

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Second Appeal No.74 of 2014

(Smt. Azizunnisa Begum wd/o Chaudhary Gulam Rahim and others
vs.
Abdul Aziz s/o Fateh Mohammed, through L.Rs.)

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Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

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Court's or Judge's Orders

Shri R.S. Kalangiware, Advocate for the appellants.
Shri A.M. Quazi, Advocate for the respondents.

CORAM : A.S. CHANDURKAR, J.

DATE : APRIL 18, 2016.

The present appeal has been filed by the original plaintiffs, who are aggrieved by dismissal of the suit for possession by the trial Court, which decree has been confirmed by the Appellate Court.

The facts which are not in dispute are that the present appellants on the basis of cause of action which arose on 11/03/1987 had filed R.C.S. No.769/1987 on 15/04/1987 praying for injunction so as to protect their possession. During pendency of said suit, the present suit bearing R.C.S. No.879/1987 was filed on 27/04/1987. During pendency of the present proceedings, the earlier suit came to be withdrawn on 18/06/1987 without obtaining any leave of the Court. The cause of action as pleaded in both the suits was stated to have arisen on 11/03/1987 alleging forcible dispossession of the appellants.

In this background, both the Courts have observed that if the cause of action for filing both the suits arose on 11/03/1987, the plaintiffs could have sought the relief of possession in the earlier suit itself. As no leave was obtained under the provisions of Order II Rule 2(3) of the Code of Civil Procedure, 1908 (for short, 'the Code') when the earlier suit was filed, the subsequent suit was held to be barred under the provisions of Order II Rule 2 of the Code. This finding has been confirmed by the Appellate Court.

Shri R.S. Kalangiware, the learned Counsel for the appellants by relying upon the judgment of the Hon'ble Supreme Court in the case of **Inacio Martins vs. Narayan Hari Naik and others – (1993) 3 SCC 123** submitted that the reliefs sought in both the suits were different and therefore, both the Courts erred in holding that the subsequent suit was barred by the provisions of Order II Rule 2 of the Code. He further submitted that the earlier suit had been withdrawn and same was not decided on merits. It was, therefore, submitted that the present suit was not barred by the provisions of Order II Rule 2 of the Code.

Shri A.M. Quazi, the learned Counsel for the respondents supported the impugned judgment. According to him, the cause of action for both the suits and the suit property

being identical, both the Courts were justified in holding that the subsequent suit was barred under the provisions of Order II Rule 2 of the Code.

Having heard the respective counsel for the parties and having perused the impugned judgment, it can be seen that the trial Court has after perusal of the record observed in paragraph 21 of the judgment that the averments in paragraphs 6 and 13 of the R.C.S. No.769/1987 were identical with the averments in paragraphs 7 and 11 of R.C.S. No.879/1987. It has been further noted that the cause of action mentioned in both the suits is stated to have arisen on 11/03/1987 alleging forcible dispossession. It is, therefore, clear that when the earlier suit was filed on 15/04/1987, the relief of possession could have been sought by the plaintiffs. As the same was not done nor was any leave of the Court obtained for not seeking the relief of possession, the subsequent suit was barred by the provisions of Order II Rule 2 of the Code.

In the case of *Inacio Martins (supra)*, the facts indicate that in the earlier suit, a relief for protection of possession was sought. During pendency of said suit, the plaintiff was dispossessed and hence the subsequent suit for possession was filed. As it was found that the cause of action for both the suits was different, it was held that bar under the

provisions of Order II Rule 2 was not applicable. Same is not the case in the present appeal. The cause of action being identical and the relief of possession which could have been sought was not sought in the earlier suit, the subsequent suit was barred under Order II Rule 2 of the Code.

In view of aforesaid, no substantial question of law arises for consideration.

The second appeal is, therefore, dismissed. No costs.

JUDGE

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