Gurbux Singh vs Bhooralal on 22 April, 1964

Equivalent citations: 1964 AIR 1810, 1964 SCR (7) 831, AIR 1964 SUPREME COURT 1810

Author: N. Rajagopala Ayyangar

Bench: N. Rajagopala Ayyangar, P.B. Gajendragadkar, K.N. Wanchoo, M. Hidayatullah, K.C. Das Gupta

PETITIONER:
GURBUX SINGH

Vs.

RESPONDENT:
BHOORALAL

DATE OF JUDGMENT:
22/04/1964

BENCH:
AYYANGAR, N. RAJAGOPALA
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AYYANGAR, N. RAJAGOPALA
GAJENDRAGADKAR, P.B. (CJ)
WANCHOO, K.N.
HIDAYATULLAH, M.
GUPTA, K.C. DAS

CITATION:
1964 AIR 1810 1964 SCR (7) 831

ACT:
Civil Procedure-Suit filed for recovery of possession and mesne profits-In a previous suit a decree for mesne profits was passed in respect of the same land-Whether cause of action same in both suits-Subsequent suit whether barred under provisions of the Code-Code of Civil Procedure, 1908 (Act 5 of 1908), Order 2 rr. (2) and (3).

HEADNOTE:
The plaintiff-respondent brought a suit against the appellant for recovery of possession of certain property and for mesne profits. The plaintiff claimed recovery of possession and mesne profits on the ground that he was the absolute owner of the property described in the plaint and the

defendant was in, wrongful possession of the same. In the plaint the plaintiff made reference to a previous suit that had been filed by him and his mother (C.S. 28 of 1950) wherein a claim had been made against the defendant for the recovery of the mesne profits in regard to the same property for the period ending February 1.0, 1950. In the previous suit the mense profits had been decreed. In his written statement in the present suit the defendant appellant raised a technical plea under Order 2 rule 2 of the Civil Procedure Code to the maintainability of the suit.

Before evidence was led by the parties the trial court decided this preliminary issue raised by the defendant. The trial court held that the suit was barred under 0. 2 r. 2 of the Code. On appeal, the Appellate Court held that the plea of a bar under Order 2 rule 2, Civil Procedum Code should not have teen entertained at all because the pleadings in the earlier suit C.S. 28 of 1950 had not been filed in the present case.

Therefore, the Appellate Court set aside the order of the trial Court. Against this order the defendant preferred an appeal which was dismissed by the High Court. The appellant obtained special leave against the judgment of the High Court.

Hence the appeal--

Held:(i) A plea under Order 2 rule 2 of the Code based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. It is for this reason that a plea of a bar under 0. 2 r. 2 of the Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the court the identity of the cause of action in the two suits. In other words a plea under 0. 2 r. 2 of the Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. Without placing before the court the plaint in which those facts were alleged, the defendant cannot invite the court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. On the facts of this case it has to be held that the plea of a bar under 0, 2 r. 2 of the Code should not have been entertained at all by

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the trial Court because the pleadings in civil suit No. 28 of 1950 were not filed by the appellant in support of this plea.

(ii)in order that a plea of a bar under 0. 2 r. 2 (3) of the Code should succeed the defendant who raises the plea must make out (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (ii) that in respect of that cause of action the plaintiff was entitled to more that one relief (iii) that being thus entitled to more than one relief plaintiff, without leave obtained from the Court omitted to sue for the

relief for which the second suit had been filed.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 583 of 1961. Appeal by special leave from the Judgment and decree dated August 12, 1959, of the Rajasthan High Court in Civil Misc. First Appeal No. 50 of 1956.

Gopal Singh, for the appellant.

B. P. Maheshwari, for the respondent.

April 22, 1964. The Judgment of the Court was delivered by AYYANGAR, J.--The facts giving rise to this appeal, by special leave, are briefly as folows: The respondent- Bhooralal-brought a suit-Civil Suit 20 1954-in the Court of the Subordinate Judge, First Class, Kekri against the appellant claiming possession of certain property which was described in the plaint and for mesne profits. The allegation in the plaint was that the plaintiff was the absolute owner of the said property of which the defendant was in wrongful possession and that in spite of demands he had failed to vacate the same and was therefore liable to pay the mesne profits claimed. In the plaint he made reference to a previous suit that had been filed by him and his mother (C.S. 28 of 1950) wherein a claim had been made against the defendant for the recovery of the mesne profits in regard to the same property for the period ending with February 10, 1950. It was also stated that mesne profits had been decreed in the said suit. In the Written Statement that was filed by the present appellant, besides disputing the claim of the plaintiff to the reliefs prayed for on the merits, a technical plea to the maintainability of the suit was also raised in these terms:

> "That 0. 2. r. 2, Civil Procedure Code is a bar to the suit. When the suit referred to in paragraph 2 of the plaint was filed the plaintiff had a cause of action for the reliefs also. He having omitted to sue for possession in that suit, is now barred from claiming relief of possession. No second suit for recovery of mesne profits is maintainable in law.
>
> Since the plaintiff had lost his remedy for the relief of possession he cannot seek recovery of mesne profits also."

On these pleadings the learned Subordinate Judge framed 5 issues and of these the 4th issue ran:

> "Whether 0. 2. r. 2, Civil Procedure Code is a bar?".

