Kunjan Nair Sivaraman Nair vs Narayanan Nair And Ors on 6 February, 2004

Equivalent citations: AIR 2004 SUPREME COURT 1761, 2004 (3) SCC 277, 2004 AIR SCW 894, (2004) 1 KHCACJ 688 (SC), (2004) 1 CLR 330 (SC), (2004) 1 CTC 628 (SC), (2004) 2 JT 386 (SC), 2004 (1) SLT 872, 2004 (2) ACE 268, 2004 (1) KHCACJ 688, 2004 (1) CLR 330, 2004 (2) SCALE 302, 2004 (1) CTC 628, 2004 (2) JT 386, 2004 (2) ALL CJ 1140, 2004 ALL CJ 2 1140, 2004 (5) SRJ 130, (2004) 1 KER LT 1082, (2004) 1 SUPREME 867, (2004) 2 RECCIVR 110, (2004) 2 ICC 744, (2004) 2 SCALE 302, (2004) 1 WLC(SC)CVL 398, (2004) 2 CAL HN 107, (2004) 2 CIVLJ 393, (2004) 1 CURCC 233, (2004) 2 CIVILCOURTC 63, (2004) 15 INDLD 486, (2004) 1 ALL WC 786

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Bench: Doraiswamy Raju, Arijit Pasayat

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           CASE NO.:
Appeal (civil)  838 of 2004

PETITIONER:
Kunjan Nair Sivaraman Nair

RESPONDENT:
Narayanan Nair and Ors.

DATE OF JUDGMENT: 06/02/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
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JUDGMENT (Arising out of SLP (Civil) No. 7653/2002) ARIJIT PASAYAT, J.

Leave granted.

Appellant questions correctness of judgment rendered by learned Single Judge of the Kerala High Court which dismissed the Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 (in short 'the Code'). The appellant was defendant no.1 in the suit for recovery of possession on the strength of title, instituted by 7 persons as plaintiff seeking recovery of possession. There were two defendants originally. As the first defendant died during the pendency of the first appeal before the Principal Sub Judge, Kottayam, his legal heirs were impleaded as respondents 9 to 13.

Case of the plaintiffs in nutshell was that the plaint schedule property originally belonged to their deceased father Narayanan Nair and his mother Kunjupennamma on the basis of a partition. On the death of mother, her right also devolved on Narayanan Nair who died on August, 1975. The suit was filed in Munsiff's Court, Palai on the ground that the plaintiffs are only legal heirs and hence they had title over the plaint schedule property. Defendant no.1 filed an application before the Land Tribunal, Palai to purchase the jenmam right claiming to be cultivating tenant. The same was dismissed. An appeal against the said order was also dismissed. The plaintiffs had earlier filed OS 208/77 seeking a decree for declaration of right and title to the plaint schedule property and their possession. Though their title was upheld but prayer for injunction was rejected as possession was not found. Appeal against the judgment in question did not bring any relief. Subsequently, the suit to which the present dispute relates was filed claiming recovery of possession with mesne profits. The appellant resisted the suit saying that he was a co-owner, as Narayanan Nair was his uncle. Both Narayanan Nair and his mother were looking after him and after the partition which took place when he was very young, Narayanan Nair gave the plaint schedule property to him and since then he was in possession and in enjoyment of the property. Though the application before the Land Tribunal and the appeal were dismissed, the rights obtained from Narayanan Nair and his mother remained unaffected. Even if title of the plaintiffs has been found in the earlier suit that was no longer in operation. It was further stated that his son is residing in the property by constructing a building and effecting improvements and, therefore, he is entitled to get value of the building and the improvements. Reference was made to the Kerala Compensation for Tenants Improvements Act, 1958 (in short 'the Compensation Act'). It was pointed out that the suit was barred in terms of Order II Rule 2 of the Code. The Trial Court framed 3 issues revolving round the question regarding applicability of Order II Rule 2 of the Code, and entitlement for the improvements claimed to have been made. The Courts below had found that the first suit was one for mere title and injunction, and the cause of action was not the same as that of the later suit; therefore, Order II Rule 2 of the Code had no application. Similarly, it was held that the provisions of Compensation Act had no application to the facts of the case as there was no material regarding any improvement. In any event, the appellant was not a tenant as defined under the Compensation Act.

Mr. P. Krishnamoorthy, learned senior counsel appearing for the appellant submitted that the conclusions of the Courts below are erroneous. Cause of action for both the suit was identical. In any event, the plaintiffs in the subsequent suit have claimed reliefs which were sought for in the earlier suit. To get the benefit of Section 2(d) of the Compensation Act the appellant is clearly eligible and, therefore, the Courts below were not correct in rejecting the stand.

In response, Mr. T.L.V. Iyer, learned senior counsel appearing for the respondents submitted that the High Court has recorded categorical findings regarding ineligibility of the appellant to get benefit under the Compensation Act. Cause of action of the two suits were entirely different. The first one was for confirmation of possession, and present is one for recovery of possession. So, the High Court was justified in its conclusions about not applicability of Order II Rule 2 of the Code.

