

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

% **RSA 186 of 2005**

+ **Date of Decision: 6th January, 2012**

KEWAL KRISHAN JAITELY **.....Appellant**

! **Through: Mr. G.P. Thareja & Mr. Neeraj Chaudhary, Advocates**

Versus

\$ **ACHARAJ RAM KAPUR & ORS.** **....Respondents**

Through: Respondent no. 3

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

JUDGMENT

P.K BHASIN,,J:

This appeal is directed against the judgment dated 11.03.2005 passed by the learned Additional District Judge as the First Appellate Court whereby the judgment and decree dated 28.03.1998 passed by the Court of Civil Judge in a suit filed by one Shri Achraj Ram Kapur, who died during the pendency of this appeal and is now being represented by his legal heirs, against the appellant herein for a decree of possession and *mesne profits* in respect of the suit land had been affirmed.

2. This being a second appeal under Section 100 of the Code of Civil Procedure was admitted for hearing on the following two

substantial questions of law which appeared to this Court to be arising in the matter for consideration and decision:-

- I. Whether the jurisdiction of the Court below is ousted in view of Order 23 Rule 3 in respect of the suit claiming right to possession over the strip of land (hereinafter referred as “suit land”) which right was claimed in the previous suit and which was withdrawn/abandon without the permission of the Court/**
- II. Is not the suit barred under Order II Rule 2 of Code of Civil Procedure liberty to file fresh suit having been declined by the previous Court?**

3. Before proceeding further to decide these questions of law the relevant facts leading to the filing of this appeal may be noticed. Late Shri Achraj Ram Kapur(hereinafter to be referred to as ‘the deceased plaintiff’) had filed a suit for possession and *mesne profits* in respect of a small piece of land on the back of shop no. 25 in Old Rajinder Nagar, New Delhi against the defendant and one other person also to whom the defendant had allegedly been put in possession thereof but that person was subsequently dropped by the deceased plaintiff. According to deceased plaintiff that shop was being used by him and the defendant as partners of a partnership firm from September, 1961 but later on the defendant started claiming that he was in fact a tenant thereof from the year 1961. The deceased plaintiff instead of fighting a legal battle to have a decision from the Court that the defendant was not his tenant decided to accept the defendant’s claim that he was a tenant of the shop under him.

4. The suit for possession etc. in respect of the open land at the backside of the tenanted shop, which land the deceased plaintiff claimed to have been allotted and delivered to him by the Ministry of Rehabilitation in the year 1965, had to be filed since the defendant had allegedly occupied that land unauthorisedly.

5. The defendant contested the suit by filing a written statement and claimed that the land in dispute was also a part of the tenancy in respect of shop no.25 since the year 1961 and he had not encroached upon that land. The suit was even otherwise claimed to be barred under Order II Rule 2 of the Code of Civil Procedure since prior to the filing of the present suit for possession etc. in April, 1985 the deceased plaintiff had also filed a suit for permanent injunction against the defendant in which also the subject matter was the same land in respect of which the present suit was filed and the reliefs which had been claimed in the subsequent suit for possession etc. could very well have been claimed in the earlier suit for injunction also but were not claimed.

6. The pleadings of the parties led to framing of the following issues for trial by the trial Court:-

- (1) Whether the suit has been properly valued for the purpose of Court fees and jurisdiction? OPP (Amended vide order dt. 25.7.1991).
- (2) Whether the suit is barred under the provisions of Sec. 50 of the Delhi Rent Control Act? OPD
- (3) Whether the suit is bad for mis-joinder of the parties? OPD

- (4) Whether the suit is barred by limitation? OPD
- (5) Whether the suit is barred under the provisions of Order II Rule 2 CPC? OPD
- (6) What is the extent of tenanted premises? OPP
- (7) Whether the plaintiff is entitled for mesne profits, if so, at what rate? OPP
- (8) Whether the plaintiff is entitled for the relief claimed in the plaint? OPP
- (9) Relief.”

7. After considering the evidence adduced by both the parties the trial Court decided all the issues in favour of the deceased plaintiff and passed a decree of possession and pre-suit period *mesne profits* @ Rs.100/- p.m. but declined the *pendente lite* and future *mesne profits* which were also claimed in the suit.

