

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on 06.07.2012

% Judgment delivered on 09.07.2012

+ RFA 669/2003
M/S FIITJEE LTD. AND ANR. ... Appellants

Versus

DR. KANWAL SUJIT ...Respondent

AND

+ RFA 373/2004
M/S FIITJEE LTD. AND ANR. ... Appellants

Versus

DR. KANWAL SUJIT ...Respondent

Advocates who appeared in this case:

For the Appellants : Mr. Upamanju Hazarika, Sr. Advocate with Mr. V. D'Costa and
Mr. Rahul Goyal, Advocates

For the Respondent : Mr. Akshat Hansaria, Advocate

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

1. By this common judgment I shall dispose of these two appeals between the same parties. RFA 669/2003 is directed against the judgment and decree dated 24.5.2003 whereby a decree for recovery of Rs.488664/- with cost and pendente lite and future interest at the rate of 18% per annum, was passed in favour of

respondent and against the appellants whereas RFA 373/2004 is directed against the judgment and decree dated 15.3.2001 whereby a decree under Order XXXVII of the Code of Civil Procedure for recovery of Rs.3,85,000/- with cost and pendente lite and future interest at the rate of 18% per annum was passed in favour of the respondent and against the appellants and Order dated 24.5.2002 whereby the application of the appellants under Order XXXVII Rule 3(7) of the Code of Civil Procedure read with Rule 4 thereof was dismissed.

2. The facts giving rise to the filing of these appeals can be summarized as under:

The respondent/plaintiff who is the proprietor of the Design Build Consortium, entered into an agreement with the appellants/defendants for interior designing and decoration of their office premises at 29A, Kalu Sarai, New Delhi and Vashist House Basement, 7/3, Begumpur, Kalu Sarai, New Delhi. It was agreed between the parties that the respondent/plaintiff shall be paid a clear 10% over and above the cost of labour overheads and material supplied to the appellants from time to time. The case of the plaintiff/respondent is that she executed the work to the satisfaction of the appellants and also handed over all the original bills of purchase, ledger of accounts and expenditure statements to them. It is alleged that a sum of Rs.567314/- however remained payable by the appellants to the respondent. A cheque dated 16th December, 1997 for Rs.2.5 lac was issued by the

appellants to the respondent. When presented to the bank, the cheque was dishonoured for want of funds. The respondent thereupon filed two suits – one under Order XXXVII of the Code of Civil Procedure for recovery of Rs. 3,85,000/- comprising Rs.2.5 lac as principal sum being the amount of the dishonoured cheque and Rs.1,35,000/- towards interest calculated at the rate of 18% per annum. The balance principal sum of Rs.3,17,314/- along with interest on that amount at the rate of 18% per annum, making a total sum of Rs.4,88,664/-, was claimed in a separate suit No. 226/2000 filed under the normal procedure though on the same date on which the suit No. 225/2000 under Order XXXVII of Code of Civil Procedure was filed.

3. In suit No. 225/2000 filed under Order XXXVII of the Code of Civil Procedure, the suit summons were served upon the appellants on 25.02.2001. They did not put appearance within the prescribed period of 10 days and accordingly, a decree against them was passed on 15.3.2001. The application under Order XXXVII Rule 3 (7) of the Code of Civil Procedure, was filed by the appellants seeking setting aside of the judgment and decree dated 15.3.2001 on the ground that the file of the case was mixed up with the file of the other suit i.e. 226/2000 which was listed for hearing on 23.4.2001. It was also alleged in the application that the counsel for the appellants was under a mistaken belief that they had to first appear before the Court on 15.3.2001 and thereafter apply for leave to contest. The

learned trial Judge noted that the appellants was not an uneducated person and negligence of the counsel was not a sufficient ground to condone the delay in filing the appearance. He accordingly dismissed the application.

4. In suit No. 226/2000, the appellants filed written statement contesting the suit. They took a preliminary objection that the plaintiff having filed a suit bearing No. 225/2000 under the Code of Civil Procedure, the second suit could not be decided independently in isolation of the first suit. On merits, it was alleged that the husband of the respondent Dr. Sujit Kumar who was a good friend of the appellant/defendant, Dr. D.K. Goel, had represented himself to be the owner of M/s Design Build Consortium and that the defendants/appellants had nothing to do with the plaintiff/respondent. It was further alleged that the defendants/appellants had been advancing money to the plaintiff from time to time and recovering/adjusting the same on the basis of the actual work done by the plaintiff. It was further alleged that the plaintiff/respondent had initially gave an estimate of Rs.9 lac, which was later extended to Rs.13 lac and the plaintiff wrongfully drew a sum of Rs.14,65,000/- without submitting the bills and also got a cheque of Rs.2.5 lacs issued towards advance for interior on the third floor of property No. 29A, Kalu Sarai, New Delhi, for which work was to commence in December, 1997. It was further admitted that the parties had agreed that the appellants shall pay clear 10% over and above the cost of labour overheads and material supplied to the

plaintiff/respondent. The defendants/appellants however denied that the bills of purchase etc had been paid to them.

