

IN THE HIGH COURT OF DELHI

RFA No.416 of 2004

Date of decision : 02nd August, 2004

Shri D.N.Sondhi ... Appellant
through Sunit Dutt Dixit, Advocate

VERSUS

The Phosphate Company Ltd. & Ors. Respondents
through NEMO

CORAM:

**HON'BLE JUSTICE DR. MUKUNDAKAM SHARMA:
HON'BLE MS. JUSTICE GITA MITTAL.**

1. Whether reporters of local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

DR. MUKUNDAKAM SHARMA, J (ORAL)

1. This appeal is filed by the appellant as against the judgment and order dated 17th April, 2004, passed by the Additional District Judge, Delhi in suit no.101/01/97. It is contended that such records as are necessary for adjudication of the present appeal have been placed before us. Accordingly we have proposed to hear the matter.

2. The appellant herein had earlier filed a suit being suit no.56/96 praying inter-alia for the following reliefs:-

“(a) A decree of declaration that the plaintiff is still in service and the order of termination of his service dated 29.1.1996 is illegal, void, ab initio and inoperative.

(b) Mesne profits Rs.7,000/- per month towards salary, or in the alternative Rs.10,000/- per month by way of damages for using the private residence of the plaintiff as the business establishment by defendant no.1 till the disposal of this suit, and

© A direction to the defendant no.1 to pay all the funds such as [C.P.Fund](#), Gratuity etc. and reimbursement of Miscellaneous expenses of Rs.25,000/- plus Rs.70,000/- for the use of personal motor car to the plaintiff forthwith; and

(d) In the alternative a lump sum compensation package in lieu of pension package on par with the industrial establishment having more than 100 employees as per the provisions of Industrial Law.

(e) Interests pendente lite.

(f) Costs of litigation.

(g) Any other relief deemed just and proper.”

3. Perusal of the above shows that the appellant was aware of its claim and had inter alia sought recovery of amount, injunction as well as a declaration in its favour declaring that the decision of respondent nos. 1,2 & 3 herein being null and void in respect of the termination of the services of the plaintiff dated 29.1.1996.

4. The appellant/plaintiff had prayed inter alia for a decree of declaration that he continued in service and that the order of termination dated 29th January, 1996 was illegal, void, ab initio and inoperative. The appellant had sought recovery of money towards his salary and damages as well as a direction to the defendant no.1 to pay all his funds as Provident Fund, Gratuity etc. as well as re-imbursement of miscellaneous expenses of Rs.25,000/- + Rs.70,000/-. Again the plaintiff had incorporated an alternative prayer for maximum compensation package in lieu of pension package.

5. During the pendency of the said suit, the plaintiff filed yet another suit being suit no.101/2001 for declaration, mandatory and permanent injunction and recovery of money seeking the following prayers:-

(A) It is, therefore, prayed that the Hon'ble Court may kindly pass a decree of declaration in favour of the plaintiff and against the defendants thereby declaring the decision of defendants no.1, 2 & 3 as null and void in respect of the termination of the service of the plaintiff dated 29.1.1996 and declaring the plaintiff as continuing in service of the defendant no.1.

(B) It is also prayed that the Hon'ble Court may kindly pass a decree in favour of the plaintiff and against the defendants thereby directing the defendants no.1 and 2 to pay Rs.4,72,000/- to the plaintiff on account of salary dues, gratuity, provident fund amount etc. or in the alternative as damages.

© It is also prayed that the Hon'ble Court may kindly pass a permanent injunction in favour of the plaintiff and against the defendants thereby restraining the defendants their agents, servants and legal representants from taking the charge of the service from the plaintiff forcibly and without due process of law and from interfere into the peaceful possession and service of the plaintiff and his property/residence bearing No.A-58, DDA Flats, Garhi, East of Kailash, New Delhi-110 065.

Any other relief which Hon'ble Court may deem fit and proper in the circumstances of the case be also passed in favour of the plaintiff and against the respondents.”

6. The following issues were framed by the trial court:-

“1. Whether the suit is bad for misjoinder of the parties as defendant no.2 to 4 are neither necessary nor proper parties? OPD

2. Whether the present suit is barred by principle of res judicata in view of the earlier suit no.56/96 which was dismissed on 3.9.1997? OPD

3. Whether the suit is not maintainable in view of the provisions of Order 23 Rule 1(4) of the CPC r/w Order 2 Rule 2 CPC? OPD

4. Whether this court has no pecuniary jurisdiction as alleged by the defendant no.2 in para no.4 of P.O? OPD

5. Whether this court has territorial jurisdiction to entertain the present suit? OPD

6. Whether the suit barred by limitation? OPD

7. Whether the plaintiff is entitled a decree of the

declaration as claimed? OPP

8. Whether the plaintiff is entitled a decree of mandatory and permanent injunction as claimed?
OPP

9. Relief.”

7. This matter proceeded to evidence. The plaintiff examined himself and one Shri [S.L.Sehgal](#) who was a retired Government servant in support of his case. The defendant had produced defendant no.4 as a witness in support of its case. The matter proceeded to judgment and vide its judgment and decree dated 17th April, 2004 the trial court dismissed the suit of the plaintiff.

8. It appears that during the pendency of the second suit and in view of the objections raised by the defendants, the plaintiff made an application under Order 23 of the Code of Civil Procedure in S.56/96 seeking leave to withdraw the said suit. The application of the plaintiff was taken up on 3rd September, 1997 when the statement of the plaintiff was recorded on oath. The plaintiff made a statement that he wanted to withdraw the suit. No right was reserved by the plaintiff to bring a fresh suit or to maintain the second suit which he had filed. The counsel for the defendant had stated that he had no objection for unconditional withdrawal of the suit. The statement made by the plaintiff has been

placed before us as part of the record in the instant Appeal. Perusal thereof lends support to the fact that the appellant did not seek any kind of reservation or liberty and the statement was made with prejudice. In view of the statement made by the plaintiff the suit no. 56/96 was dismissed as withdrawn by the learned trial court on the basis of the statement made on behalf of the appellant vide order passed on 3rd September, 1997.

