Jokhi Ram And Anr. vs Sardar Singh And Ors. on 22 July, 1955

Equivalent citations: AIR1955ALL661, AIR 1955 ALLAHABAD 661

JUDGMENT

Agarwala, J.

1. This is a defendants' appeal arising out of a suit for possession over certain property and recovery of "damages. The only question in the appeal is whether the plaintiffs' suit was barred by Order 2, Rule 2, Civil P. C. The following pedigree will be useful in understanding the facts of the case:

SHEO BARAN SINGH _____|_____ | | | Nabbo Singh Kedar Singh= Lochan Singh= | Mst. Chameli Mst. Larehti | D.4 | | | _____|_____ | | | | | Budha Singh TIkam Singh | | D.5 D.6 | | _____|_____ | | | | Lakhan Sing Sardar Singh | P.2 P.1 | _____ |_____ | | Hukam Singh Hakim Singh P. 4 P. 3

2. Sheo Baran Singh was the owner of 21/2 biswa share in Patti Sheo Baran Singh. Appertaining to this share he had some Sir land. On 23-11-1921 he made a gift of his zamindari share and the Sir land to the three branches of his sons but in unequal shares. To Lakhan Singh and Sardar Singh plaintiffs 1 and 2 and their mother Srimati Chameli he gave 15 biswansis share, to, Budha Singh, and Tikam, Singh, defendants 5 and 6 and Nabbo Singh defceased their father he gave 15 biswansis share, and to Shrimati Larehti, wife ,of Lochan Singh and mother of Hakim Singh and Hukam Singh, plaintiffs 3 and 4, he gave one Biswa share.

3. On 2-7-1924, Nabbo Singh and his sons, Budha Singh and Tikam Singh sold 8 Biswansis zamindari share out of the 15 biswansis which they obtained under the aforesaid deed of gift to the appellants Jokhi Ram and Munna Lal.

4. In 1925 the appellants who had thus become co-sharers in Patti Sheo Baran Singh brought a suit for profits against the members of the family of Sheo Baran Singh, who were co-sharers in the Patti. Lakhan Singh and Sardar Singh, plaintiffs 1 and 2, Hakim Singh and Hukam Singh, plaintiffs 3 and 4, were impleaded as minors represented by their respective guardians. The suit was decreed on 4-12-1925. Execution proceedings were taken out and the entire zamindari share remaining in the hands of the judgment-debtors was sold in auction and purchased by the appellants on 22-1-1929.

5. The auction sale did not satisfy the decree in full and there was a balance of about Rs. 400/-still due t9 the decree-holders, the appellants. As a result of the sale, the Sir land in possession of the judgment-debtors became their exproprietary tenancy holding.

6. In order to satisfy the balance of the decree, on 20-4-1931 Budha Singh and Tikam Singh, sons of Nabbo Singh, and Lochan Singh for himself and as guardian of his sons Hakim Singh and Hukam Singh, plaintiffs 3 and 4, and Srimati Chameli for herself and as guardian of Lakhan Singh and Sardar Singh, plaintiffs 1 and 2 executed a deed of relinquishment of their exproprietary rights in five plots measuring 8 bighas and 5 biswas in favour of the decree-holders appellants.

In this way the appellants acquired possession over the entire 21/2 biswas zamindari share and also actual cultivatory possession over 5 plots measuring 8 bighas, and 5 biswas. The branch of Nabboo Singh submitted to all these proceedings, but the branches of the other two sons of Sheo Baran Singh did not.

7. In 1938, Lakhan Singh and Sardar Singh, sons of Kedar Singh & Hukam Singh & Hakim Singh, sons of Lochan Singh brought a suit, suit No. 26, of 1938, against the appellants for possession over their 2/3rds share out of 21/2 biswas zamindari share which was the subject-matter of the gift of 23-11-1921 on the grounds that the property was ancestral, that Sheo Baran Singh had no right to make a gift of it to different persons as he purported to do by means of the deed of gift dated 23-11-1921, that in the suit for profits brought by the appellants in the year, 1925, the plaintiffs were not properly re-presented and the guardians were negligent in defending the suit and for these reasons the decree in that suit was not binding upon them, that the sale in execution thereof was consequently of no legal validity and that they were entitled to obtain possession over their share of the property.

