

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1495 of 2016 (O&M)

Date of decision: 07.12.2016

Mubin

....Appellant

V/S

Sahabuddin and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE DARSHAN SINGH

Present: Mr. Shalendra Jain, Senior Advocate with Ms. Rajni Paul, Advocate
for the appellant.

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment and decree dated 14.12.2015 passed by the learned District Judge, Mewat whereby the appeal filed by defendant No.1-appellant against the judgment and decree dated 14.8.2015 passed by the learned Civil Judge (Junior Division), Mewat, has been dismissed.

2. Plaintiff-respondents No.1 and 2 filed the suit seeking decree of possession against the appellant and proforma respondent No.3 for directing them to hand over the vacant possession of the residential house comprised of Rectangle No.10, Killa no.8/2/3(0-3) situated in Village Chundhika, Tehsil Tauru, Distt. Mewat. In the consequential relief, the plaintiffs have also sought the decree of permanent injunction restraining the defendants from raising further construction in the disputed house.

3. As per the case of plaintiff-respondents No.1 and 2, they are owners of the suit property. The defendants were their close relatives being their maternal uncles. They were allowed to reside in the house in dispute as a licensee. With the passage of time, the defendants became dishonest and intended to grab the

residential house of the plaintiffs. That plaintiffs earlier filed a suit for permanent injunction against the defendants but vide judgment and decree dated 12.11.2011, the said civil suit was dismissed. They preferred an appeal. The said appeal was partly allowed by the learned Additional District Judge, Nuh vide judgment and decree dated 17.5.2014 declaring the plaintiffs to be the owners of the suit property. It has further pleaded that the suit property is required by the plaintiffs for their residence. Due to that reason, they served the notice dated 11.6.2012 terminating the licence of defendants. The defendants were requested to surrender the vacant possession of the suit property but of no avail. Hence, the suit.

4. The appellant and proforma respondent No.3 contested the suit by raising the preliminary objections regarding maintainability, estoppel, lack of cause of action, concealment of true and material facts and the suit being barred under Order 2 Rule 2 of the Code of Civil Procedure 1908 (for short 'CPC') because in earlier Civil Suit No.802/2008/2011, the plaintiffs never alleged that the defendants were licensees and different facts were pleaded in that suit. It is further pleaded that defendant No.1-appellant is in exclusive possession of the suit property. He has got constructed the pucca residential house in the year 1995. Defendant No.1-appellant and his father had been coming in open possession over the suit property for the last more than 40 years. Their possession is open, hostile, continuous for the last 40 years and as such defendant No.1-appellant has acquired the title over the suit property by way of adverse possession. With these pleas, the appellant pleaded for dismissal of the suit.

5. From the pleading of the parties, the following issues were framed by the learned trial Court:

- “1. Whether the plaintiffs are owner of the suit property? OPP
2. If issue No.1 is proved, whether plaintiffs are entitled to a decree of possession on the grounds as alleged? OPP

3. If issue No.1 and 2 are proved, whether the plaintiffs are entitled to a decree of permanent injunction restraining the defendant from raising construction over the suit property?
OPP
4. Whether the suit is not maintainable? OPD
5. Whether the plaintiffs are estopped by their own act and conduct? OPD
6. Relief.”

6. On appreciating the evidence on record and contentions raised by the learned counsel for the parties, the learned trial Court decreed the suit of plaintiff-respondents No.1 and 2 and a decree of possession was passed against the defendants. They were directed to put the plaintiffs in vacant possession of the suit property within three months from the date of decree. The defendants were also restrained from raising any further construction in the suit property.

7. Defendant No.1-appellant aggrieved with the aforesaid judgment and decree dated 14.8.2015 preferred the appeal. The same has also been dismissed by the learned District Judge, Mewat vide impugned judgment and decree dated 14.12.2015. Hence, this regular second appeal.

8. I have heard Mr. Shalendra Jain, learned Senior Advocate assisted by Ms. Rajni Paul, learned counsel for the appellant and have meticulously gone through the record of the case.

9. Learned counsel for the appellant contended that the suit of the plaintiff-respondents was barred by the provisions of Order 2 Rule 2 CPC. The plaintiffs have earlier filed Civil Suit No.802/2011 for permanent injunction restraining the defendants from interfering in his peaceful possession, use and occupation of the suit property. In the said suit filed by the plaintiff-respondents, it was found that the plaintiffs were out of possession and their suit was dismissed

by the learned trial Court vide judgment and decree dated 12.11.2011 (copy Ex.D1). The appeal filed by the plaintiffs was partly allowed by the learned Additional District Judge, Nuh, vide judgment and decree dated 17.5.2012 whereby the plaintiffs were held to be the owner of the suit property, however, as they were not found in possession of the suit property, they were declined the relief of injunction. Thus, the learned counsel contended that even on the date of filing of the previous suit, the plaintiff-respondents were out of possession and the relief of possession was available to them but they omitted to seek the relief of possession in the earlier suit without the leave of the Court. So, the subsequent suit filed by the plaintiff-respondents for possession is barred by the provisions of Order 2 Rule 2 CPC. He relied upon cases **J.D. Jain and others versus Sharma Associates and others 2010(5) AD (Delhi) 166, Shakti Ram and others versus Municipal Council, Jaitu and others 2012 (2) PLR 788 and Kalabati Debi and others versus Pratapi Devi 2011(1) RentLR 320.**

