

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No. 3643 of 2012(O&M)

Date of Order:13.09.2018

Gian Chand and others

...Appellants

Versus

Ram Nath and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Keshav Partap Singh, Advocate,
for the appellants.

Mr. Arun Bansal, Advocate,
for respondent no.1.

Mr. A.S.Brar, Advocate,
for respondents no.2 to 6.

ANIL KSHETARPAL, J (Oral).

Defendants-appellants are in the regular second appeal against the judgment passed by the learned first appellate court reversing the judgment passed by the learned trial court.

Plaintiff claiming to be owner in possession of the property along with defendants no. 4 to 9 comprised in khasra no.44//18/2 measuring 2 kanals 1 marla, filed a suit. Plaintiff also claims in alternative decree for possession. It is the case of the plaintiff that he and his brother Janki Dass, who is no more, represented by defendants no.4 to 9, were joint owners of the property and defendants no.1 to 3 have no concern with the same.

Defendants contested the suit and pleaded that plaintiff and late Sh. Janki Dass were not co-owners. In fact, defendants and Daulat Ram are co-owners of the property in dispute.

It may be noted that the plaintiff had filed a suit for injunction, Ex.D4 against the defendants, which was dismissed on 06.10.2006. Thereafter, the plaintiff filed the present suit on 27.07.2007. No doubt, plaintiff also filed first appeal and second appeal which were dismissed.

Learned trial court dismissed the suit on the ground that the previous judgment has been upheld upto the High Court in regular second appeal and the subsequent suit filed by the plaintiff is barred under Order 2 Rule 2 of the Code of Civil Procedure. However, learned first appellate court after scrutinizing the evidence reversed the judgment of the trial court and held that earlier injunction suit in which title was not adjudicated upon directly would not operate as bar to the second suit filed and consequently, reversed the judgment of the trial court.

As per Order 2 Rule 2 of the Code of Civil Procedure, a plaintiff is entitled to make in respect of a cause of action his entire claim but if plaintiff omits to claim any part of his claim then he is debarred from bringing a subsequent suit on same cause of action. Order 2 Rule 2 of the Code of Civil Procedure is extracted as under:-

1. Frame of suit.- Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

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 internationally 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.”*

Now let's examine whether Order 2 Rule 2 of the Code of Civil Procedure would apply in the present case or not?

A suit for permanent injunction was filed vide plaint dated 22.05.2004. Cause of action of the aforesaid suit as pleaded in paragraph 6 is extracted as under:-

“6. That the actual cause of action to file the present suit are to the plaintiff a week ago when the defendants started hurling the aforesaid illegal threats and finally the cause of action arose on yesterday when the defendants finally and flatly refused to admit the claim of the plaintiff. Hence, the suit.”

NO doubt, plaintiff had filed a suit claiming that plaintiff and other co-shares are owners in possession. The injunction suit was contested and learned court framed the following issues:-

- “i) Whether plaintiff is entitled to injunction prayed for?OPP*
- ii) Whether suit is not maintainable in present form?OPD*
- iii) Whether plaintiff has not approached this court with clean hands?OPD*
- iv) Whether exchange took place as alleged in sub-para no.2 of preliminary objections no.2?OPD*

- v) *Whether plaintiff is estopped from filing present suit by his own act, conduct, admission and acquiescence?OPD*
- vi) *Whether plaintiff has no cause of action to file present suit?OPD”*

The aforesaid suit as noticed was dismissed by the court vide judgment dated 06.10.2006, whereas the present suit was filed on 27.07.2007. Cause of action as pleaded by the plaintiff in the present suit is extracted as under:-

“10. That the plaintiff asked defendants no.1 to 3 to admit his claim and to declare that plaintiff and defendants no.4 to 9 are owners in possession of the house in question and the refrain from in any manner interfering and dispossessing them therefrom or in the alternative, asked defendants no.1 to 3 to deliver possession of the house in question, in case, they succeed in dispossessing plaintiff and defendants no.4 to 9 during the pendency of suit but they have refused to admit claim of the plaintiff for the last two days. The cause of action has arisen for the last 2 days.”

