

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 488 OF 2015

Balkrishna Karbhari Bahikar (Kumbhar) and others.....Appellants

V/s.

Smt. Sugandhabai Walmik Nikam and othersRespondents

Mr. N. R. Bubna for the appellants.

Mr. Milind Sathaye for respondent nos. 1 to 8 & 12 to 22.

CORAM : NITIN W. SAMBRE, J.

DATE : DECEMBER 8, 2017.

P.C.

This appeal is by original plaintiffs who filed Regular Civil Suit no. 74 of 1995 for declaration and permanent injunction. The suit came to be decreed against respondents/defendants. The counter claim filed by the respondents / defendants also came to be decreed by the common judgment dated January 17, 2002 passed by Civil Judge Junior Division Nandgaon, district Nashik whereby it is declared that the respondents/defendants have no concern with suit property city survey no. 712 and an injunction is ordered against the defendants from creating any obstruction or disturbance to the peaceful possession of the plaintiffs over the suit property.

So far as the counter claim preferred by the respondents/defendants is

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concerned, it is ordered against the appellants to hand over the vacant possession of the suit property consisting of three rooms which is situated on city survey no. 42/2 which was in possession of the plaintiffs / appellants.

2 Feeling aggrieved by the judgment delivered by the Trial Court to the extent of granting counter claim of the respondents/defendants, the appellants preferred Regular Civil Appeal no. 11 of 2002 which came to be dismissed vide judgment and order dated November 12, 2014 passed by Ad-hoc District Judge-1, Malegaon.

3 Being aggrieved present second appeal by the original plaintiffs/appellants.

4 Since the appeal is preferred only against the judgment delivered in the counter claim preferred by the respondents/defendants and respondents / defendants have not questioned the order of injunction and declaration passed against the defendants, this Court is required to consider the present second appeal only to the extent of the findings recorded by both the Courts below granting counter claim.

5 So far as the counter claim under Order VIII Rule 6 (A) is concerned it was the case of the respondents/defendants that they are the owners of land survey no. 42/2 particularly defendant nos. 1 & 2, who were cultivating the same. It is claimed that the plaintiff and defendant nos.3 & 5 obstructed the

possession of the defendant on July 16, 1995 when they were fencing their property. Civil Suit no. 68 of 1995 for injunction based on said cause of action was initiated by the defendant against the plaintiffs.

6 It is further claimed by the defendants in their counter claim that three rooms situated in their property being survey no. 42/2, municipal house no. 1521/owned by them was given to the plaintiffs to occupy free of cost as temporary structure (a shed) of the plaintiff collapsed, as such the plaintiffs were gratuitous occupants of the said property. It is claimed that the possession was handed over temporarily on humanitarian ground so as to provide shelter as the plaintiffs were in distress.

7 Hence, it is claimed in counter claim that the possession of the said property be handed over to the defendants.

8 In written statement to the counter claim by the plaintiffs/appellants at Exhibit 39, the claim by the defendants was denied in *toto* as it is claimed by them that they are the owners of the suit property consisting of three rooms. It is further claimed that in Regular Civil Suit No. 68 of 1995 filed by the present respondent nos. 1 & 2 / original defendant nos. 1 & 2 since the claim for possession of the suit property was not made, the counter claim is not maintainable particularly in the backdrop of provisions of Order II Rule 2 of the Code of Civil Procedure.

9 The learned Trial Court framed issues on the counter claim vide Exhibit 29 and amongst other, framed issues of ownership of the suit property by defendant no. 3 by way of adverse possession and answered the same against the appellants. The claim made in the counter claim for possession was answered in favour of the defendants/respondents.

10 The Appellate Court in Appeal no. 11 of 2002 framed points for consideration and held that present respondents are the owners of the suit land and they are entitled for possession of the suit land.

11 In the aforesaid background, the learned counsel for the appellants/original plaintiffs would urge that the judgment of both Courts below have lacked the consideration of provisions of Order II Rule 2 of the Code of Civil Procedure as it has failed to appreciate the non setting up of claim for possession of the suit property in Regular Civil Suit No. 68 of 1995 initiated by the defendants. According to him, a specific plea to that effect was raised. According to him, in view of non raising of plea in Regular Civil Suit No. 68 of 1995, present respondents have relinquished their claim as put forth in the counter claim. The learned counsel then would urge that the respondents have not paid the Court fee, still the Courts below have proceeded to evaluate the claim in the counter claim which is not permissible in law. He submits that appropriate orders needs to be passed.

