

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Siddhartha Roy Chowdhury

FA 246 of 2008

Subir Kumar Banerjee & Anr.

vs.

Madhusudan Ghosh

For the Appellants : Mr. Souradipta Banerjee, Adv.
Mr. Naba Krishna Das, Adv.
Ms. Fatima Hassan, Adv.

For the Respondent : Mr. Dipankar Dandapath, Adv.

Hearing concluded on : 10th August, 2022

Judgement on : 11th August, 2022

Siddhartha Roy Chowdhury, J.: Challenge in this appeal is to the judgement and decree passed by the learned 10th Bench of City Civil Court at Calcutta in Title Suit No. 519 of 2001 and Title Suit No. 671 of 2001, both the suits were tried analogously and disposed of by a common judgement and decree passed on 20th July, 2007. For proper appreciation of the appeal it is expedient to delineate the facts of the case.

Claiming to be the owners of the suit property Sri Subir Kumar Banerjee and Sri Saswata Bandyopadhyay, the appellants herein, filed a suit for eviction being Title Suit No. 519 of 2001. Title Suit No. 671 of 2001 was also filed by the plaintiffs Sri Subir Kumar Banerjee and Sri Saswata

Bandyopadhyay against Madhusudan Ghosh seeking Permanent, Mandatory and Prohibitory injunction stating, inter alia, that they have purchased the suit premises on 8th January, 2001. Their father Bhupendra Kumar Banerjee was a tenant in respect of the entire premises except two rooms, one kitchen, one bath with privy and verandah on the ground floor, which was in occupation of one Shailesh Chandra Sengupta another tenant under Subala Bala Sahu. The plaintiffs have been residing therein for more than 30 years. After the demise of Sailesh Chandra Sengupta, his widow and son became the tenants in respect of the property occupied by them. While in possession of two rooms, kitchen, bath and privy, Senguptas gave license to Madhusudan Ghosh, the defendant herein in respect of one room and also allowed him to use the bathroom and privy. On 16th October, 2000, Senguptas surrendered the tenancy in favour of the erstwhile owner Subala Bala Sahu; delivered possession of one room, kitchen to her. Said Subala Bala Sahu delivered possession of said room and kitchen to the plaintiffs after execution of deed of sale, on 8th January, 2001. When plaintiffs were entering into the said room the defendant obstructed them. Sewerage system of the entire building is lying underneath the passage in the portion occupied by the defendant and their access to that passage was denied. On 16th January, 2001, the defendant dispossessed the plaintiffs from the said room and kitchen by putting padlock on the door. Police was informed which was reduced into writing vide G.D. Entry No. 1730 dated 16th January, 2001. On 17th January, 2001, the elder brother of the defendant obstructed the wife of plaintiff no. 1 and assaulted her with fist and blows. On 18th January, 2001, an application under Section 144 (2) of the Code of

Criminal Procedure was filed and prohibitory order was passed by the Executive Magistrate. The plaintiff lodged complaint on 20th February, 2001, and on 23th October, 2001, being harassed by the defendant, who wanted tenancy right in respect of part of premises occupied by him. On 25th March, 2001, the plaintiff informed the police against the defendant, followed by complaint on 28th March, 2001. The plaintiffs were compelled to file suit for permanent mandatory and prohibitory injunction only to restrain the defendant and his family members, men and agents from disturbing and/or interfering with the peaceful ingress and egress of the plaintiff to the room and to northern gate on the ground floor.

Refuting such allegations made against him, the defendant in his written statement contended, inter alia, that he has been possessing the suit property lawfully without having any intention to create any disturbance to anyone. The plaintiffs have filed the false cases before various authorities including the Executive Magistrate. The plaintiffs have filed Title Suit No. 519 of 2001 against the defendant without any reason; no attempt was ever made by defendant to dispossess the plaintiff from the suit property in any manner whatsoever.

Learned Trial Court after considering the issues was pleased to hold that the suit as framed is not maintainable inasmuch as barred by the constructive res judicata and it is further observed that when equally efficacious relief was available injunction should not be granted.

Being aggrieved by and dissatisfied with the judgement and decree the plaintiffs have preferred this appeal.

Assailing the impugned judgement Learned Advocate appearing for the appellants submits that learned Trial Court decided the suit mechanically without appreciating the provisions of law. According to the learned Advocate for the appellants, learned Trial Court ought to have given liberty to the parties to seek prayer for recovery of possession. Learned Trial Court had no reason to decide the issues arising out of suit for eviction in the affirmative and dismissing the suit for permanent injunction.

Learned Advocate for the respondent/defendant, however, submits that the suit as framed is frivolous and learned Trial Court was absolutely justified in dismissing the suit.

From the attending facts of the case, we find that the appellants filed a suit for eviction of the respondent, depicting him as trespasser which was registered as Title Suit No. 519 of 2001. It was filed on 2nd April, 2001, subsequently, on 2nd May, 2001 this suit for permanent injunction was filed. Cause of action for the suit for eviction, arose on 16th August, 2000 and on 8th January, 2001 while the cause of action for this suit for permanent, mandatory, prohibitory injunction arose on 8th January, 2001 and, thereafter, on 25th April, 2001. But there is no narrative in the pleading as to how cause of action arose on 25th April, 2001.

From the plain reading of the plaint it appears that allegedly the defendant wrongfully and illegally dispossessed the plaintiff from the room and kitchen on 16th January, 2001 by putting padlock, ignoring the fact that the plaintiffs/appellants kept their articles inside the room.