10. I have duly considered the aforesaid contentions.

11. Order 2 Rule 2 CPC reads as under:

“2. 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 a 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 of 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.

Explanation—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

12. The aforesaid provisions show that once the plaintiff came to the Court for getting any relief basing his claim on an existing cause of action, he must include in his suit the whole claim available to him pertaining to that cause of action. If he gives up a part of the claim based on the said cause of action or omits to sue in connection with the same, then he cannot subsequently sue for the relief so omitted. As per Order 2 Rule 2 (3) CPC before the second suit of the plaintiff can be held to be barred, it must be shown that the second suit is based on the same cause of action on which the earlier suit was based. If the cause of action on which the earlier suit was filed, the plaintiff had not sued for any of the relief available to him except with the leave of the Court on the basis of that cause of action, he subsequently cannot file suit to seek the relief which he had failed to press into service in the earlier suit. Thus, it must be shown by the defendants for establishing their plea of bar of Order 2 Rule 2 CPC that the second suit filed by the plaintiffs is also based on the same cause of action on which the earlier suit was filed and they had omitted to claim the relief available to them in the earlier suit without obtaining the leave of the Court.

13. Ex.DW-2/1 is the copy of the plaint of Civil Suit No.802/2008 filed by plaintiff-respondents No.1 and 2 against the appellant and proforma respondent No.3. That was a suit for permanent injunction wherein the plaintiffs have claimed themselves to be the owners in possession of the suit property and they had sought the decree for permanent injunction restraining the defendants from interfering into their peaceful possession, use and occupation and from raising any sort of construction therein. In the alternative, relief of mandatory injunction was sought in case the defendants succeed in raising any construction over any portion

of the suit property during the pendency of the suit. In that suit, the plaintiffs have pleaded the facts constituting the cause of action in para No.5 of the plaint which reads as under:

“5. That plaintiffs asked to the defendants several times not to interfere in the peaceful possession and user of the plaintiffs over the suit property detailed in para No.1 of the plaint in any manner and not to encroach any portion of the same and also not to raise any sort of construction over any portion of the suit property, but the defendants have paid no heed to the genuine requests of the plaintiffs and they have finally refused to do so on or about 21.06.2008 and this is the date of final cause of action arose to the plaintiffs to file the present suit.”

14. No doubt in that suit, the plaintiff-respondents have failed to establish their possession. So, they were declined the relief of injunction. However, in appeal, the Appellate Court vide judgment and decree dated 17.5.2012 (Copy Ex.PW-1/1) held the plaintiffs to be the owner of the suit property. Defendant No.1-appellant was held to be in possession of the suit property being licensee due to close relationship between the parties. The Appellate Court further observed that the plaintiffs, if so, advised, can seek the possession in due course of law.

15. As per the averments in the plaint of this suit after the judgment and decree dated 17.5.2012 passed by the learned Appellate Court in the first round of litigation declaring the plaintiffs as owner, they issued a legal notice dated 11.6.2012 cancelling the licence of the defendants and requested them to surrender the possession of the house in dispute to them and when they failed to surrender the possession, the present suit has been filed. The cause of action for filing the present suit is mentioned in para No.4 of the plaint which reads as under:

“4. That the cause of action finally arose on or about a week

ago when the defendants failed to put the plaintiffs into peaceful vacant possession of said residential house and cause of action still recurring one.”

16. The comparison of the facts constituting the cause of action in both the suits are entirely different. The previous suit was filed by the plaintiff-respondents alleging the interference into their peaceful possession over the suit property and threat to raise the further construction. On the refusal of the defendants to desist from their action that suit was filed whereas in the present suit, the possession has been sought by the plaintiff-respondents on the basis of their title. They have served the legal notice dated 11.6.2012 copy Ex.PW1/3 calling upon the defendants to hand over them the vacant possession of the house in dispute. Due to their non-compliance of the said legal notice, they have filed the present suit for possession on the basis of their title. So, the present suit is based entirely on different and distinct cause of action. Hence, it cannot be stated that the present suit is also based on the same cause of action on the basis of which the previous suit for injunction was filed by the plaintiff-respondents. Even in the written statement filed by the defendant-appellant, it has been pleaded that the plaintiff-respondents have pleaded different story in the previous suit and now they have come up entirely with a contradictory plea which is not permitted in law. Meaning thereby even the appellant has admitted in the written statement that the previous suit was filed on different facts. Thus, due to different causes of action in both the suits, the provisions of order 2 Rule 2 CPC are not attracted.

