

C.O. No. 1009 of 2023

Smt. Suvra Som & anr.
Vs.
Sri Partha Pratim Mitra & anr.

Mr. Sounak Bhattacharya
Mr. Sounak Mondal

.....for the petitioners.

Mr. Arnab Roy
Mr. Satyam Mukherjee
Mrs. Sayani Ahmed

....for the opposite party.

Mr. Ayan Poddar
Mr. Kamran Alam

....for the proforma opposite party.

This revisional application arises out of an order dated February 06, 2023, passed by the learned Civil Judge (Senior Division) 4th Court at Alipore, district South 24 Parganas, in Title Suit No.1281 of 2021.

By the order impugned, the learned court rejected an application under Order 7 Rule 11(d) of the Code of Civil Procedure filed by the petitioners.

According to the learned court, the point raised by the petitioners for rejection of the plaint, involved the question of maintainability of the suit. As mixed questions of law and facts were involved, the issue could not be decided without evidence.

Mr. Saunak Bhattacharjee, learned advocate for the petitioners submits that the suit is barred under the provisions of Order 22 Rule 9 of the Code of Civil Procedure, 1908. According to Mr. Bhattacharjee, the law provides that in case of abatement or dismissal of a suit, no fresh suit shall be brought on the self-same cause of action. The legal representative of the deceased plaintiff could apply for substitution and also pray for an order for setting aside the abatement or the dismissal of the suit. The present suit is not maintainable.

Mr. Bhattacharjee, contended that the cause of action of the present suit, was the date of the abatement of the earlier title suit and as such, the suit which has been brought on the same cause of action as that of Title Suit no.917 of 2019, is barred under the provisions of Order 22 Rule 9 of the Code of Civil Procedure. The plaint should be rejected.

It is further contended that the plaintiff also relied upon the eviction notice dated July 22, 2019, which was issued by his mother to Amitava Shome, asking Amitava Shome to quit and vacate the premises in question, after expiry of the license.

According to Mr. Bhattacharjee, the plaint does not disclose any separate cause of action or a subsequent cause of action against the petitioners on the basis of which, the heir of Gita Rani had

instituted the subsequent suit, instead of taking steps in the Title Suit no. 917 of 2019. The causes of action as pleaded are identical, and as such, the plaint should have been rejected by the learned court below upon observing that the suit was barred as per the provisions of Order 22 Rule 9 of Code of Civil Procedure.

Mr. Bhattacharjee relies on the following decisions, (i) ***Mrs. V.P. Salu and ors. vs. Mr. R. Vadivelu*** reported in **(2011) SCC online Madras 1659**, (ii) ***O.A.O.K.C.T. Chidambaram Chettiar and ors. vs. Swaminathan alias Samidurai Thevar and ors.*** reported in **(1937) 1 Madras Law Journal 33** and (iii) ***Dahiben v. Arvindbhai Kalyanji Bhanusali and ors.*** reported in **(2020) 7 SCC 366**.

Mr. Arnab Roy, learned advocate on behalf of the opposite party/plaintiff submits that cause of action is a bundle of facts. The plaint must be read as a whole, to ascertain the cause of action. In the present suit, the heir of the original owner, who had filed the earlier suit prayed for eviction of the heirs of the erstwhile defendant who was allegedly a licensee and thereafter a trespasser in respect of the property in question. The cause of the action in the second suit is different. The parties are also different and the heirs of Gita Rani had the right to pray for eviction

against the heirs of the Amitava Shome, who continued to reside illegally, as trespassers, in the property in question.

Mr. Roy, further submits that without evidence, it would not be possible for the court to ascertain whether the causes of action of the suits were same and identical or not. At the stage of rejection of the plaint, all the court can look into are the averments in the plaint and documents relied upon in the plaint. In the present case, the averments in the plaint and the documents relied upon do not indicate that the suit is barred by law. The plaint discloses a cause of action.

Mr. Roy, relies upon the decision of the Hon'ble Apex Court in the matter of **Srihari Hanumandas Totala vs Hemant Vithal Kamat & Ors.** reported in **(2021) 9 SCC 99**, on the proposition that in order to reject the plaint on the ground that the suit is barred by law, only averments in the plaint will have to be referred to. Case of the defendant should not be considered. He next relies upon a decision of **Arunachalam Pillai vs. Vellaya Pillai and ors.** reported in **AIR 1919 Madras 572** on the proposition that Order 22 Rule 3 and Order 22 Rule 4 of the Code of Civil Procedure, do not prevent the plaintiff from filing a fresh suit.