We shall first deal with the question regarding applicability of Order II Rule 2 of the Code. Said provision lays down the general principle that suit must include whole claim which the plaintiff is entitled to make in respect of a cause of action, and if he does not do so then he is visited with the

consequences indicated therein. It provides that all reliefs arising out of the same cause of action shall be set out in one and the same suit, and further prescribes the consequences if the plaintiff omits to do so. In other words Order II Rule 2 centers round one and the same cause of action.

Order II Rule 2 with its sub rules and illustration reads as follows:

> "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.
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> (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.
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> (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.

Illustration A lets a house to B at a yearly rent of Rs.

1200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907."

A mere look at the provisions shows that once the plaintiff comes to a court of law for getting any redress basing his case on an existing cause of action, he must include in his suit the whole claim pertaining to that cause of action. But if he gives up a part of the claim based on the said cause of action or omits to sue in connection with the same, then he cannot subsequently resurrect the said claim based on the same cause of action. So far as sub-rule (3) is concerned, before the second suit of the plaintiff can be held to be barred by the same, it must be shown that the second suit is based on the same cause of action on which the earlier suit was based and if the cause of action is the same in both the suits and if in the earlier suit plaintiff had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press into service in that suit cannot be subsequently prayed for except with the leave of the court. It must, therefore, be shown by the defendants for supporting their plea of bar of Order II, Rule 2, sub-rule (3) that the second suit of the plaintiff filed is based on the same cause of action on which its earlier suit was based and that because it had not prayed for any relief and it had not obtained leave of the court in that connection, it cannot sue for that relief in the present second suit. A Constitution Bench of this case of Gurbux Singh v. Bhooralal (1964 (7) SCR 831) in this connection has laid down as under:

> "In order that a plea of a bar Order 2, Rule 2(3), Civil Procedure Code 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 more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief 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. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2, Rule 2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identify of the cause of action in the two suits. It of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2, Rule 2, Civil Procedure Code. The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion rightly, that without the plaint in the previous suit being on the record, a plea of a bar under Order 2, Rule 2, Civil Procedure Code was not maintainable."

The above position was again illuminatingly highlighted by this Court in Bengal Waterproof Limited v. Bombay Waterproof Manufacturing Company and Another (1997 (1) SCC

99).

Order II Rule 2, sub-rule (3) requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based. Therefore, there must be identical cause of action in both the suits, to attract the bar of Order II sub-rule (3). The illustrations given under the rule clearly brings out this position. Above is the ambit and scope of the provision as highlighted in Gurbux Singh's case (supra) by the Constitution Bench and in Bengal Waterproof Limited (supra). The salutary principle behind Order II Rule 2 is that a defendant or defendants should not be vexed time and again for the same cause by splitting the claim and the reliefs for being indicated in successive litigations. It is, therefore, provided that the plaintiff must not abandon any part of the claim without the leave of the Court and must claim the whole relief or entire bundle of reliefs available to him in respect of that very same cause of action. He will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the Court.

Rule of res judicata is contained in Section 11 of the Code. Bereft of all its explanations, namely, Explanations I to VIII, Section 11 is quoted below :

> "11. Res judicata. - No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raise, and has been heard and finally decided by such court."
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> "Res judicata pro veritate accipitur" is the full maxim which has, over the years, shrunk to mere "res judicata".

Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman Jurisprudence "Interest reipublicae ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "Nemo debet bis vexari pro una at eadem causa" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised.

The above position was noted in Deva Ram and Another v. Ishwar Chand and Another (1995 (6) SCC 733).

The doctrine of res judicata differs from the principle underlying Order II Rule 2 in that the former places emphasis on the plaintiff's duty to exhaust all available grounds in support of his claim, while the latter requires the plaintiff to claim all reliefs emanating from the same cause of action. Order II concerns framing of a suit and requires that the plaintiffs shall include whole of his claim in the framing of the suit. Sub-rule (1), inter alia, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the very same cause of action. If he relinquishes any claim to bring the suit within the jurisdiction of any Court, he will not be entitled to that relief in any subsequent suit. Further sub-rule (3) provides that the person entitled to more than one reliefs 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 such relief he shall not be afterwards be permitted to sue for relief so omitted.

The expression "cause of action" has acquired a judicially-settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously the expression means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove

each fact, comprises in "cause of action".

In Halsbury's Laws of England (Fourth Edition) it has been stated as follows:

> "'Cause of action' has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject matter of grievance founding the action, not merely the technical cause of action."