8. Aggrieved by the judgment and decree of the trial Court the defendant filed an appeal challenging the passing of the decrees of possession and pre-suit period *mesne profits* against him and the deceased plaintiff also filed an appeal against the denial of the relief of *pendente lite* and future *mesne profits* to him by the trial Court. The appellate Court dismissed the appeal of the defendant and allowed the appeal of the deceased plaintiff vide its common judgment dated 11-03-2005 and awarded him the relief of *pendente lite* as well as future *mesne profits* at the same rate at which the same were granted by the trial Court for the pre-suit period. Hence this second appeal came to be filed by the unsuccessful defendant and this Court, as noticed already, found that two substantial questions of law, which have been noted already, arose for decision by this Court.

9. The learned counsel for the appellant-defendant submitted that even though the earlier suit filed by the deceased plaintiff was described as a suit for injunction simplicitor but a meaningful reading of the plaint of that suit, certified copy of which is Ex.PW-2/6, would make it clear that the deceased plaintiff even as per his own case stood dispossessed from the land in dispute before the filing of that and, therefore, he should have claimed the relief of possession also in that suit itself and not by filing a separate suit subsequently on the same cause of action after withdrawing that suit without obtaining the permission of the Court for the filing of the fresh suit on the same cause of action. Therefore, counsel contended, the subsequent suit for possession was clearly barred under Order II Rule 2 as well as under Order XXIII Sub-rules 3 & 4 of Rule 1 CPC.

10. Order II CPC reads as under:

“Suit to include the whole claim – (1) every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim – Where a plaintiff omits to sue in respect of , or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs - A person entitled to more than one relief in respect of the same cause of action may sue for all or any such reliefs: but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

11. Order XXIII CPC reads like this:

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:*

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

- 2. An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other persons.*
- 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.*
- 4. Where the plaintiff-*
 - a. abandons any suit or part of claim under sub-rule (1), or*
 - b. withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.*
- 5. Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.]*

12. On behalf of the legal heirs of the deceased plaintiff one of the legal heirs, respondent no. 3 Ashok Kapur who is the son of the deceased plaintiff, argued in person from all the legal heirs. He

submitted that fresh cause of action had arisen during the pendency of the suit for injunction with the defendant succeeding in taking the possession of the shop no. 5 and that development had necessitated withdrawal of the injunction suit and filing of a separate suit for possession of that encroached piece of land.

13. In order to appreciate the rival submissions it would be appropriate to take note of the relevant pleadings of the plaint in the suit for injunction and the present suit for possession. Paras no. 8,9 and 12 of the plaint in the suit for injunction read as under:

“8. That on 28th of October, 1982 i.e. Yesterday, when the Plaintiff passed by the said strip of land he noticed that his lock has been removed on the door at point Z, referred to above and another lock is placed there and he therefore went from the main road facing Old Rajinder Nagar Market to shop No. 25 duly described above to contact the defendant, but the defendant was not there and he viz. the plaintiff herein was informed by one of his(Defendant's) servant that since somebody had removed the lock of the Plaintiff from the door at point Z, therefore, the defendant has placed the said lock as a safety measure, upon which the Plaintiff contacted defendant at his residential house i.e. at the address given in the title viz. House No. 21/43 Old Rajinder Nagar, New Delhi who (defendant) also confirmed as to what his servant had stated, but began to press upon the Plaintiff that since the said strip of land is not yielding any income to him(Plaintiff) therefore the Plaintiff should let out the same to him to which the Plaintiff replied that since he wants to construct a shop over the said strip of land he is not going to let out the said strip of land to the defendant. Upon which the defendant threatened that in case the Plaintiff does not agree to let out the said strip of land on a reasonable rate of rent to him he would take forcible possession of the same and join the said piece of land with his aforesaid tenanted shop No. 25, Old Rajinder Nagar Market, Delhi since the said strip of land is required by him for expanding his business and since he wants to change the business of sale and purchase of plastic goods to some other business, upon which the Plaintiff asked him(defendant) that he has no right to take legal possession of the aforesaid strip of land, hence the necessity for the present suit.

