

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.398 OF 2018

Shri. Madhukar Balwant Kothule Appellants
& Ors.

Vs.

Sou. Lata Trimbak Dalvi & Ors. Respondents

Mr. Girish Agrawal for Appellants.

Mr. Anil Kumar Patil i/by Mr. Prashant D. Patil for Respondent No.1.

Coram : NITIN W. SAMBRE, J.

Date : 11th February, 2020

P.C.:

1. This is an appeal by original defendants against the concurrent findings. Respondent no.1 had initiated Special Civil Suit No. 365 of 2003 seeking partition and perpetual injunction, which came to be decreed by the impugned judgment and order dated 10th July, 2006 passed by Civil Judge, Senior Division, Nashik.

2. In an appeal carried out by the present appellants being Regular Civil Appeal No. 239 of 2012, the learned District Judge confirmed the decree, however, modified the share by impugned

judgment dated 2nd November, 2017. As such this, Second Appeal.

3. Mr. Agrawal, learned counsel for the appellants has raised following question of law:

“Whether the suit initiated by the appellants is bared under Order 2, Rule 2 of Code of Civil Procedure as the earlier suit preferred by the appellants being Special Civil Suit No.350 of 2002 was withdrawn without any opportunity on 29th April, 2003.

4. The facts necessary for deciding the claim are as under :

The defendants and plaintiffs are brother and sisters. The respondent-plaintiff claiming that the suit properties as prescribed in paragraph 2(A), 2(B) are ancestral properties and property mentioned in plaint, paragraph 2(C), since was purchased in the name of the appellant-Ganpat Kothule i.e. original defendant no.3., out of the consideration received from sale proceedings of survey No. 36/1+2+3A + 3B/1, who is entitled for her share in the suit property.

5. Before the aforesaid partition suit, it is not in dispute that the Special Civil Suit No. 350 of 2002 was initiated in the Court of Civil

Judge, Senior Division, Nashik claiming therein the setting aside of sale-deed dated 15th March, 2002 in relation to the part of suit property in the present claim and not to deal with 1/4th share in the property mentioned therein by defendant no.7.

6. The said Suit came to be compromised between the respondent-plaintiff and defendant no. 7 on 29th April, 2003.

7. Respondent no.1 thereafter initiated suit for partition and permanent injunction.

8. The suit having been decreed and the decree therein being confirmed by the appellate court, learned counsel for the appellants has urged that both the suits are based on the cause cited in common notice dated 19th October 2002, which cause of action as pleaded prompted the plaintiff to initiate second suit. According to him, earlier suit being Special Civil Suit No. 350 of 2002, was not withdrawn with liberty or permission of the Court to initiate fresh suit for partition, the bar under Order 2, Rule 2 of the C.P.C. will operate, as the Court must infer that the respondent no.1 has abandoned her claim, when first Suit 350 of 2002 was initiated.

9. Learned counsel for the appellant has also invited the attention of this Court to the very language of the notice dated 19th October, 2002, the pleadings in earlier suit and the pleadings in Special Civil Suit No. 365 of 2003 and also the written statement of the present appellants. According to him, even if, it is not in categorical and clear terms pleaded that the bar under Order 2, Rule 2 C.P.C. will operate, the Court should exercise a strong approach in the matter of moffusil pleadings. He then urged that merely because the suit is hit by Order 2, Rule 2, suit was not framed, the same cannot be considered to be detrimental to the interest of present appellant.

9. As such, the submissions are that the Suit being No. 365 of 2003 is liable to be dismissed as hit by order 2, Rule 2 of the Code of Civil Procedure.

10. Shri. Patil, learned counsel for respondent no.1 opposed the claim and submitted that the trial Court and the appellate Court had analyzed minutely the nature of claim (relief of suit) in both suits i.e. 350 of 2002 and 365 of 2003. According to him, the .. Order 2, Rule 2

C.P.C. will not operate against the respondent-plaintiff in absence of specific pleadings and issue to that effect particularly when the respondent had no opportunity to meet with such a case, which is sought to be canvassed at this stage. According to Shri. Patil, since the relationship between the parties being that of brother and sister is not in dispute, both the Courts had rightly decreed the suit and that being so, the appeal against the concurrent findings is liable to be dismissed.