Heard learned Advocates for the parties.

The facts are that one Late Gita Rani Mitra, the predecessor-in-interest of the opposite party no.1/plaintiff, filed a suit for eviction against Late Amitava Shome, predecessor-in-interest of petitioners and the proforma opposite party. The said suit was filed before the court of learned Civil Judge (Senior Division) 4th Court, at Alipore, which was registered as Title Suit no.917 of 2019. Amitava Shome, the predecessor-in-interest of the petitioners entered appearance in the suit and contested the same by filing a written statement. The sole plaintiff, namely, Gita Rani expired on November 26, 2020, leaving behind the opposite party no.1 as her legal heir. During pendency of the suit, Amitava Shome/the sole defendant and the predecessor-in-interest of the petitioners expired, leaving behind the petitioners and a daughter Smt. Anindita Basu, as his legal heirs. During the pendency of the suit, the opposite party no.1 filed an application for substitution upon the death of Gita Rani. However, none moved the said application. By order dated November 9, 2021; the suit was dismissed as abated as no steps for substitution of the heirs of the defendant had been taken by the plaintiff.

It was further observed by the learned trial judge that although, an application had been filed for substitution, upon the death of the plaintiff, none

had moved the said application and the same had been dismissed. It further appears that the learned trial judge held that no steps had been taken for substitution of the defendant and the suit abated as a whole. Accordingly, the title suit was dismissed.

After the dismissal of the said suit on November 29, 2021, the opposite party no.1 filed another suit for eviction against the present petitioners as also the proforma opposite party no.2 for a decree of eviction and recovery of khas possession, as also mense profits.

The petitioners filed an application for rejection of the plaint under Order 7 Rule 11(d) of the Code of Civil Procedure, on the ground that the suit is barred by law. The petitioners relied on the provisions of Order 22 Rule 9 of the Code of Civil Procedure. The learned trial court rejected the said application on the ground that the cause of action was mixed questions of facts and law and without evidence being led the question of rejection of the plaint did not arise.

The relevant paragraphs in the plaint which give rise to the cause of action, in the present suit, are quoted below:-

“5).. That the premises no 24D, Suburban School Road, was owned by Bimal Chandra Som and his wife was predeceased without any issue and as such the estate of Bimal Chandra Som who died in the year 2003, has been

develoved upon the only living sister Smt. Gita Rani Mitra, according to the Hindu Succession Act, 1956. While Gita Rani Mitra was the absolute Owner of Premises No. 24D, Suhasini Ganguly Sarani formerly Suberban School Road, P.S. Bhowanipore, Kolkata 700 025 died on 26.11.2020, leaving intestate her only son Sri Partha Pratim Mitra, the present plaintiff herein who inherited the estate of Gita Rani Mitra.

6).. That Bimal Chandra Som was the uncle of Amitava Shome. Bimal Chandra Som at the request of Amitava Shome the predecessor in interest of plaintiff was allowed to use the ground floor of his house 24D Suberban School Road for temporary period. On the death of Bimal Chandra Som the license of Amitava Shome was extinguished and at that time, that is in the year 2003 the said Amitava Shome took further license (Permissive Occupation.) from Gita Rani Mitra occupy the ground floor of the said premises without any license fee.

7).. That by a notice dated 22.07.2019 written by Gita Rani Mitra advocate Mr. Susanta Kumar Samanta revoked license granted to Amitava Shome and asked him for handing over the khas possession in respect of the ground floor on the expiry of August, 2019. The notice has served through Speed Post with A/D upon the defendant on 23.07.2019 but unfortunately the A/D was not returned. Subsequently, the plaintiff obtained a track consignment from the postal tracking cyber copy wherefrom it appears that the notice was duly delivered to the addressee.

8).. That in spite of service of notice, upon Amitava Shome deliberately retained the possession in respect of the ground floor more fully described in the schedule hereunder written which will hereinafter be referred to as "suit property" as trespasser on 1 day of September, 2019.