9. *That the cause of action for the institution of the present suit arose to the Plaintiff on 28.10.1982 due to what has been submitted above and the same is continuing since it is apprehended that at any moment the defendant may illegally and forcibly occupy the aforesaid strip of land, hence the present suit is within time.*

14. The prayer para is also being reproduced below:

“12. That the Plaintiff therefore pays as under:

- (a) That this Hon'ble Court may be pleased to restrain the defendant by means of a decree for permanent injunction from taking possession of the strip of land measuring about 19.11 sq. yards being in length 17' and in width 10' situated at the back of shop No. 25, Old Rajinder Nagar Market, New Delhi duly shown in green colour in the plan attached, or otherwise interfering with the possession of the Plaintiff qua the same.*
- (b) That this learned Court may also be pleased to award costs of the suit to the Plaintiff and against the defendant.*
- (c) That this learned Court be also pleased to award other appropriate relief/reliefs to the Plaintiff which this learned Court deems fit and proper in the circumstances of the case.”*

15. Paras no. 5 and 7 of the plaint and the relevant portion of cause of action para no. 9 in the suit for possession read as under:

“5. That, however, on 28th October, 1982 when the Plaintiff passed by the said strip of land he noticed that his lock placed on the door by him has been removed and another lock has been placed there, and he thereupon went from the Main Road facing Old Rajinder Nagar Market, New Delhi to shop No. 25 described above to contact the defendant no. 1 but the defendant was not there, however, the Plaintiff was informed by one of the employee/servant of Defendant No. 1 that since somebody had removed the lock of the Plaintiff therefore the defendant No. 1 has put his own lock upon which the Plaintiff contacted Defendant No. 1 at his residence i.e. House No.21/43, Old Rajinder Nagar, New Delhi and he i.e. the defendant confirmed the fact that as to what was conveyed by his servant, but began to press upon the Plaintiff that since the said strip of land is not yielding any income to the Plaintiff and since the said strip of land is closed to his shop therefore the Plaintiff should let out the said strip of land to defendant no. 1 and threatened that in case the same is

not done at a reasonable rate of rent he would take forcible possession of said strip of land and join the said piece of land with his tenanted shop No. 25, Old Rajinder Nagar Market, New Delhi, however, the Plaintiff did not agree to the said proposal of the defendant No.1 and since he apprehended that the defendant No. 1 may not take the forcible possession of the aforesaid strip of land shown in green colour in the plan attached and superstructure over there, he therefore on 29.10.1982 filed a suit for perpetual injunction bearing suit No. 826 of 1982 which number was allotted by the Court of Smt. Bimla Makan, Sub Judge Delhi to whom the said suit was sent for disposal by the Court of Senior Sub Judge Delhi. However, it may be mentioned that in the said case the defendant No. 1 submitted a written statement dt. 16.11.1982 in which he alleged that he is in possession of the said strip of land together with the superstructure over there as tenant and since by then the said defendant No. 1 took the possession of the said strip of land together with the superstructure thereupon and has placed the ballis and covered the same with tarpaal therefore the Plaintiff's counsel made a statement since the possession of the land in suit has been taken by defendant no. 1 during the pendency of the case therefore permission be granted to withdraw the suit with liberty to file a suit for possession. In consequence thereof the learned Sub Judge permitted the Plaintiff to withdraw the suit but was pleased to mention in order dt. 20.1.1983 that there is no need of giving any permission since there is a separate cause of action for possession, and upon this the suit was dismissed as withdrawn with costs of ₹ 30/- by order dt. 20.1.1983 passed by Smt. Bimla Makan Sub Judge Delhi. Certified copy of the said order is attached.

7. *That since the defendant No. 1 has taken illegal possession of the aforesaid strip of land together with superstructure thereupon raised by the Plaintiff therefore he is liable to surrender the possession of the said strip of land to the Plaintiff together with the superstructure raised by the Plaintiff since he has no right, interest and title in the said strip of land hence the present suit for possession is being filed and in case it is held that the superstructure over the said strip of land has not been raised by the Plaintiff and has been raised by the defendant no. 1 then the Plaintiff is entitled to the possession of the said strip of land by removal of superstructure. It may be mentioned that since the defendant has taken illegal possession of the said strip of land about 2 ½ years back, therefore, he is also liable to pay mesne profits for illegal use and occupation qua the same to the tune of ₹ 1500/- (Rupees Fifteen hundred only) p.m. because the said strip of land if let out can easily fetch rent at ₹ 100/- p.m. since it is situated in a very prosperous business locality thus the mesne profits claimed at that rate i.e. ₹ 100/- p.m. coming to the tune of ₹ 3000/- for the last 30 months, however, the*

plaintiff voluntarily gives up ₹1500/- and the present suit for ₹1500/- is being filed qua the relief of mesne profits.

