

\$~21 & 22.

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

+ **Date of Decision: 08.01.2016**

% **RSA Nos. 7/2016 & 8/2016**

NIRMAL SINGH (SINCE DECEASED)

THR LRS & ORS

..... Appellants

Through: Mr. Ravi Gupta, Senior Advocate
along with Mr. Narender Bhandari,
Mr. Mayank Jain, Mr. Parmatma
Singh & Mr. Madhur Jain, Advocates.

versus

OM PRAKASH & ANR

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

C.M. Nos. 719/2016 & 722/2016

1. Exemptions allowed, subject to all just exceptions.
2. The applications stand disposed of.

C.M. Nos. 720/2016 & 723/2016

3. By these applications, the appellants seek condonation of five days delay in filing the present appeals.
4. The delay is small and since I am not inclined to issue notice on the

appeals, I see no difficulty in allowing these applications.

5. Accordingly, the applications are allowed and the delay in filing the present two appeals is condoned.

RSA No.7/2016 & C.M. No. 718/2016; and

RSA No.8/2016 & C.M. No. 721/2016

6. The present second appeals are directed against the common judgment and decrees passed in RCA Nos.21-22/2014 preferred by the appellants/ defendants. The First Appellate Court has dismissed both the said appeals and affirmed the common judgment and decrees passed in Suit Nos.181/1996 & 485/1996 preferred by respondent No.1 and Smt. Dhanpati (deceased), whose LRs were impleaded as the other respondents in the first appeal.

7. The original plaintiffs initially filed a suit for mandatory and perpetual injunction against the defendants/ appellants on the premise that they are the owners of the suit property, and somewhere in November 1994 and December 1994, the defendants had unauthorisedly encroached on the suit property with a view to grab the same. The original plaintiffs averred that the defendants had constructed a *Kutchha* room on the Southern side of the plot in dispute and put up a tin-shed on the Northern side of the plot. It was further alleged that they had opened a gate between Plot No.30 & 31. The plaintiffs stated that they came to know of the illegal and unauthorised encroachment in the third week of January 1995, when they visited the same. Since the unauthorised and illegal encroachment was not removed, despite their requests, and the Police also did not cooperate, the first suit

being Suit No.181/1996 was filed by the plaintiffs, on or about 25.04.1995 to seek the following substantive reliefs:

“It is, therefore, respectfully prayed that the defendants may be directed by a decree of mandatory injunction to remove kuchha room, tin sheets and to close the door as shown in red colour in the site plain attached herewith. It is further prayed that the defendants may be restrained by a decree of perpetual injunction to make any addition or construction on the plot in question or to hand-over the possession of the plot in question to any third person. The cost of suit may also be awarded to the plaintiffs and against the defendants.”

8. It appears that the defendants, upon being summoned, filed the written statement and raised an objection that in the garb of an injunction, the plaintiffs are seeking relief of injunction.

9. Consequently, the plaintiffs filed the second suit being Suit No.485/1996 on 13.12.1996. In this second suit, the plaintiffs disclosed the filing of the first suit. The plaintiffs stated in paragraphs 12 & 13 of the second suit as follows:

“12. That on the above said facts narrated in para No.1 to 11 when the plaintiffs did not get any help from the local Police, the plaintiffs thought it proper to approach the Civil Court and filed a suit of mandatory as well as Perpetual injunction against the defendants which suit is pending now in the Court of Shri Sanjay Kumar Agarwal, Civil Judge, Delhi, and fixed for 19.12.1996 for miscellaneous arguments.

13. That after filing of the said suit the defendants appeared in that suit and they are contesting the same in the said court by filing a written statement. One of the objections of the defendants in that case is that the plaintiffs’ suit is not maintainable as they are trying to claim possession in the garb

of injunction which objection though has no force yet to avoid any complication in execution of the decree of mandatory injunction the plaintiffs have decided to file the present suit for possession, hence this suit.”

10. The relief sought in the second suit read as follows:

“It is, therefore, most respectfully prayed that the Hon’ble Court may please to pass a decree for possession in favour of the plaintiffs and against the defendants directing the defendants to hand over vacant and peaceful possession of the plot bearing No. H 1-31 situated at Vikaspuri, Delhi, more specifically shown in black colour in the site-plan attached with the plaint. The Hon’ble Court may further please to pass a decree for damages for use and occupation as Rs.23000/-, in favour of the plaintiffs and against the defendants to pay the same to the plaintiffs with further direction to pay pendente-lite and future damages at the same rate of Rs.1000/- per month till the possession is delivered back. The defendants be further directed to pay interest on damages past, pendente-lite and future at the rate of 18% per annum with cost of this suit. Any other/ further relief deem fit and proper also be granted to the plaintiffs.”

11. Both the suits were filed by the plaintiffs through their attorney Sh. Amresh.

12. The two suits were consolidated on 25.11.2003, and it was ordered that Suit No.485/1996, i.e. the suit for possession – the second suit, be treated as the main suit and the evidence be led in the said suit only. Consequently, the parties led their respective evidence and the Trial Court decreed the two suits by the judgment dated 31.08.2012. The Trial Court returned the finding that the plaintiffs had been able to establish their title in the suit property, whereas the defendant had no title to the suit property.

The first appeal preferred by the appellants has also been dismissed.

13. The submission of Mr. Gupta, learned senior counsel for the appellant is limited in a narrow compass. In view of the concurrent findings of fact returned by the two Courts below with regard to the title of the plaintiffs and the lack of title in the defendants, no submission is advanced on the said aspects.