It may be noted here that ownership of the plaintiff and defendants no.4 to 9 over the property in dispute is not being contested as DW1 when appeared in evidence admitted that property comprised in khasra no.44//18/2 is owned by plaintiff and predecessor in interest of defendants no.4 to 9. However, defendants claim that they have right of passage over some part of the property as there was exchange of some portion of the land. It may be noted that the exchange has not been proved

on the file. Order 2 Rule 2 of the Code of Civil Procedure as extracted above creates a bar on the plaintiff to file a subsequent suit in respect of cause of action to which the plaintiff was entitled to while filing the first suit. It is well settled that Order 2 Rule 2 of the Code of Civil Procedure is to be strictly construed because it debars a plaintiff to file a subsequent suit. On careful cross-examination of Order 2 Rule 2 of the Code of Civil Procedure, it is clear that the previous suit and the subsequent suit should be in respect of same cause of action. The sine-qua-non for applicability of bar under Order 2 Rule 2 of the Code of Civil Procedure would only be if both the suits are based on same cause of action and the plaintiff had in the previous suit omitted to pray for another relief which on that day was available except with the leave of the court.

Once the court examines the facts of the present case on the aforesaid parameters, this court finds that the previous suit filed by the plaintiff cannot be said to be on same cause of action. In the first suit, plaintiff had specifically pleaded that a week ago when the defendants started hurling the aforesaid threats, cause of action finally accrued yesterday, which the defendants finally and flatly refused to claim of the plaintiff. As noticed above, in the previous suit, the learned court only decided relief of injunction and ownership of the property was neither directly nor substantially in issue in the previous suit.

When the plaintiff filed second suit i.e. the present suit, plaintiff pleaded that they have asked defendants no.1 to 3 to deliver possession of the house in question but they have refused to admit the claim of the plaintiff for the last 2 days. It may be mentioned here that the previous suit filed by the plaintiff and dismissal thereof was specifically

pleaded in paragraph 10 of the plaint, which is extracted as under:-

“That the plaintiff asked defendants no.1 to 3 to admit his claim and to declare that plaintiff and defendants no.4 to 9 are owners in possession of the house in question and to refrain from in any manner interfering and dispossessing them therefrom or in the alternative, asked defendants no.1 to 3 to deliver possession of the house in question. In case, they succeed in dispossessing plaintiff and defendants no.4 to 9 during the pendency of suit, but they refused to admit claim of the plaintiff for the last two days. The cause of action has arisen for the last 2 days.”

As noticed earlier, subsequent suit was filed after judgment was delivered in the first suit by the trial court. Thus, plaintiff prayed for relief of possession in alternative admitting that defendants no.1 to 3 are in possession. In such circumstances, bar under Order 2 Rule 2 would not be applicable as the subsequent suit was not filed on the cause of action which was available to the plaintiff at the time of filing of the first suit.

Still further, previous suit as noticed above, was only for injunction. The issues which have been framed by the court are only relating to entitlement of the plaintiff to get the relief of injunction. No doubt, the court while deciding the first suit has at some stages referred to the ownership but since the ownership was neither directly nor substantially in issue, therefore, that finding cannot operate as resjudicata as argued by learned counsel for the appellant. For applying rule of resjudicata, it is fundamental that in the previous suit issue should be directly or substantially in issue and the court has decided the earlier suit on the basis of the aforesaid issue.

Learned counsel for the appellant further submitted that the

defendants have easementary right to use passage.

It may be significant to note that there was neither any issue on easement nor there was any pleadings. This court for the first time cannot examine this issue. No doubt, before the first appellate court, argument was raised claiming that the strip of land which is being claimed by the defendant as a passage is easement of necessity. However, learned first appellate court after examining the record has found that the defendants have a passage to their property. The court further found that neither easement of necessity has been pleaded nor easement by way of prescription has been pleaded by the defendants.

In view of the aforesaid discussion, this court does not find any good ground to interfere with the findings of learned first appellate court.

The regular second appeal is dismissed.

September 13, 2018
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned

: Yes/No

Whether reportable

: Yes/No