9. The stand now taken before us is that in view of the fact that the second suit being suit no.101/2001 already stood filed and was pending, therefore, the plaintiff did not need to reserve any right or take any kind of permission from the Court for perusing the same.

10. It is established from the records of the case that at the time of withdrawal of the prior suit, the appellant/plaintiff did not urge reservation of liberty to file a fresh suit nor such a liberty was granted by the Court while dismissing the suit as withdrawn. Although it is submitted by the counsel appearing for the appellant that such a liberty was sought for in the application filed by the appellant under Order 23 Rule 1 CPC, the said statement could not be verified as the said application is not placed on record. Even assuming that the statement of the counsel for the appellant/plaintiff is correct, we are of the considered

opinion that such liberty, which was prayed for in the application, was not pressed when the statement of the appellant/plaintiff was recorded. The Court while dismissing the said application also did not grant any liberty to the appellant/plaintiff. The appellant was also satisfied with the aforesaid disposal of the suit and did not challenge the same in any other forum and, therefore, he cannot challenge the aforesaid order in the suit subsequently filed by the appellant.

11. It is noteworthy that the plaintiff has also added parties in the second suit to create a distinction between the two suits and has also claimed an injunction which is contended to not have been prayed earlier. Perusal of the record laid before us makes it abundantly clear that the plaintiff had no claim or grievance against the defendants 2 to 4 and had led no evidence against them whatsoever. There is nothing in the oral testimony or the documents on behalf of the plaintiff to support the relief sought against them. In our considered opinion the trial court has rightly held that the plaintiff had no cause of action against the defendants 2,3 & 4 and has correctly answered the issue of misjoinder of parties against the plaintiff.

12. In case the plaintiff had any claim or cause of action which had arisen subsequent to the filing of the first suit, the proper course for

the plaintiff was to have either filed a proper application withdrawing the first suit with liberty to bring a fresh suit on the same cause of action. Upon such liberty having been granted, the plaintiff could very well have included the relief based on the additional cause of action in the second suit.

13. In the alternative, the appellant could have filed a second suit only in respect of such cause of action as had arisen after the filing of the first suit. In such circumstance the plaintiff could have contained with his first suit as well. The second suit could however, have been continued only against such defendants against whom the cause of action had arisen after the filing of the first suit.

14. We have been taken through the records of the case and have given our considered thought to the material urged before us. The plaintiff was aware of its money claim and had already sought a decree in respect thereof in S.54/96. The plaintiff has also sought a declaration that his termination was bad in law. The plaintiff could have claimed the reliefs sought by it in suit no.101/01 in suit no.54/96. It is necessary to advert to the provisions of Order 2 Rule 2 of the Code of Civil Procedure which reads as under:-

“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.”

15. The only contention urged is that the second suit was pending on the date he had withdrawn the prior suit and consequently the learned trial court had fallen into error in dismissing the second suit vide the impugned judgment.

16. Comparison of the reliefs sought in the two complaints can leave no manner of doubt that the reliefs sought for in the second suit are identical to the reliefs sought in the earlier suit. The plaintiff has merely attempted to couch the reliefs in different wordings in order to create a semblance of distinction between reliefs sought in the two complaints in order to support his plea for maintainability of the second suit. There is no dispute that the reliefs in respect of service pension as well as the money claim and the other claims had been raised in suit 54/96 as well.

The differences set up are not of substance, only of language and deserve to be ignored. Another material fact which lends support to the view taken by us is that the second suit was filed during the pendency of the first suit. This suit for the same reliefs was barred under the provisions of Order 2 Rule 2 of the Code of Civil Procedure on the date of its institution. The plaintiff was apparently precluded from bringing a suit for such reliefs as could have been sought in the prior suit or which had been sought in the prior suit. The claim made in s.101/01 was clearly barred under the provisions of Order 2 Rule 2 of the Code of Civil Procedure.

18. The issue no.3 was framed in this behalf reads as herein:-

“3. Whether the suit is not maintainable in view of the provisions of Order 23 Rule 1(4) of the CPC read with Order 2 Rule 2 CPC?”

The finding recorded by the learned trial court on issue no.3 aforesaid records that the plaintiff was materially seeking the same relief and has based his claim in the second suit on the same cause of action which is barred by the provisions of the CPC. Such a bar, as has been recorded by the learned trial court, is to be found under Order 2 Rule 2 of the CPC. The reasoning given by the learned trial court appears to have proceeded on this basis but has erroneously recorded the prohibition to be contained in Order 23 of the CPC.

19. In our view, the subsequent suit was clearly barred under the provisions of Order 2 Rule 2 of the CPC on the date of its filing. Withdrawal of the second suit could not remove this bar. As such the suit filed by the appellant as well as the present Appeal must fail. The finding of the learned trial court to the effect that the suit was barred by provisions of Order 23 Rule 1(4) of the CPC is modified to the extent that the suit would be barred under the provisions of Order 2 Rule 2 of the Code of Civil Procedure and issue no.3 is as such decided against the plaintiff and in favour of the defendants.

20.

20. No other ground was urged before us.

21. The findings on issue no.3 go to the root of the matter and the suit necessarily fails in view of the discussion above.

22. We find no merit in the appeal and the same is hereby dismissed.

DR.MUKUNDAKAM SHARMA
JUDGE

GITA MITTAL
JUDGE

August 02, 2004
JK