

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

+ **RFA No.720/2005**

% **28th March, 2012**

PARMA NAND

..... Appellant

Through : Mr. Sunil K. Jha, Advocate.

Versus

MANI RAM AGGARWAL & ORS.

..... Respondents

Through : Mr. Bhupesh Narula, Advocate with
Mr. Yash Tandon, Advocate for
respondent Nos.1 and 2.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? Yes.

VALMIKI J. MEHTA, J (ORAL)

1. At the commencement of hearing in this appeal, Counsel for the respondent No.1 states that respondent No.1 expired on 14.9.2009. The counsel who appears for other respondents was also the counsel for respondent No.1 and in terms of the duty fixed on the counsel under Order 22 Rule 10A of the Code of Civil Procedure, 1908 (CPC), the counsel did not inform the factum of death of respondent No.1. In any case, the

controversy in this regard is immaterial inasmuch as Mani Ram Aggarwal was the husband of respondent No.2/defendant No.2 and therefore so far as the present appeal is concerned, the interest of the respondent No.1 is represented. I therefore accept the oral prayer of the appellant to treat the respondent No.2 as a legal heir of respondent No.1. Of course, this is subject to just exceptions and the appellant will subsequently in the subject suit bring on record all the legal heirs of the deceased respondent No.1.

2. This Regular First Appeal filed under Section 96 CPC impugns the judgment of the trial Court dated 18.11.2004 dismissing the suit on the preliminary issue by holding that the suit was barred under Order 2 Rule 2 CPC.

3. The facts of the case are that the appellant/plaintiff filed a suit for declaration, possession and injunction. This suit was originally filed in the original side of this Court and whereafter due to change of pecuniary jurisdiction, same was transferred to the District Court. The following preliminary issue was decided by the trial Court:-

“Whether the present suit is liable to be dismissed as not maintainable in view of the preliminary objection in para no.1 of the written statement of defendants no.1 & 2.”

4. The contention of the defendant Nos.1 and 2 before the trial
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Court was that the plaintiff had earlier filed a suit on 17.9.1997 for perpetual and mandatory injunction which was registered as suit No.198/1997 and the appellant/plaintiff during the pendency of the said civil suit instituted the present suit in the original side of this Court and therefore the present suit was not maintainable in view of the Order 2 Rule 2 CPC.

5. Trial Court has dismissed the suit by making the following observations:-

“13. Admittedly the present plaintiff had earlier filed a Civil Suit on 16.9.97 against the sole defendant Sh. Mani Ram Aggarwal who is defendant No.1 in the present suit seeking relief of permanent and mandatory injunction. In the said Civil Suit plaintiff had also filed an application dated 15.5.01 U/o 6 Rule 17 read with section 151 CPC for amendment of the plaint and an amended plaint was also filed but a perusal of the said judicial file reveals that the said amendment application was not allowed. In that case ultimately on plaintiff's own application dated 3.7.03 the suit was dismissed as withdrawn by Ld. trial Court.

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15. In the said earlier suit the plaintiff had claimed the following reliefs:

“i) Directing the defendant his agents, associates, representatives etc, to hand over the original documents namely Sale Deed dt. 5.10.59, GPA dt. 1.1.97, Deed of Will dt. 1.1.97 etc, to the plaintiff.

ii) Further, restraining the defendant his agents associates etc, from raising any construction in the premises in dispute bearing No.I 26,27 Laxmi Nagar, Delhi-110092 as shown red in the site plan attached herewith.

iii) Further, restraining the defendant, agents, representatives etc., from selling off, disposing off or otherwise part away with interest in the premises in dispute as shown in black and red in the site plan attached herewith.”

16. In the body of the plaint of the said earlier suit, the plaintiff claimed that his grandmother Smt. Manbhavti Devi who was the owner of the property in question, on 1.1.97 had executed a GPA and a Will duly registered in his favour, that in March 1997 he had requested the defendant to hand over the possession of the property in dispute because defendant was occupying the same unlawfully, illegal and without any right, title or interest, that on 11.6.97 Smt. Manbhavti Devi passed away and after her death he i.e, plaintiff became the owner of the property in question bearing no. I-26,27 Laxmi Nagar, Delhi by virtue of the Will dated 1.1.97, that on 15.5.97 he learnt that the defendant was planning to raise construction in the open space in the property in question, that on 23.8.97 plaintiff was called to the Police Station at Shakar Pur, where the defendant in connivance and collusion with SHO PS Shankar Pur, got written certain papers regarding handing over all the original papers by the plaintiff to the defendant, that plaintiff's plea of ownership of the property in dispute was turned down by the local police, and that on 27.8.97 at the gun point he was threatened by the defendant to hand over the relevant documents, which he did at the said police station in the presence of SHO.