But no prayer was made before the learned Trial Court by the plaintiff/appellant for recovery of possession. It is pertinent to mention

here that the plaintiffs filed suit for eviction of the defendant depicting him as trespasser from one room, bathroom with privy in the ground floor of the suit house. The suit property in respect of suit for injunction has been depicted as one room and kitchen in the ground floor. Learned Trial Court held that the plaintiff/appellant could have raised this issue in his earlier suit instead of filing a separate suit. The subsequent suit is barred by constructive res judicata.

It is well settled that one of the essential conditions of res judicata is that there must be a formal adjudication between the parties after full hearing, in other words, the matter must be finally decided between the parties. This suit under reference though cannot be held to be barred by principle of constructive res judicata, but under the present facts and circumstances, it is barred under Order II Rule 2 of the Civil Procedure Code, since the plaintiffs relinquished intentionally or omitted to sue in respect of his claim that allegedly arose on 8th January, 2001 and on 16th January, 2001.

In this regard we can rely upon the judgement pronounced in the case of ***Kewal Singh v. Lajwanti*** reported **in 1980 (1) SCC 290** :

“5. So far as the first two contentions are concerned, we are of the opinion that they do not merit any serious consideration. Regarding the question of the applicability of Order 2 Rule 2 CPC the argument of the learned Counsel for the appellant is based on serious misconception of law. Order 2 Rule 2 CPC runs thus:

“2(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) 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.”

A perusal of Order 2 Rule 2 would clearly reveal that this provision applies to cases where a plaintiff omits to sue a portion of the cause of action on which the suit is based either by relinquishing the cause of action or by omitting a part of it. The provision has, therefore, no application to cases where the plaintiff bases his suit on separate and distinct causes of action and chooses to relinquish one or the other of them. In such cases, it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he may have relinquished.

6. In the case of Mohammad Khalil Khan v. Mahbub Ali Mian [AIR 1949 PC 78 : 75 IA 121] the Privy Council observed as follows: “That the right and its infringement, and not the ground or origin of the right and its infringement, constitute the cause of action, but the cause of action for the Oudh suit (8 of 1928) so far as the Mahbub brothers are concerned was only a denial of title by them as that suit was mainly against Abadi Begam for possession of the Oudh property; whilst in the present suit the cause of action was wrongful possession by the Mahbub brothers of the Shahjahanpur property, and that the two causes of action were thus different. Their Lordships are satisfied that there is no force in the contention that the plaintiffs in the present suit could not reasonably commence an action in respect of the Shahjahanpur property while their right to mutation in the Revenue registers was the subject of an appeal to the Commissioner which had not been decided, or, in other words, that it was not open to them to sue the defendants in respect of the Shahjahanpur property at a date earlier than October 29, 1928 and to include the Shahjahanpur property in the earlier Suit 8 instituted on September 14, 1923. The principles laid down in the cases thus far discussed may be thus summarised: (1) The correct test in cases

falling under Order 2, Rule 2 is whether the claim in the new suit is, in fact, founded on cause of action distinct from that which was the foundation for the former suit (Moonshee Buzloor Ruheem v. Shumsoonnessa Begum [11 Moo IA 551, 605 : 8 WR PC 3 : 2 Hay 190]). (2) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment (Read v. Brown [(1889) 22 QBD 128, 131 : 58 LJ QB 120]). (3) If the evidence to support the two claims is different then the causes of action are also different (Brunsden v. Humphery [(1884) 14 QBD 141 : 53 LJQB 476]). (4) The causes of action in the two suits may be considered to be the same if in substance they are identical (Brunsden v. Humphery [Ibid]). (5) The cause of action has no relation whatsoever to the defence that may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers ‘to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour’ (Muss. Chand Kour v. Pratab Singh [15 IA 156, 157 : 16 Cal 98 (PC)]). This observation was made by Lord Watson in a case under Section 43 of the Act of 1882 (corresponding to Order 2 Rule 2) where plaintiff made various claims in the same suit.”

8. Secondly, as regards the question of constructive res judicata it has no application whatsoever in the instant case.”

Therefore, we do not find any reason to disagree with the judgement of learned Trial Court as to the maintainability of the subsequent suit, though not barred by constructive res judicata, the suit is barred by Order II Rule 2 of the Civil Procedure Code. That apart in clear terms plaintiff has stated in the plaint that they were dispossessed by the defendant/respondent on 16th January, 2001, but no prayer was made for recovery of possession. Suit as framed appears to be not maintainable.

PW 1 in his oral testimony as well as in pleadings stated that the entire suit property was in occupation of their father as tenant except two rooms, kitchen, bath with privy and verandah on the ground floor was in occupation of the other tenant namely Sailesh Chandra Sengupta who granted licensee to the defendant/respondent in respect of one room.

But while adducing evidence as PW 1 Saswata Bandyopadhyay stated that the defendant was in occupation of one room since 1997 and Title Suit No. 519 of 2001 is the suit for eviction filed against the defendant/respondent for recovery of possession. Hence, this suit for injunction appears to be vexatious.

In our considered opinion the impugned judgement and decree do not warrant any interference.

The appeal is devoid of merit and is dismissed but without cost.

I agree

(Siddhartha Roy Chowdhury, J.)

(Soumen Sen, J.)