9. *That the cause of action for institution of the present suit so far relief of possession is concerned firstly arose to the Plaintiff about 2 ½ years back when the defendant No. 1 took illegal possession of the said strip of piece of land.....”*

16. From the aforesaid paras extracted from the plaints in the two suits it is clear that the previous suit had been filed by the deceased plaintiff against the defendant on mere apprehension of his dispossession from the plot in dispute and the subsequent suit was filed when he actually stood dispossessed during the pendency of that suit and that development gave him a fresh and an independent cause of action for filing the suit for possession. Order II Rule 2 CPC bars those suits only in which the cause of action is the same as was there for the previous suit. So, suit for possession filed by the deceased plaintiff cannot said to be barred under this provision of law. In this regard a useful reference can be made to a judgment of Calcutta High Court in ***“Indian Cable Company Limited v. Smt. Sumitra Chakraborty”*** AIR1958Cal248 where in also a similar situation had arisen and the applicability of Order II Rule 2 CPC had come up for consideration and the High Court had held that Order II Rule 2 was not attracted to a suit for possession filed by a plaintiff after he had been dispossessed from the suit property during the pendency of an injunction suit. The relevant para is re-produced below:

“8. I have carefully considered the rival contentions put forward before us. Before I proceed to consider the plaintiff's claim for injunction by way of restoration on its merits, I must clear the two grounds on which according to the learned Subordinate Judge, the plaintiff's prayer must fail in law. In my view, the learned Judge clearly

overlooked the provision of Order 2, Rule 2 in taking the view that the present suit filed by the plaintiff company will be barred under such a provision only because the earlier suit filed by the plaintiff company, being Title Suit No. 168 of 1982 is still pending. What this Rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant. The plaint in Title Suit No. 168 of 1982 is to be found at page 126 of the informal paper book prepared for our present purposes. It was based upon a cause of action which arose on and before March 15, 1982, and as pleaded in paragraphs 6, 7 and 8 of the plaint. In those paragraphs of that plaint it was clearly pleaded that the plaintiff had been in quiet and peaceful possession of the suit property until March 15, 1982, when the defendant started abusing and harassing the plaintiff's men and agents in the matter of getting access to the suit property. In the plaint of that suit there was no allegation of dispossession from the first floor flat. What was being alleged was that the defendant was wrongfully putting padlocks on the outer door thus making it difficult for the plaintiff's men getting access to the first floor. As a matter of fact the factum of dispossession was not known to the plaintiff until April 2, 1982, when for the first time the defendant disclosed the said fact in their affidavit-in-opposition. That was a simple suit for injunction valued at Rs. 50/-, while the present suit is a suit based on a different cause of action, namely, the dispossession itself which arose only on i March 24, 1982. This being a suit for recovery of possession on declaration of tenancy rights along with damages valued at more than Rs. 33,000/- obviously such a claim could not have been added to the earlier plaint pending in the court of the learned Munsif not having the necessary pecuniary jurisdiction to entertain such a suit. Thus, the cause of action of the two suits being totally different, in my opinion the learned Subordinate Judge was in error in thinking that the present suit is prima facie barred under the provision of Order 2, Rule 2 of the Code.....”

17. For the same reasons, even the bar under Sub-rule IV of Rule 1 of Order XXIII CPC will not get attracted in the facts of the present case inasmuch as the suit for possession was filed on a cause of action which had arisen after the institution of the earlier suit for permanent injunction by the deceased plaintiff and at the time of withdrawal of the suit for injunction the Court had rightly observed that no

permission for institution of a fresh suit for possession was required to be given to the plaintiff as he had been dispossessed during the pendency of that suit.

18. Both the questions of law formulated in this appeal are accordingly answered against the appellant. Consequently, this appeal is dismissed with costs.

P.K. BHASIN,J

January 6, 2012