The following issues were framed on the pleadings of the parties:

- “1. Whether the plaintiff has not rendered accounts of advances received by him and if so, its effect? OPD
2. Whether the plaintiff has filed another suit No.2 to 5/2000 under Order 37 CPC and present case has to be decided alongwith that suit.
3. Whether defendant no.2 admitted liability of Rs.5,76,340/-? OPP
4. Whether the plaintiff is entitled for the relief claimed? OPP
5. Relief.”

5. The first contention of the learned counsel for the appellants before this Court was that the second suit i.e. the suit for recovery of Rs.4 lac being suit No. 226/2000 was the second suit which was barred under Order II Rule 2 of the Code of Civil Procedure, which to the extent, it is relevant provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and that where a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted. It further provides that 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, excepts with

the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

6. Order II Rule 2 of the Code of Civil Procedure is based on the principal that the defendant should not be twice waxed for one and same cause of action. This Rule does not preclude second suit based on a distinct and separate cause of action, therefore, before this Rule can be invoked, two conditions need to be satisfied firstly that the previous suit as well as subsequent suit should arise out of the same cause of action and secondly that they must be between the same parties. The requirement of law thus is that the whole of the claim in respect of one cause of action should be included in one suit. Splitting of the claims based on the same cause of action is prohibited.

7. As held by the Supreme Court in *Swamy Atmananda v. Swami Bodhananda & Ors.*, 2005 (3) SCC 734, a cause of action comprises every fact which traversed it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words it is a bundle of facts which taken that the law applicable to those facts gives a right to the plaintiff to claim a relief against the defendant.

In *Mohammad Khalil Khan and Others*, AIR (1949) Privy Council 78, the following principles were laid down to ascertain whether the subsequent suit was barred by Order 2 Rule 2 of the Code of Civil Procedure or not.

- (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,”
- (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.
- (3) If the evidence to support the two claims is different, then the causes of action are also different.
- (4) The causes of action in the two suits may be considered to be the same if in substance they are identical.
- (5) The cause 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.”

In *Sidramappa v. Rajashetty and Ors.*, AIR 1970 Supreme Court 1059, the Apex Court was of the view that if the cause of action mentioned in the earlier suit afforded a basis for a valid claim but did not enable the plaintiff to ask for any

relief other than those he prayed for in that suit, the subsequent suit would not be barred under Order 2 Rule 2 of the Code of Civil Procedure.

In **Raman Ittiyathi and Ors. Pappy Bhaskaran and Ors., AIR 1990 Kerala 112**, the High Court was of the view that Order 2 Rule 2 does not require that when a transaction or right gives rise to several causes of action they should all be combined in one suit or that the plaintiff must lay his claim alternatively in the same suit for these different causes of action. The fundamental postulate for the application of the rule is that there must be one and only one cause of action in fact before its several provisions can apply. The cause of action cannot be split up to sue for one part in one suit and another part in another suit.

8. It has been contended by the learned counsel for the plaintiff/respondent that the causes of action for filing suit of the Order 37 of the Code of Civil Procedure was the cheque of Rs.2.5 lacs issued by the appellants/defendants, whereas the cause of action in the other suit was the work executed by them for the defendants/appellants and their failure to pay the balance amount due to the plaintiff/respondent for that work. He further submitted that since the plaintiff is required to prove not more than issue of cheque in question and its dishonor by the bank, whereas in the other suit, she was required to prove all the facts germane to the transaction such as execution of the work, it cannot be said that the cause of action for the two suits were identical. It was, further submitted by him that

plaintiff/respondent could not have claimed the whole of the amount payable to her, in the suit under Order 37 of the Code of the Civil Procedure and, therefore, the bar of Order 2 Rule 2 of the Code of Civil Procedure would not operate. The learned counsel for the appellants on the other hand submitted that since the case of the plaintiff/respondent was that the principal amount due to her was Rs.5,67,314/- and the amount of the cheque was only Rs.2.5 lacs, she could have filed an original suit for recovery of the whole of the said amount, instead of one suit under Order 37 of the Code based on the amount of the cheque and the other for recovery of the balance amount.