That suit was decreed. It was held that the property was joint, that Sheo Baran Singh was not entitled to make a gift of it, that the guardians appointed in the suit of 1925 were negligent and that the decree and sale in the execution proceedings of that decree were not binding on the plaintiffs.

8. Later on, in the year 1942, the suit which has given rise to this appeal was instituted by Lakhan Singh, Sardar Singh, Hakim Singh and Hukam Singh for recovery of possession over 2/3rds share of the land covered by the deed of relinquishment of 20-4-1931.

9. The main defence with which we are concerned was that the suit was barred by Order 2, Rule 2, Civil P. C., in as much as the cause of action for the suit was the same as for suit No. 26 of 1938 and the relief for possession over the area sought for in the present suit should have been included in the previous one.

10. The trial Court rejected the defence and decreed the suit. The lower appellate court on appeal set aside the decree of the trial court and dismissed the suit. There was an appeal to this Court which came up before a learned Single Judge who allowed the appeal and decreed the suit of the plaintiffs, holding that it was not barred by Order 2, Rule 2. Against this judgment, the present special appeal has been brought by the defendants.

11. The recitals/in the plaints of the two suits so far as they related to the foundation of the plaintiff's claim were exactly the same, namely, that the property was ancestral that Sheo Baran Singh had no right to make a gift of it to different, pert sons, that the decree passed in the appellant's suit for

profits in which the plaintiffs were arrayed as minor defendants under their guardians were not binding upon them as their guardians were negligent in defending the suit and that the sale in execution of the decree was consequently void and not binding on them.

The only additional facts narrated in the present suit which were not narrated in the previous one were that as the decree for profits obtained by the appellants was not binding against the appellants, there was no real consideration for the deed of relinquishment, and that as such it was not binding on the plaintiffs to the extent of their share. 20th of April, 1931, the date of the deed of relinquishment, was mentioned as one of the dates of the accrual of the cause of action in the present suit and this date was not mentioned in the previous suit No. 26 of 1938.

12. It is conceded that the plaintiffs could have included in the previous suit the claim made in the present suit if they were so disposed. On these facts the question is whether the cause of action for the previous suit is the same as the cause of action for the present suit or the two causes of action are different.

13. Order 2, Rule 2, lays down that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of a particular cause of action and that if he omits to sue in res- pect of any portion of his claim he shall not afterwards sue in respect of the same. The objection of the rule is clearly to avoid splitting up of claims and to prevent multiplicity of suits. The phrase 'cause of action' has not been defined in any enactment, but the meaning of it has been judicially considered in -various decisions. In -- 'Read v. Brown', 1889-22 QBD 128 (A), Lord Esher, accepted the definition given in -- 'Cook v. Gill', (1873) 8 C. P. 107 that it meant:

> "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. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

In -- 'Sm. Chand Koer v. Pratab Singh', 15 Ind App 156 (PC) (C), Lord Watson delivering the judgment of the Board observed as follows:

> "Now the cause of action has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set out in the plaint as the cause of action, or in other words to the 'media' upon which the plaintiff asks the court to arrive at a conclusion in his favour."

In -- Soorjomonee Dayee v. Suddanund', 12 Beng LR 304 (D), it was observed that the term "cause of action" is to be construed with reference rather to the substance than to the form of action. "To the same effect are the observations in --'Krishna Behari Roy v. Brojeswari Chowdranee', 2 Ind App 283 at p. 285 (P.C.) (E). In -- 'Mohammad Khalil Khan v. Mahbub Ali', AIR 1949 PC 78 at p..87 (F), Sir Madhavan Nair, after a review of the relevant cases, summarised the law as follows:

> "(1) The correct test in cases falling under Order 2, Rule 2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former, suit.
>
> (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.
>
> (3) If the evidence to support the two claims is different, then the causes of action are also different, (4) The causes of action in the two suits may be considered to be the same if in substance they are identical.
>
> (5) The cause of action has no relation whatever to the defence that may be set, up by the defendant nor does it depend upon 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."