17. So these appear to be the material facts which were alleged by the plaintiff in the earlier suit which he was also required to

prove in order to succeed. It is also not in dispute that during the pendency of the said earlier suit, plaintiff on 26.11.99 filed the present suit before Hon'ble Delhi High Court which now stands transferred to this Court. Cause of action as specified in paragraph 26 of the present plaint reads as follows:

“That the cause of action accrued to the plaintiff on 11.6.97 when the last WILL of Ms. Manbhavti Devi became operative and the plaintiff became entitled to get exclusive possession of the suit property, then the cause of action accrued to the plaintiff when defendant nos. 1 and 2 told him that they had become owners of the property on the basis of the above referred forged/fabricated documents of agreement to sell etc; and demolished it; lastly, the casue of action accrued the previous week when the defendant nos. 1 and 2 refused to hand over the possession of the suit property to the plaintiff. As the construction of the defendant nos. 1 and 2 over the suit property is still continuing, the cause of action is subsisting.”

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19. The material facts alleged by the plaintiff in the present suit which are required to be proved by him for grant of decree are as follows: that after the death of Smt. Manbhavti Devi on 11.6.97 he became the owner of the property in question on the basis of the WILL dated 1.1.97 whereas defendants no. 1 and 2 are in unauthorized possession of the same, that the said defendants by demolishing the previous construction have been constructing shops and flats for the purpose of selling for which they have no legal right, and that the documents executed by Smt. Manbhavti Devi had been forcibly taken away by defendant no.1 in collusion

with the police which he was required to return. Apart from these material facts plaintiff has also talked of various other documents existing in favour of defendant no. 1 and defendant no.2 on the basis of which they have been claiming ownership of the property in question which are stated to be forged and fabricated.

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21. A perusal of the averments of material facts mentioned in the first suit which have been reproduced by me hereinbefore, goes to show that at the time of its institution on 17.9.1997, plaintiff was entitled to claim reliefs of declaration of ownership as also of relief of possession. Reliefs of permanent injunction and mandatory injunction claimed for in the first suit have also been claimed in the present suit. At the time of filing of the first suit, no leave U/o II Rule 2 CPC was taken from the court for brining present the suit for declaration and possession subsequently. Quite clearly, plaintiff did not reserve any right for brining fresh suit. Additional reliefs of declaration and possession sought for in the present suit were available and ought to have been sought for in the earlier suit.

22. There is no semblance of distinction between the bundle of facts which are the basis of reliefs sought for by the plaintiff in the earlier plaint as also in the present suit. The present suit was filed during the pendency of the first suit. Therefore, the present suit for the same relief was barred U/o II Rule 2 of Code of Civil Procedure on the date of its institution. In my view the plaintiff was precluded from bringing such suit as the reliefs sought for in the present suit are barred under the provisions of the Order II Rule 2 of the Code of Civil Procedure. Once plaintiff had omitted to claim reliefs of declaration of ownership and possession in the first suit, the second suit for the said reliefs on the same facts is

clearly not maintainable. Reliefs of permanent injunction and mandatory injunction had already been sought for by the plaintiff in the earlier suit and as he was precluded from filing the present suit again claiming the said two reliefs almost on identical facts. In this regard I am supported by Division Bench Judgment of Hon'ble Delhi High Court reported as **Vishal Anand v. Vimal Anand 2004 (76) DRJ 483.**” (underlining added)

6. The disputes in the present case pertain to ownership rights in the suit property bearing No.I-26,27 Laxmi Nagar, Delhi. The appellant/plaintiff claimed rights in the same by virtue of a registered Will of his grandmother Smt. Manbhavti Devi who was the owner of the property in question. It is also stated that Smt. Manbhavti Devi had executed a general power of attorney in favour of the appellant/plaintiff. The appellant/plaintiff claimed to be the owner of the property after the death of Smt. Manbhavti Devi.

7. The aforesaid facts show that it is not disputed that the present suit was filed during the pendency of the earlier suit for injunction. The earlier suit was withdrawn after filing of the subject/present suit. In these circumstances, the issue is not of applicability of provision of Order 2 Rule 2 CPC but of withdrawal of suit filed on one cause of action without seeking permission to file the second/subsequent suit on the same cause of action.