9. In view of the provisions contained in Rule 1 of Order 37 of the Code, the plaintiff/respondent, in a suit under Order 37 of the Code could have claimed only the amount of the cheque and interest on that amount. The balance amount, if any, payable to the plaintiff/respondent, could not have been claimed in such a suit. The law does not expect a party to suffer for no fault on his part. Also, a person cannot be precluded from availing the legal remedy available to him. Therefore, the plaintiff/respondent had a legal right to file a suit under the provisions of Order 37 of the Code of Civil Procedure and in view of the restrictions contained in the said order, she could not have claimed more than the amount of cheque and interest on that amount, in such a suit. There being a legal bar to claim more than the amount of cheque and the interest on that amount, in a suit under Order 37 of the

Code, it is difficult to accept the contention that the second suit, for recovery of that amount which was not covered by the cheque issued by the appellants/defendants to the plaintiff/respondent, was hit by Order 2 Rule 2 of the Code of Civil Procedure. Any other interpretation would result in gross injustice being caused to the plaintiff/respondent since either she would be denied of the statutory remedy available to her to file a suit under the summary procedure contained in Order 37 of the Code, for recovery of the amount of the cheque and interest on that amount or she would have to forego that part of her claim which was not covered by the cheque issued to her.

For the reasons stated above, I am of the view neither of the suits is barred under Order 2 Rule 2 of the Code of Civil Procedure.

10. The learned counsel for the appellants/defendants has referred to a decision of the Supreme Court in *S. Nazeer Ahmed v. State Bank of Mysore and Ors., (2007) 11 SCC 75*, where the Supreme Court referred to the principle laid down by the Privy Council in the case of *Mohammad Khalil Khan* (Supra) with respect to the scope of the Order II Rule 2 of the Code of Civil Procedure. In this case, the Court relying upon the provisions contained in Order 34 Rule 14 & 15 of the Code held that a previous suit for recovery of mid-term loan did not bar a subsequent suit to enforce the equitable mortgage since the two cause of action were different though they might have been parts of the same transaction. This judgment does not

help the appellants before this Court for the simple reason that in the suit filed under Order 37 of the Civil Procedure, the plaintiff/respondent could not have claimed any amount other than the amount of the cheque and interest on that amount.

The learned counsel for the appellants has also referred to the following observations made in Swamy Atmananda & Ors v. Sri Ramakrishna Tapovanam and Ors., (Supra):

“24. A cause of action, thus, means every fact, which, if traverse, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, 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 the material facts on which it is founded.”

However, in the facts and circumstances of this case, this judgment does not help the appellants.

11. Coming to the merits of the case, the case of the plaintiff/respondent is that she had executed work for Rs.19,07,598/- and was paid a sum of Rs.1,45,0000/-, thereon by leaving a balance of Rs.4,57,598/-. Exhibit DW 1/A is the letter dated 20.11.1997 whereby the bill for the work executed at Vasisth House Basement, Begumpur was sent by the plaintiff/respondent to the appellants/defendants. A

copy of the bill for Rs.19,07,598/- is attached to this letter sent to the appellants/defendants.

12. The bill in respect of the work executed on the second floor of FIITJEE, Main Building, ICES House was sent vide letter dated 28.11.1997, a copy of which was filed by the plaintiff/respondent alongwith copy of the bill attached to the letter. In the affidavit of the plaintiff/respondent, the letter was exhibited as Ex-PW1/4 whereas the final bill in respect of that work was referred as Ex-PW1/3. However, the learned trial judge has not put exhibit mark on these two documents. Neither in their written statement nor in the deposition of Sh. D.K. Goel, who is the only witness produced by the appellants, the appellants disputed any particular item of these two final bills. This is not the case of the appellants/defendants that no work in respect of ICES House was executed. It is an admitted position that the work was executed by the plaintiff/respondent at two places. This is not their case that any work mentioned in either of these two bills was actually not executed. No evidence was led by the appellants to prove the actual work which according to them was executed by the plaintiff/respondent in their offices. In cross-examination of the plaintiff, no particular work mentioned in these bills was disputed by the appellants. In these circumstances, it would only be appropriate to hold that all the works mentioned in these two final bills were actually executed by the plaintiff/respondent.