As observed by the Privy Council in Payana v. Pana Lana (1914) 41 IA 142, the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action or different causes of action, even though they arise from the same transaction. One great criterion is, when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit whether the same evidence will maintain both actions. (See Mohammad Khalil Khan v. Mahbub Ali Mian (AIR 1949 P.C. 78) In Inacio Martins (deceased through LRs.) v. Narayan Hari Naik and Ors. (1993 (3) SCC 123), an almost identical question arose. In that case, the plaintiff had prayed for protection of his possession by a prohibitory injunction. That prayer was refused. Subsequent suit was for recovery of possession. This Court held that in the former suit the only relief that the Court could have granted was in regard to the declaration sought for which the Court could not have granted in view of the provisions of Specific Relief Act. The cause of action for the first suit was based on the apprehension about likely forcible dispossession. The cause of action of the suit was not on the premise that he had, in fact, been illegally and forcefully dispossessed and needed the Courts' assistance for restoration of possession. In that background this Court held that subsequent suit was based on a distinct cause of action not found in or formed the subject matter of the former suit. The ratio of the decision has full application to the facts of the present case.

In Deva Ram's case (supra) it was held that where the previous suit was for recovery for loan which was dismissed on the ground that the document on the basis of which the suit was filed was not a sale deed but agreement for sale, subsequent suit for recovery of possession on the basis of title was not hit by Order II Rule 2 as the cause of action in the two suits were not identical or one and the same.

The Courts below were, therefore, justified in holding that Order II Rule 2 of the Code had no application to the facts of the case. Consequently, the decree passed in favour of the plaintiffs for recovery of possession shall stand affirmed and the appeal to that extent shall stand dismissed.

That brings us to the residual question about eligibility of the appellant to make a claim for compensation for the alleged improvements made. Section 2(d) of the Compensation Act reads as follows:-

"2(d): "Tenant" "tenant" with its grammatical variations and cognate expressions includes

(i) a person who, as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee, or sub-mortgagee of land, is in possession thereof.

(ii) a person who with the bona fide intention of attorning and paying a reasonable rent to the person entitled to cultivate or let waste-land, but without the permission of such person, brings such land, under cultivation and is in occupation thereof as cultivator; and

(iii) a person who comes into possession of land belonging to another person and makes improvements thereon in the bona fide belief that he is entitled to make such improvements."

It is to be noted that the three clauses of Section 2(d) use different expressions to meet different situations and class of persons. While clause (i) refers to a person who is a lessee or sub-lessee, or mortgagee or sub-mortgagee or in "good faith" believing himself to be any one of the above such persons, clause (ii) deals with a person with "bona fide intention" by doing any one of the things enumerated is in occupation as cultivator, and clause (iii) deals with a person who comes into possession of land belonging to another and makes improvement thereon in the "bona fide belief" that he is entitled to make such improvements. According to the appellant, both clauses (i) and (iii) are applicable to him. Clause (i) deals with the person who bona fide believes himself to be a lessee in respect of land in question. The fact that he asserted a claim for purchase of jenmam rights, irrespective of the rejection of the claim would go to show that at any rate he was believing in good faith to be one such person viz., lessee. Clause (iii) encompasses a person who come into possession of land belonging to another person and makes improvements thereon with the bona fide belief that he is entitled to make such improvements. The appellant was claiming himself to have been put in possession as the nephew of late Narayanan Nair, and as a person in such possession - claims to have made certain improvements. Indisputably he was in possession. Though, in view of the judgments of the Courts below his claim to assert a title in him has been rejected and his possession cannot be a lawful possession to deny the right of the real owner to recover possession or assert any adverse claim against the lawful owner to any longer squat on the property his initial induction or entering into possession cannot be said to be by way of encroachment. Whether such a person could not claim to have entertained a bona fide belief that he is entitled to make such improvements has to be factually determined with reference to the point of time as to when he really made such improvements. If the alleged improvements are found to have been made after the disputes between parties commenced then only it may not be in bona fide belief. Improvements made, if any, even thereafter only cannot fall under clause (iii). The Court dealing with the matter is required to examine the claim and find out whether the prescriptions in the different clauses individually or cumulatively have any application to the claim of the appellant for improvements alleged to have been made, if so really made. The Courts below have noted that the appellant made a claim that he was a lessee and thereafter made the improvements. The Courts below do not appear to have

considered the issues arising at any rate in respect of the claim for alleged improvements said to have been from aforesaid angle. As factual adjudication is necessary as to whether appellant acted in good faith or with bona fide belief as envisaged, has to be decided taking into consideration the materials placed before the Court in that regard. It is, therefore, appropriate that the Trial Court should consider this aspect afresh uninfluenced by any observation made by it earlier or by the Appellate Courts. We also do not express any conclusive opinion on the merit of the claim except indicating the parameters relevant for such consideration. For that limited purpose, the matter is remitted to the Trial Court which shall make an endeavour to adjudicate the matter within six months from the date of judgment, after allowing the parties to place material in support of their respective stands.

The appeal is partly allowed to the extent indicated and in other respects shall stand dismissed. Costs made easy.

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