Provision of Order 2 Rule 2 CPC would have applied if the earlier suit was disposed of on merits and thereafter on the cause of action in the earlier suit reliefs which were not claimed were then claimed in the second suit and which become clear from the expression ‘afterwards’ in Order 2 Rule 2 CPC. A similar view has been taken by a learned Single Judge of this Court in the decision reported as ***Vakil Chand Jain Vs. Prakash Chand Jain, 2009 (8) AD (Delhi) 155***. Para 26 of this judgment reads as under:-

“26. Order II Rule 2 CPC requires, however, the earlier suit to include “the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action”. The Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. Under Order II Rule 2(2) CPC 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 or relinquished. In other words, the earlier suit filed had to have run its full course. In such a suit the Plaintiff is expected to make all the claims in respect of a cause of action. It does not envisage a situation like the present one where the suit filed stands withdrawn without the suit running its full course.”

8. The issue in this case is fully covered by the judgment of the Supreme Court in the case of ***Vimlesh Kumari Kulshrestha Vs. Sambhajirao and Anr. (2008) 5 SCC 58***. Paras 7 to 13 of the said judgment are relevant and the same read as under:-

“7. It is not in dispute that OS No.13-A of 1987 was filed
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during pendency of OS No.228-A of 1986.

8. Order 23 Rule 1 CPC *stricto sensu*, therefore, was not applicable, the relevant provision whereof reads thus:

“1. Withdrawal of suit or abandonment of part of claim.-(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

(2) * * *

(3) Where the court is satisfied.-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim”

9. Admittedly, the second suit was filed before filing the application of withdrawal of the first suit. The first suit was withdrawn as an objection had been taken by the respondent in regard to payment of proper court fee. We, therefore, are of the opinion that Order 23 Rule 1 of the Code was not applicable to the facts and circumstances of the present case.

10. A somewhat similar question came up for consideration in *Mangi Lal v. Radha Mohan* wherein it was held:

“Order 23 Rule 1, refers to permission to withdraw a suit with liberty to institute a fresh suit after the first one has been withdrawn. Order 23 Rule 1, cannot be read so as to bar a suit which has already been instituted before the other suit has been abandoned or dismissed. The rule is clear and can only be applied to suits instituted after the withdrawal or abandonment of previous suits.”

11. The said view was followed by the Kerala High Court in *P.A. Muhammed v. Canara Bank*.

12. An identical view was also taken in *Girdhari Lal Bansal v. Chairman, Bhakra Beas Management Board* wherein it was held:

“4.....The earlier application was filed on 6-10-1982 and the present application was fixed on 26-10-1982 and the first application was withdrawn vide order dated 18-11-1982. The learned counsel for the Board could not show if aforesaid two decisions were ever dissented from or overruled. The aforesaid two Lahore decisions clearly say that if second suit is filed before the first suit is withdrawn then Order 23 CPC is not attracted and the second suit cannot be dismissed under Order 23 Rule 1(4) of the Civil Procedure Code. Accordingly, I reverse the decision of the trial court and hold that the present petition was not barred under Order 23 CPC.”

13. We agree with said views of the High Courts. ”

9. In view of the above, the trial Court has erred in dismissing the suit under Order 2 Rule 2 CPC inasmuch as subject suit was filed during the pendency of the earlier suit. Once the second/subsequent suit is filed during the pendency of the earlier suit, the issue would not be of applicability of provision of Order 2 Rule 2 CPC but of the subsequent suit having been filed without permission to file the second suit under Order 23 Rule 1 CPC. In the facts of the present case, the applicability of provision of Order 23 Rule 1 CPC of seeking permission to file the second suit does not arise as the second suit was filed not after disposal of the first suit but during the

pendency of the earlier suit. Courts should be wary of dismissing suits at the initial stages and that too on technical grounds without allowing opportunity to the plaintiff to prove his case during trial.

10. In view of the above, appeal is accepted. Impugned judgment and decree dated 18.11.2004 is set aside. The suit is remanded back to the trial Court for a fresh decision in accordance with law. Parties are left to bear their own costs. Trial Court record be sent back.

11. Parties to appear before the District & Sessions Judge, Delhi on 2nd May, 2012, and on which date the District & Sessions Judge will mark the suit for disposal to a competent Court in accordance with law.

VALMIKI J. MEHTA, J.

MARCH 28, 2012

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