12 *Per contra* the learned counsel for the respondents/defendant nos. 1 & 2

would urge that cause of action in the suit being 68 of 1995 was based on notice dated 16/07/1995. According to him, the said claim was based on an obstruction in the cultivation and fencing, caused by the appellants/plaintiffs. He would urge that bundle of facts formed to be cause of action in the suit of 1995 was altogether different. Same gives a different cause of action which has no relation with the issue raised in the counter claim. He would then urge that the issue of provisions of Order II Rule 2 of the Code of Civil Procedure was not raised and so did the issue of constructive resjudicata was not pressed. He would urge that second appeal against concurrent findings does not warrant any consideration.

13 So far as the first issue *qua* bar of subsequent suit in pursuant to provisions of Order II Rule 2 is concerned, the fact remains that the same was not raised in express terms before the learned Trial Court when the claim of the present appellants *qua* injunction was allowed and claim of the respondents for possession was also allowed. It is then to be noted that so far as the judgment of the lower Appellate Court is concerned, the said issue was also not raised by the appellants, as such both the Courts below have not recorded any finding on the said issue as regards the applicability of Order II Rule 2 of the Code of Civil Procedure.

14 It is then required to be noted that while proving the applicability of Order II Rule 2 to the cause of action claimed in the counter claim, it was expected of the present appellant/plaintiff to confront the respondent nos. 1 & 2

during the course of recording of evidence in the suit in question particularly as regards the filing of suit no. 68 of 1995, proving the pleadings therein by confronting defendant nos. 1 & 2 to the pleadings raised in Regular Civil Suit No. 68 of 1995. This Court has perused the evidence of appellants/plaintiffs and also that of defendant nos. 1 & 2 from which it can be noticed that the evidence of the respective witnesses in no terms establishes the requirement under Order II Rule 2 of the Code of Civil Procedure. The very foundation for invoking the provisions of Order II Rule 2 are not led by the present appellants and as such both the Courts below have no occasion to deal with the said issue.

15 The Apex Court in the matter of **Coffee Board V/s. Ramesh Exports Private Limited**¹ has noticed that the principle of Order II Rule 2 of the Code of Civil Procedure are offshoot of ancient principle that there should be a finality to litigation. A party cannot be given lever to litigate twice for the same cause.

Just because the party has omitted to claim a relief before the Court in one suit then such party is barred from lodging a claim afresh having omitted the earlier chance of claiming the relief by raising the same plea in a subsequent proceedings.

Bar under Order II Rule 2 still operate in the backdrop of cause of action on which the earlier suit was based. The same cause of action cannot be formed to be a foundation or basis for claiming the relief which should have been claimed in an earlier suit. What is required to be noted is such suit must be between the same parties and based on the same cause of action. It is also

¹ [(2014) 6 SCC 424]

mandatory to request the Court to frame the issue based on the pleadings of the parties particularly on the issue of bar of the subsequent suit. It is also required to note that the pleadings in the earlier suit are required to be put to witnesses so as to demonstrate that the cause of action for the subsequent suit is different. What is expected of the Trial Court is while dealing with the issue under Order II Rule 2, the bundle of facts formed to be cause of action in both suits i.e. earlier suit and the subsequent suit must be read as a whole so as to verify and identify the exact cause of action. If it is noticed that the cause of action pleaded in both suits is identical, pursuant to the issue framed in the backdrop of pleadings of the parties, the Court should proceed to answer the issue framed pursuant to provisions of Order II Rule 2 of the Code of Civil Procedure. Appropriate support can be drawn from paragraphs 9, 11 & 12 of the aforesaid judgment which reads thus:

*“9. The above rules are offshoots of the ancient principle that there should be an end to litigation traced in the Full Bench decision of the Court in **Lachmi v. Bhulli** and approved by this Court in many of its decisions. The principle which emerges from the above is that no one ought to be vexed twice for the same cause. In light of the above, from a plain reading of Order 2 Rule 2, it emerges that if different reliefs and claims arise out of the same cause of action then the Plaintiff must place all his claims before the Court in one suit and cannot omit one of the reliefs or claims except without the leave of the Court. Order 2 Rule 2 bars a Plaintiff from omitting one part of claim and raising the same in a subsequent suit.”*