11. Mr. Agrawal also submitted that since the claim in the earlier suit being Suit No. 350 of 2002 was withdrawn without any opportunity, the subsequent suit ought not to be permitted to be entertained in view of the provisions under Order 23, Rule 1, Sub-Rule 3.

12. Considered rival submissions.

13. For the convenience, the provisions of Order II Rule 2 and Order XXIII Rule 1 Sub-Rule (3) of Code of Civil Procedure are reproduced as under:-

“Order II Rule 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.

Order XIII Rule 1 Sub-Rule (3)

Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the

subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.”

14. As far as the bar created under Order II Rule 2 is concerned i.e. on the maintainability of the second suit when the relief claimed therein was very much available when the first suit was filed, this Court is required to consider the nature of pleadings, the cause of action and the relief claimed. The Apex Court in the matter of *Sucha Singh Sodhi (dead) through Legal Representatives V/s. Baldev Raj Walia and another* reported in **(2018) 6 SCC 733** had an occasion to consider both these provisions and in para 29 has made following observations:

“29. Our answer to the aforementioned question is in favour of the plaintiffs (appellants) and against the defendants(respondents). In other words, our answer to the aforementioned question is that the plaintiff could not claim the relief of specific performance of agreement against the defendants along with the relief of permanent injunction in the previous suit for the following reasons.

29.1. First, the cause of action to claim a relief of permanent injunction and the cause of action to claim a relief of specific performance of agreement are independent and one cannot include the other and vice versa. In other words, a plaintiff cannot claim a relief of specific performance of agreement against the defendant on a cause of action on which he has claimed a relief of permanent injunction.

29.2. Second, the cause of action to claim temporary/permanent injunction against the defendants from interfering in plaintiff's possession over the suit premises accrues when defendant threatens the plaintiff to dispossess him from the suit premises or otherwise cause injury to the plaintiff in relation to the suit premises. It is governed by Order 39 Rule 1 (c) of the Code which deals with the grant of injunction. The limitation to file such suit is three years from the date of obstruction caused by the defendant to the plaintiff (See - Part VII Articles 85, 86 and 87 of the Limitation Act). On the other hand, the cause of action to file a suit for claiming specific performance of agreement arises from the date fixed for the performance or when no such date is fixed, when the plaintiff has noticed that performance is refused by the defendant. The limitation to file such suit is three years from such date (See – Part II Article 54 of the Limitation Act).

29.3. Third, when both the reliefs/claims, namely, (1) Permanent Injunction and (2) Specific Performance of Agreement are not identical, when the causes of action to sue are separate, when the factual ingredients necessary to constitute the respective causes of action for both the reliefs/claims are different and lastly, when both

the reliefs/claims are governed by separate articles of the Limitation Act, then, in our opinion, it is not possible to claim both the reliefs together on one cause of action.”

15. As such, while analyzing the case of the appellant in view of the question of law alleged to have been involved, it is required to be noted that the cause of action pleaded in both these suits appears to be similar. The fact remains that in the present case the earlier suit i.e. Suit No.350/2002 was for setting aside the sale-deed and partition and the claim to the extent of third party interest was compromised, however, the rests of the claim was not adjudicated upon between the parties on merit.

16. The provisions of Order II Rule 2 of the Civil Procedure Code which bars the remedy of second suit is required to be read in the light of the statement of the plaintiff recorded by the Court in that very suit. When the earlier suit was compromised, it can be inferred from the very language of the compromise in Suit No.350/2002 that the claim is compromised only to the extent of interest of the third party and not the present appellants i.e. defendants to the Suit No.365/2003. Appropriate support can be drawn *qua* aforesaid observations from the matter of *Gurinderpal V/s. Jagmittar Singh* reported in **(2004) 11 SCC 219**. It is also required to be noted that the appellant at no point of time has come out with a specific pleading that the entire suit claim was compromised in S.C.S. No.350/2002.

17. As such, the reliance placed by Shri Agrawal on the judgment in the matter of *Shri Gangai Vinayagar Temple & Anr. V/s. Meenakshi Ammal and others* reported in **2015 (3) SCC 624** will be of hardly any assistance, rather the observations in the para Nos.4 and 5 of the said judgment supports the case of the respondent / plaintiff whose second suit was held to be maintainable.

18. In the aforesaid background, I hardly see involvement of any substantial question of law in the matter. The present second appeal which is against the concurrent findings as such sans merit and is accordingly **dismissed**.

(NITIN W. SAMBRE, J.)