9).. Thereafter, the said Gita Rani Mitra filed a Title Suit No. 917 of 2019 against Amitava Shome for eviction. But during pendency of the said suit Gita Rani Mitra died on 26.11.2020. the present plaintiff had filed an application for substitution which was fixed on 29.11.2021.

10).. That Amitava Shome, the defendant in Title Suit No. 917 of 2019 died on 21.11.2020. Accordingly, by an Order dated 29.11.2021,

the Ld. 4th Court of Civil Judge, Senior Division, at Alipore abate the suit.

11).. That after demise of Amitava Shome, the present defendant being the heirs of Amitava Shome, are retaining the possession of the suit property as trespasser on and from 21.11.2020 for which they are liable to be evicted from the suit property.

12).. That the Xerox copy of true copy of Ejectment notice dated 22.07.2019 written by Mr. Susanta Kumar Samanta, Advocate for the plaintiff, Xerox copy of postal receipt, the Xerox copy of track consignment are filed herewith and the plaintiff crave leave to file those original at the time of hearing treating the same as part of the plaint.

13).. The cause of action for the suit arose on 21.11.2020, when Amitava Shome died and also day by day as well as on 27.11.2021, when the Title Suit no. 917 of 2019 has been abated at Premises No. 24D, Suhashini Cranguli Sarani, P.S. Bhowanipore, Kolkata 700 025 within the jurisdiction of this learned Court.”

Thus, it is clear from the facts pleaded in the plaint, that a notice was issued by Gita Rani upon Amitava Shome, through her learned Advocate, indicating that the license had been revoked and Amitava Shome should handover khas possession in respect of the ground floor of the suit property, on expiry of August, 2019. That in spite of the service of the notice dated July 22, 2019 upon the Amitava Shome, he continued to retain possession in respect of the property in question and had become a trespasser on and from September 1, 2019. Upon demise of Amitava Shome, his heirs continued to be in possession as trespassers. Thus, the subsequent suit was filed by the heirs of Gita Rani for eviction

and recovery of khas possession on the basis of the ejectment notice and revocation of license by Gita Rani, the deceased plaintiff of the earlier suit.

The cause of action has been pleaded in paragraph 3 of the plaint. The same arose on November 21, 2020, when Amitava Shome, predecessors of the defendant died and continued day to day till November 27, 2021, when Title Suit no.917 of 2019 had abated.

Order 22 Rule 9 is quoted below:-

“9. Effect of abatement or dismissal.—(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of Section 5 of the Indian Limitation Act, 1877 (15 of 1877) shall apply to applications under sub-rule (2).”

If a suit abates, no fresh suit can be brought on the self-same cause of action. The cause of action is the eviction of trespassers. The plaintiff has not pleaded any further development giving rise to a fresh cause of action against the present defendants. The entire cause of action is based on the plaint case of the earlier suit which was dismissed as abated. The suit is barred by law. The plaint in Title Suit

No.1281 of 2021 is rejected. The provisions of Order 22 Rule 3 are quoted below:-

“3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.—(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. (2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.”

The provisions of Order 22 Rule 4 are quoted below:-

4. Procedure in case of death of one of several defendants or of sole defendant.—(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendants to be made a party and shall proceed with the suit. (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant. (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant. 1

[(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the

same force and effect as if it has been pronounced before death took place. (5) Where— (a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and (b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.]

The proper remedy of the plaintiff should have been to substitute himself and also take steps for substitution of the heirs of the defendant.

A frivolous suit, which is not maintainable in law, cannot be allowed to continue unnecessarily. The averments made in the plaint indicate that the suit is barred by the provisions of law. The suit is the same as that of the earlier suit, that is eviction of trespassers, upon revocation of license. The plaintiff's proper course should have been to take steps under Order 22 Rule 3 and Order 22 Rule 4 of the Code of Civil Procedure at the appropriate stage.

It is also on record that the application for substitution of the legal heir of the Gita Rani had been filed, which was not moved and hence, was dismissed. The plaintiff is thus at liberty to take

appropriate steps in the court below in Title Suit No.917 of 2019.

The revisional application is hereby allowed.

The order impugned is set aside.

There will be no order as to costs.

Parties are directed to act on the server copy of this order.

(Shampa Sarkar, J.)