“11. The bar of Order 2 Rule 2 comes into operation where the cause of action on which the previous suit was filed, forms the foundation of the subsequent suit; and when the Plaintiff could have claimed the relief sought in the subsequent suit, in the earlier suit; and both the suits are between the same parties. Furthermore, the bar under Order 2 Rule 2 must be specifically pleaded by the Defendant in the suit and the Trial Court should specifically

frame a specific issue in that regard wherein the pleading in the earlier suit must be examined and the Plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different. This was held by this Court in Alka Gupta v. Narender Kumar Gupta (supra) which referred to decision of this Court in Gurbux Singh v. Bhooralal AIR 1964 SC 1810 wherein it was held that:

“13.....6. In order that a plea of a bar under Order 2 Rule 2(3) of the Code of Civil Procedure should succeed the Defendant who raises the plea must make out: (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the Plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the Plaintiff, without leave obtained from the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the Defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. (Gurbux Singh case, AIR p. 1812, para 6).”

12. *The Courts in order to determine whether a suit is barred by Order 2 Rule 2 must examine the cause of action pleaded by the Plaintiff in his plaints filed in the relevant suits (See: S. Nazeer Ahmed v. State Bank of Mysore. Considering the technicality of the plea of Order 2 Rule 2, both the plaints must be read as a whole to identify the cause of action, which is necessary to establish a claim or necessary for the Plaintiff to prove if traversed. Therefore, after identifying the cause of action if it is found that the cause of action pleaded in both the suits is identical and the relief claimed in the subsequent suit could have been pleaded in the earlier suit, then the subsequent suit is barred by Order 2 Rule 2.*

16 Apart therefrom, if the above alleged question of law is appreciated in the second appeal jurisdiction, the very basis for invoking the provisions of Order II Rule 2 of the Code of Civil Procedure cannot be noticed or inferred

from the pleadings and evidence of the respective parties. The basic foundation on the issue of maintainability of the counter claim. In absence of any plea and issue to that effect by the Appellant, same cannot be appreciated for first time in this Second Appeal in the backdrop of provisions of Order II Rule 2 of the Civil Procedure Code. Appropriate support on the aforesaid issue can be drawn from the judgment of the Apex Court in the matter of **Alka Gupta Vs. Narendra Kumar Gupta**² particularly paragraph 14 which reads thus:

“14. In the instant case, the respondent did not contend that the suit was barred by Order II Rule 2 of the Code. No issue was framed as to whether the suit was barred by Order II Rule 2 of the Code. But the High Court (both the Trial Bench and the Appellate Bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order II Rule 2 of the Code. Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order II Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Order II Rule 2 of the Code, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable.”

The said view was further confirmed by the Apex Court in the matter of **Coffee Board V/s. Ramesh Exports Private Limited** (cited supra).

17 In the case in hand the counter claim initiated by Exhibit 40 under Order VIII Rule 6 (A) of the Code of Civil Procedure, the cause of action narrated in para 10 speaks of death of defendant no.3 which fact was within the knowledge of the plaintiffs, still they have included him with an intention to delay the hearing.

² [(2010) SCC 141]

18 In the counter claim it is specifically pleaded by the defendants that on 16/07/1995, when they were fencing their land, the plaintiffs and defendant nos. 4 & 5 started creating obstruction and also issued threats, which was not a cause of action in R.C.S. no. 68 of 1995.

19 The original plaintiffs then come out with a case of dismissal of the counter claim based on the provisions of Order II Rule 2. In the wake of above, Appellant was expected to lay foundation to that effect. Perusal of the evidence and also written statement to the counterclaim at Exhibit 39 preferred by the present appellants does not in categorical terms speaks of plea based on the said provisions. Even in the evidence of the plaintiffs there is no reference to the earlier suit being 68 of 1995 either in the examination-in-chief or in re-examination of the plaintiffs. In the cross-examination of the defendants / respondents, present appellant has failed to bring it on record as regards the pleadings in earlier suit being 68 of 1995 and bar under provisions of Order II Rule 2 of the Code of Civil Procedure.

20 In view of above, the question of law sought to be framed by the learned counsel for the appellants based on provisions of Order II Rule 2 of the Code of Civil Procedure is without any foundation or basis and as such is liable to be rejected.

21 So far as the non payment of the Court fee by respondent nos. 1 & 2 is

concerned, the defendant/respondent has denied the same and has in categorical terms stated that the Court fee was paid and categorical statement to that effect on instructions was made which is accepted. As such, the said issue need not be examined in the form of question of law in the present proceedings.

22 As a consequence of above, in my opinion the second appeal against concurrent finding does not call for any interference. Second appeal as such fails, dismissed.

[NITIN W. SAMBRE, J.]