13. As regards original invoices, vouchers etc., the case of the plaintiff/respondent in the plaint are that all these documents were supplied to the appellants/defendants. In their written statement, the appellants/defendants have apathetically denied the receipt of any such document. However, in their reply to the legal notice received from the plaintiff/respondent, the appellants/defendants have stated that some of the vouchers were supplied to them by the plaintiff and on perusal of those vouchers, they had found discrepancies in the prices mentioned in the vouchers and the bills claimed by the plaintiff on account of the furniture items. Thus, the stand taken in the written statement in this regard is contrary to the stand taken in the reply to the notice. The averment in the reply indicates that not only the bills sent by the plaintiff/respondent, even the vouchers/invoices etc., were also received by the appellants defendants from the plaintiff/respondent, and the plea taken by them in the written statement is patently false.

14. It had been claimed in the reply to the notice that appellants had carried out verifications from the shops which had supplied furniture to the plaintiff/respondent for those projects and on verification, it had been found that she had taken illegal advantage of the blind faith of the appellants/defendants and had inflated the bills by 20 to 30 per cent. However, no such shopkeeper was produced by the appellants/defendants to prove that the price paid by the plaintiff/

respondent to them was less than the price claimed by her from the defendants/appellants.

In his deposition in the court, Sh. D.K. Goel claimed that he had got the property independently valued from the assessor Sh. Virender Kohli & Associates and second opinion was taken from Sh. Manoj Singh. However, neither any such report was filed by the appellants/defendants nor did they produce either Sh. Virender Kumar or Sh. Manoj Singh in the witness box. In these circumstances, an adverse inference can be drawn against the appellants/defendants either they had not carried out any verification with the shopkeepers and had not obtained any independent valuation or that the valuation report as well as the verification report from the shopkeepers was not in their favour and that is why they neither produce any such report in the court nor did they examine any shopkeeper or expert.

15. Admittedly, a cheque of Rs.2,50,000/- was issued by the appellant to the respondent and that cheque, when presented to the bank was dishonored for want of funds. The case of the plaintiff/respondent is that the cheque was paid towards part payment of her dues, whereas the case of the defendants/appellants is that the cheque was paid as advance for the another project which was latter abundant by them. There is no documentary proof to indicate that the cheque was issued towards advance for the third project, as is claimed by the defendants/appellants.

The cheque was dishonored for want of funds. The cheque was first dishonored by

the Bank on 18.12.1997 as is evident from the copies of the bank memos. Had the cheque been issued as advance payment for the third project, it would have been honored. I am, therefore, of the view that the entire principal claimed in both the suits was payable by the plaintiff/respondent to the appellants/defendants.

16. Since the plaintiff/respondent have been able to prove her case on merits, no useful purpose will be served from setting aside the judgment and decree dated 15.03.2001 passed in the suit filed under Order 37 of the Code of Civil Procedure. I, therefore, need not go into the question as to whether the appellants/defendants had shown sufficient cause for condonation of delay in entering appearance or not.

In the suit under Order 37 of the Code of Civil Procedure, a decree for recovery of Rs.3,85,000/- with costs and pendente-lite at future interest @ 18% was passed in favour of the plaintiff/respondent, whereas in the suit filed under ordinary procedure, a decree for recovery of Rs.4,88,664/- with costs pendente-lite at future interest @ 18% per annum was passed.

Considering the rates normally being charged by the banks and the fact that the transaction between the parties was a commercial transaction, I am of the view that interest @ 18% per annum was of the higher side. In my view, the interest should have been awarded @ 12% per annum.

For the reasons stated herein above, in the suit filed under Order 37 of the Code of Civil Procedure (Suit No.225/2000) a decree for recovery of Rs.3,85,000/- costs and pendente-lite and future interest @ 12% per annum and Suit No.226/2000 a decree of Rs.4,88,664/- with costs and pendente-lite at future interest @ 12% is passed in favour of the respondent/plaintiff and against the defendants/appellants. The appellants/defendants will be entitled to adjustment of the amount which they have already paid to the plaintiff/respondent. Interest on the entire principal sum of both the suits shall be calculated till the date part payment was made by the appellants/defendants and, thereafter, interest will be calculated on the balance principal sum i.e. the amount remaining after deducting the money paid by the appellants/defendants to plaintiff/respondent, from the total principal sum, @ 12% per annum till the date of payment.

Decree-sheet be prepared accordingly.

The appeals stand disposed of.

V.K.JAIN, J

JULY 09, 2012
rb/raj