from the record are that respondent no.1 claims herself to be the owner of suit property no.B-2/277, Raghubir Nagar, New Delhi, being the only daughter/ legal heir of Late Smt. Shanti Devi, owner of property, who died on 17.01.1981. Petitioner was inducted as tenant by Late Smt.Shanti Devi in the suit property in 1982. Daughter of respondent no.1, Smt.Sweety was married to petitioner on 15.10.1984, after which petitioner stopped paying rent. After the demise of Smt.Sweety on 25.10.1987, Poonam other daughter of respondent no.1, was also got married to the petitioner on 13.12.1987 and remained married to him, till the marriage was dissolved in the year 2006. Smt.Poonam alongwith petitioner, resided in the suit premises till the dissolution of marriage. Respondent no.1 claimed that thereafter, petitioner was allowed to

stay in the suit property only till the time arrangement for alternate accommodation was made by him. Thus, petitioner was in permissive occupation of the suit property after the divorce.

3. Apprehending that petitioner may part with the suit property after divorce, respondent no.1 to assert her right, instituted a suit for Permanent and Mandatory injunction against petitioner and others.

4. In the written statement, petitioner for the first time claimed himself to be the owner of suit property by virtue of Will and GPA dated 14.8.1985 allegedly executed in his favour by Late Smt.Shanti Devi, who died on 17.1.1988. It was after his claim of ownership in the previous suit, that respondent no.1 filed the present suit for Possession, Declaration, Mesne Profits/ Damages and Permanent Injunction against petitioner and others. It was in the aforesaid circumstances, that previous suit for Mandatory and Permanent Injunction was withdrawn, admittedly without the leave of the court, after the present suit was instituted.

5. In the written statement filed by petitioner, preliminary objection of suit being barred under Order 2 Rule 2 CPC and limitation was taken.

6. Accordingly, following preliminary issues were framed :-

(i) Whether suit of the plaintiff is barred under the principle of Order 2 Rule 2 CPC ? OPD – 1

(ii) Whether suit of the plaintiff is barred by limitation ? OPD -1

7. It is contended by learned counsel that petitioner has been enjoying the property in question for last about 28 years and has got a Will in his favour which was executed by deceased Smt.Shanti Devi. Respondent no.1 never came forward for exercising her right from 1982 till the death of Smt.Shanti Devi.

8. It is also contended that present suit filed before trial court is not maintainable, since it is hit by Order 2 Rule 2 of the Code of Civil Procedure (for short 'Code'). On earlier occasion, respondent no.1 had filed a suit against petitioner on almost all and similar relief and on the same cause of action. The earlier suit was withdrawn by respondent no.1, without taking leave of the court for filing a fresh suit on the same cause of action. Though, permission to withdraw the suit was granted, but no liberty was granted to file the same on the same cause of action.

9. It is also contended that relief for possession was available to respondent no.1 earlier also at the time of filing of the previous suit in

the year 2006 and she could have filed the suit for possession against petitioner at that time also.

10. Present petition has been filed under Article 227 of the Constitution of India. It is well settled that jurisdiction of this Court under this Article is limited.

11. In *Waryam Singh and another vs. Amarnath and another*, **AIR 1954, SC 215**, the court observed;

“This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in – ‘Dalmia Jain Airways Ltd. V. Sukumar Mukherjee’, AIR 1951 Cal 193 (SB) (B), to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.”

12. In light of principles laid down in the above decision, it is to be seen as to whether present petition under Article 227 of the Constitution of India against impugned order is maintainable or not.

13. In order to make Order 2 Rule 2 of the Code applicable, petitioner must satisfy the following three conditions :-

(a) The previous and second suit must arise out 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.

14. Respondent no.1 filed the earlier suit for permanent and mandatory injunction, praying that present petitioner be restrained from selling and using the property in question and directing defendants no.2 to 4 (before the trial court) to pay rent from August, 2006 to respondent no.1.

15. Present suit on the other hand, has been filed by respondent no.1 for declaration, permanent injunction, recovery of possession and mesne profits/ damages.

16. On the face of it, different reliefs have been sought by respondent no.1 in these two suits. Trial court in this regard observed;

“From the facts and circumstances of the present case, it is evident that the previous and subsequent suits were based on two separate and distinct causes of action. The earlier cause of action was based on the apprehension of plaintiff that defendant no.1 after obtaining decree of divorce from the daughter of plaintiff may part with possession of suit property. In the plaint of previous suit, it was categorically averred by plaintiff that it had come to her knowledge that defendant no.1 had received earnest money from defendant nos.2 to 4 towards the consideration of sale of the suit property. In the written statement filed by defendant no.1, admission with respect to entering agreement to sell dated 14.8.2006 for

selling the suit property was made. While, the subsequent suit i.e. the present suit is based on a separate cause of action which arose on 18.10.2006, when the defendant asserted his ownership in the suit property by virtue of Will and GPA dated 14.8.1985 implying thereby that both the suits were based on different causes of action.

Another condition which needs to be satisfied for application of bar under Order 2 Rule 2 CPC is the disposal of earlier suit on merit. It is pertinent to note that the previous suit was not decided on merit but the same was withdrawn by the plaintiff. Therefore, it can in no circumstances be held that the present suit is not maintainable due to bar under Order 2 Rule 2 CPC.”

17. In the context of Order 2 Rule 2 of the Code, a Constitution Bench of the Supreme Court in ***Gurbux Singh vs. Bhooralal AIR 1964 SC 1810***, observed :-

“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.”

The Constitution Bench also held:

“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.”

18. Thus, after going through the record, I find that present petition under Article 227 of the Constitution of India is not maintainable. Since there is no infirmity, illegality or error on the part of the trial court, order passed by the trial court does not call for any interference.

19. Accordingly, present petition is hereby dismissed.

CM No.15576/2010 (stay)

20. Dismissed.

27th September, 2010
'ns'

V.B.GUPTA, J.