If 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 of the court, it must obviously include not only the facts which would entitle the plaintiff to establish the right which he seeks to establish, but also its infringement because without the infringement of the right it can hardly be said that the cause of action has arisen for the suit. In every suit the plaintiff has to mention the date when the cause of action arose for the suit.

The date is the date of the infringement of the right of which the plaintiff complains. The right (including the facts constituting its foundation) and its infringement must, therefore, both constitute the cause of action for a suit. In 'Mohammad Khalil Khan's case (F)', (Ubi supra), the Judicial Committee clearly accepted this view. An observation of their Lordships at the bottom of page 86, of the report in the Allahabad Law Journal to the effect that:

> "The plaintiff's cause of action to recover the properties consists of those facts which would entitle them to establish their title to the properties'", should not be understood as laying down the proposition that the facts necessary to establish the title or the right of the plaintiff alone were sufficient to constitute the cause of action for the suit, and that the facts relating to, its infringement were immaterial; because later on their Lordships do consider the infringement of the title or the right in the two suits which were under - consideration before their Lordships and they approve of the observation of the High Court to the effect that the infringements in the two suits in substance arose cut of the same transaction or formed part of the same transaction.
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> Thus it is clear that in order that the cause of action for two suits may be the same, it is necessary that not only the facts which would entitle the plaintiff to establish his title to the property claimed in the two suits be the same but also that the attack on me title of the infringement of the plaintiff's right at the hands of the defendant must

> have arisen, in substance out of the same transaction,

14. In, the present case the transaction which, gave rise to the cause of action for the present suit was the deed of relinquishment executed on 20-4-1931. This was entirely a different transaction from the execution sale which took place in the execution proceedings of the appellants decree for profits.

It is true that the consideration for the deed of relinquishment was the balance of the amount due under that decree, but the consideration for a transaction is not the same thing as the transaction itself. The deed of relinquishment was a voluntary act quite separate from the execution sale which was the subject-matter of the previous suit.

Though the facts which would entitle the plaintiff to establish his title to the property were the same in both the cases the infringements of the plaintiff's right having been occasioned as a result of two separate transactions covering different kinds of rights in property, it cannot be said that, the cause of action was substantially the same in both the cases.

15. This view finds support from the decision of the Judicial Committee in -- 'Rajah of Pittapur v. Venkata Mahipati Suriya', 12 Ind App.116 (PC) (G). In that case the plaintiff sued to recover immoveable property in consequence of having been, improperly turned out of possession and afterwards sued to recover from" the same defendant moveable property in consequence of its wrongful detention.

The plaintiffs' title to the said estate as well, as to the half share of the personalty arose under a will of one Bharayamma. It was held by their Lordships that:

> "The claim in respect of the personalty was not a claim arising out of the cause of action which. existed in consequence of the defendants having improperly turned the plaintiffs out of possession of the zamindari property. It was a distinct cause of action altogether and did not arise at all out of the other."

In -- 'Har Sarup v. Anand Sarup', AIR 1942 410 (H), a Bench of this Court held that:

> "The question whether a subsequent suit is founded upon the same cause of action on which. a previous suit was based is essentially one of fact and must be determined upon the facts of each case. The right of an owner to maintain his possession over a particular item of property is quite distinct and apart from his right to recover possession of another item of property from which he has been ousted by a trespasser.
>
> Where there is an infringement of two separate rights by two separate acts of trespass which cannot be said to have formed part of the same transaction committed by the same trespasser there must be two separate causes of action, and a suit in respect of the one will not be barred by a prior suit in respect of the other by Order 2 Rule 2

> because Order 2 Rule 2 does not make it incumbent upon the plaintiff to combine separate causes of action in the same suit.
>
> All that it lays down is that the plaintiff must include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action."

With respect, we agree with these observations.

16. We, therefore, hold that the present suit was not barred by the provisions of Order 2, Rule 2, of the Code.

17. There is no force in this appeal and if is dismissed with costs.