14. Mr. Gupta has raised two submissions before this Court. Firstly, he submits that the second suit for possession was barred under Order II Rule 2 CPC. When the first suit to seek injunctive relief was filed, on the basis of same cause of action it was open to the plaintiffs to seek the relief of possession, which the plaintiffs omitted to do at their own peril. Thus, the second suit for possession was not maintainable. Secondly, it is submitted that the suits had been filed through an attorney, and the evidence have been led by the attorney on behalf of the plaintiffs. The plaintiffs did not appear as their own witnesses to prove their case.

15. Having heard Mr. Gupta and perused the judgments of the Trial Court and the First Appellate Court as well as the record, in my view, no substantial question of law arises for consideration in the present second appeal and the same deserves to be dismissed.

16. As already noted above, the concurrent findings of fact are that the plaintiffs are the registered owners of the suit property. It stands conclusively established that the defendants/ appellants had encroached on the suit property and they had no right, title or interest in the suit property. Thus, the grant of the relief of possession in favour of the respondents/

plaintiffs cannot be said to be such as to lead this Court to interfere with the same in second appeal.

17. The submission premised on Order II Rule 2 CPC, in my view, has no merit. Order II Rule 2 CPC 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*”. It also, *inter alia*, provides that “*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*”.

18. In the facts of the case, it cannot be said that the plaintiff had omitted to include the whole of the claim when the first suit was filed. On a reading of the entire plaint in the first suit, it is clear that the substantive relief sought by the respondents/ plaintiffs was the relief of possession inasmuch, as, the plaintiffs sought a direction/ injunction from the Court against the defendants/ appellants that they should remove the structures erected by them on the suit property, and they should also close the entries created by them, enabling their access to the suit property from their own adjoining land. In effect, what the plaintiffs had sought was the relief of possession, though the relief was nomenclatured in the first suit as that of a permanent and mandatory injunction.

19. The objection of the appellants/ defendants raised by them in their written statement in response to the first suit itself shows that even they understood the real relief sought by the plaintiffs as that of possession, though nomenclatured as permanent and mandatory injunction. Preliminary objection No.2 of the appellants/ defendants raised in their written statement

in response to the first suit reads as follows:

“2. That the suit is further not maintainable in law as the Plaintiffs are trying to claim possession in respect of the suit property under the garb of mandatory injunction and as such to the suit is not being maintainable in law, and be dismissed with cost.”

20. The filing of the second suit, as is clear from the averments extracted hereinabove (which are made in the plaint of the second suit), shows that the same was merely to obviate the technical objection raised by the appellants/defendants that the plaintiffs had really sought the relief of possession in the garb of an injunctive relief.

21. The plaintiffs could well have sought amendment of the first suit itself to incorporate the relief of possession, instead of nomenclaturing the same as relief of injunction. However, the plaintiffs preferred to file the second suit. Pertinently, the second suit also raised the claim for damages for the period post the filing of the suit – the cause of action in respect whereof obviously arose after the filing of the first suit. Consequently, in respect of the said relief of damages, in any event, Order II Rule 2 CPC does not come into play. The objective behind Order II Rule 2 CPC is that the defendant should not be vexed twice, and the plaintiff should claim the entire relief that he could claim in the first suit itself. In the facts of this case, it cannot be said that that objective has been defeated by the entertainment of the second suit. In the light of the aforesaid discussion, I do not find any merit in this submission that the second suit for possession was barred under Order II Rule 2 CPC.

22. Mr. Gupta also submitted that the Trial Court has not passed any decree in the first suit for injunction. This does not appear to be correct. No doubt, at the top of the first page of the certified copy of the judgment, only CS(OS) No.1481/2010 has been mentioned, which is the number of the suit filed to seek the relief of possession. However, a perusal of the judgment passed by the Trial Court shows that in paragraph 2, the Trial Court was conscious that it was disposing of both the suits. The Trial Court records “... .. *I shall dispose of Old Suit No181/96 & Suit No. 1481/10 (485/96 Old No.) filed by the plaintiff for Recovery of Possession and Damages and Mandatory and perpetual injunctions against the defendants*”. The Trial Court also takes note of the fact that vide order dated 25.11.2003, the two suits were merged.

23. Mr. Gupta submits that the only relief granted by the Trial Court was the relief of possession with damages. No injunctive relief was granted, as prayed for in the first suit. I do not find any merit in this submission, for the reason that the relief of possession is comprehensive enough to include within itself the injunctive relief as sought by the plaintiffs in the first suit itself.

24. So far as the submission of Mr. Gupta that the plaintiffs had not entered into the witness-box, and the suit was pursued through an attorney, who also appeared as a witness of the plaintiffs is concerned, once again, I find no merit in the same. A perusal of the evidence led by the plaintiffs shows that the plaintiffs have premised their claim on the basis of their recorded title. The title of the plaintiffs could be proved by even an attorney since the same involved the production of documents, and it does not

involve deposition being made by the witness on the basis of his/ her personal knowledge. So far as the defendants are concerned, it was for them to establish that they had some title to the suit property, which they failed to establish. Thus, the witnesses produced by the plaintiffs were competent witnesses in the light of the nature of the evidence led by the plaintiffs, and the said evidence could not have been disregarded.

25. In the light of the aforesaid discussion, in my view, no substantial question of law arises for consideration in the present appeals, which are, accordingly, dismissed.

VIPIN SANGHI, J

JANUARY 08, 2016

B.S. Rohella