17. In case **Pachaiyammal and another versus Velusami Kandanthaiyar 1998 (1) CivCC 308**, while repelling the contentions with respect to the embargo contained in Order 2 Rule 2 CPC, the Madras High Court laid down as under:

“Therefore, when in a suit or declaration and injunction the

relief of injunction was refused on the ground that the plaintiff was not shown to be in possession on the date of the suit notwithstanding the declaration of the title granted to the plaintiff, the same does not preclude the very plaintiff from bringing a second or subsequent suit for recovery of possession. The relief of permanent injunction and recovery of possession are not only two distinct and different categories or relief but the cause of action and the basis of claim for seeking the same also would turn on different considerations and consequently it is futile to contend that merely because the claim related to one and the same properties it ought to have been made even in the first instance. At times, seeking for such reliefs simultaneously would appear to be self-contradictory unless sought for in the alternative.”

18. In case **Inacio Martins (Deceased) through LR's versus Narayan Hari Naik AIR 1993 SC 1756**, the allegations in the previous suit were that the plaintiff was a lessee and his possession was threatened therefore, he sought the prohibitory injunction to protect his possession but in the course of the suit it was found that the plaintiff had in fact been dispossessed. Therefore, there was no question of granting the injunction. In the second suit, the plaintiff sought the relief for restoration of the possession. The Hon'ble Supreme Court laid down as under:

“Therefore, the cause of action for the former suit was based on an apprehension that the defendants were likely to forcibly dispossess the plaintiff. The cause of action for that suit was not on the premise that he had in fact been illegally and forcibly dispossessed and needed the court's assistance to be restored to possession. Therefore, the subsequent suit

was based on a distinct cause of action not found in the former suit and hence we do not think that the High Court was right in concluding that the suit was barred by Order 2 Rule 2(3) of the Code of Civil Procedure. It may be that the subject matter of the suit was the very same property but the cause of action was distinct and so also the relief claimed in the subsequent suit was not identical to the relief claimed in the previous suit. The High Court was, therefore, wrong in thinking that the difference in the reliefs claimed in the two suits was immaterial and irrelevant. In the previous suit the relief for possession was not claimed whereas in the second suit the relief was for restoration of possession. That makes all the difference. We are, therefore, of the opinion that the High Court was completely wrong in the view that it took based on the language of Order 2 Rule 2(3) of the Civil Procedure Code.”

19. In case **Kunjan Nair Sivaraman Nair versus Narayanan Nair and others AIR 2004 SC 1761**, the plaintiffs had earlier filed a suit seeking decree for declaration. In that suit, though their title was upheld but the prayer for injunction was rejected as they were not found in possession. Subsequently, they filed the suit claiming the recovery of the possession and the mesne profits. The facts of the said case were totally identical to the case in hand as in this case also in the earlier suit, the plaintiffs were held to be owner of the suit property but their prayer regarding injunction was declined as they were not found to be in possession and thereafter, they have filed the present suit seeking the decree for possession. In the case referred above, the Hon'ble Apex Court held that the Courts below were justified in holding that the provisions of Order 2 Rule 2 CPC have no application to the facts of the case due to distinct causes of action.

20. All the three cases referred above are fully applicable to the facts of the case. The cases relied upon by learned counsel for the appellant are not

applicable to the case in hand and are quite distinguishable on facts. In view of the authoritatively pronouncements of the Hon'ble Apex Court in the cases referred above, they cannot render any help to the appellant. Moreover, there is an additional factor in this case. The learned First Appellate Court while deciding the appeal in the previous suit has categorically held appellant to be the licensee in the demised premises and it was specifically mentioned that the plaintiffs, if so, advised, can seek the possession in due course of law. Meaning thereby, the learned trial Court in the first round of litigation has given a liberty to the plaintiff-respondents to file the subsequent suit to seek the possession on the basis of their title from the appellant-defendants, a licensee. So, there can be no question of applicability of the provisions of Order 2 Rule 2 CPC in the present case.

21. No other point was raised before this court.

22. Thus, keeping in view my aforesaid discussion, there is no perversity or illegality in the concurrent findings recorded by the learned Courts below calling for any interference by this Court while exercising the limited jurisdiction under Section 100 CPC.

23. In this appeal, no substantial question of law arises. Questions of law if arising are settled questions of law. For the reasons given above, this appeal fails and is dismissed.

December 07, 2016

ps

(DARSHAN SINGH)

JUDGE

Whether speaking/reasoned

: Yes/No.

Whether reportable

: Yes/No.