Before evidence was led by the parties issue no. 4 was argued before the learned trial Judge as a preliminary issue and the Court recorded a finding that the suit was barred by the provision named and directed the dismissal of the suit. The plaintiff preferred an appeal from this decree to the additional District Judge and the appellate Court considered this plea as regards the bar under 0. 2.

r. 2, Civil Procedure Code on two alternative bases. In the first place, the learned District Judge pointed out that the pleadings in the earlier suit-C.S. 28 of 1950-had not been field in the case and made part of the record, so that it was not known what the precise allegations of the plaintiff in his previous suit were. For this reason the learned District Judge held that the plea of a bar under 0. 2. r. 2, Civil Procedure Code should not have been entertained at all. He also considered the question as to whether, if the plea was available, it could have succeeded. On this he referred to the conflict of Judicial opinion on this point and held that if the point did arise for decision he would have decided in favour of the plaintiff and treated the cause of action for a suit for mesne profits as different from the cause of action for the relief of possession of property from a trespasser. In view, however, of his finding on the first point as to there being no material on the record to justify the plea of a bar under 0. 2. r. 2, Civil Procedure Code the learned District Judge did not rest his decision on his view of the law as regards the construction of 0. 2. r. 2(3). In the circumstances he set aside the dismissal of the suit and remanded it to the trial Court for being decided on the merits in accordance with the law.

The defendant-the appellant before us-preferred a second appeal to the High Court of Rajasthan and the learned Single Judge dismissed this appeal. It is from this judgment that the appellants have preferred this appeal after obtaining special leave.

As already indicated, there is a conflict of judicial opinion on the question whether a suit for possession of immoveable property and a suit for the recovery of mesne profits from the same property are both based on the same cause of action, for it is only if these two reliefs are based on "the same cause of action" that the plea of 0. 2. r. 2., Civil Procedure Code 1, P(D)ISCI-27 that was raised by the appellant could succeed. Clause (3)of O. 2. r. 2, Civil Procedure Code that is relevant in this context reads:

> (3) 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 reliefs so omitted."

Some of the High Courts, notably Madras, have in this con- nection, referred to the terms of 0. 2. r. 4 which runs:

> "R. 4. No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except-
>
> (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;
>
> (b) claims for damages for breach of any contract under which the property or any part thereof is held; and
>
> (c) claims in which the relief sought is based on the same cause of action:

> Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property".

as an aid to the construction of the term 'cause of action' and the expression 'relief based on the same cause of action' in 0. 2. r. 2(3). Reading these two provisions together it has been held that the cause of action for suits for possession of immoveable property and the cause of action for a suit in respect of mesne profits from the same property are distinct and different. On the other hand, it has been held, particularly by the High Court of Allahabad that the basis of a claim for mesne profits is wrongful possession of property and so is a claim for possession and thus the cause of action for claiming either relief is the same viz., wrongful possession of property to which the plaintiff is entitled. On this reasoning it has been held that a plaintiff who brings in the first instance a suit for possession alone or for mesne profits alone is afterwards debarred from suing for the other relief under 0. 2. r. 2(3). The learned trial Judge had, after referring to the ,conflict of authority, expressed his preference for the Allahabad view and had, therefore, upheld the defence. At the stage of the appeal the learned District Judge had, as already pointed out, expressed his preference for the other view. The learned Single Judge expressed his concurrence with the learned District Judge in preferring the Madras view as against the decisions of the Allahabad High Court. Learned counsel for the appellant sought to argue that the Allahabad view was more in accordance with principle and with the proper construction of 0. 2. r. 2(3), Civil Proce- dure Code. We do not consider it necessary to examine this conflict of judicial opinion in this case as, in our opinion, the learned District Judge was right in holding that the appellant had not placed before the Court material for the purpose of founding a plea of 0. 2. r. 2, Civil Procedure Code.

In order that a plea of a bar under 0. 2. r. 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 to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for 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 ordinarly 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 0. 2. r. 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 identity of the cause of action in the two suits. It is common ground that the pleadings in C.S. 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under

0. 2. r. 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 appelllant'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 0. 2. r. 2, Civil Procedure Code was not main- tainable. Learned counsel for the appellant, however, drew our attention to a passage in the judgment of the learned Judge in the High Court which read:

> LP(D)ISCl-27(a) "The plaint, written statement or the judgment of the earlier court has not been filed by any of the parties to the suit. The only document filed was the judgment in appeal in the earlier suit. The two courts have, however, freely cited from the record of the earlier suit. The counsel for the parties have likewise done so. That file is also before this Court."

It was his submission that from this passage we should infer that the parties had, by agreement, consented to make the pleadings in the earlier suit part of the record in the present suit. We are unable to agree with this interpretation of these ,observations. The statement of the learned Judge "the two courts have, however, freely cited from the record of the ,earlier suit" is obviously inaccurate as the learned District Judge specifically pointed out that the pleadings in the earlier suit were not part of the record and on that very ground had rejected the plea of the bar under 0. 2. r. 2, Civil Procedure Code. Nor can we find any basis for the suggestion that the learned Judge had admitted these documents at the second appeal stage under 0. 41. r. 27, Civil Procedure Code by consent of parties. There is nothing on the record to suggest such an agreement or such an order, assuming that additional evidence could legitimately be admitted in a second appeal under 0. 41. r. 27, Civil Procedure Code. We can therefore proceed only on the basis that the pleadings in the earlier suit were not part of the record in the present suit. Learned counsel for the appellant, however, urged that in his plaint in the present suit the respondent had specifically referred to the previous suit having been for mesne profits and that as mesne profits could not be claimed except from a trespasser there should also have been an allegation in the previous suit that the defendant was a trespasser in wrongful possession of the property and that alone could have been the basis for claiming mesne profits. We are unable to accept this argument. In the first place, it is admitted that the plaint in the present suit was in Hindi and that the word `mesne profits' is an English translation of some expression used in the original. The original of the plaint is not before us and so it is not possible to verify whether the expression `mesne profits' is an accurate translation of the expression in the original plaint. This apart, we consider that learned counsel's argument must be rejected for a more basic reason. Just as in the case of a plea of res judicata which cannot be established in the absence on the record of the judgment and decree which is pleaded as estoppel, we consider that a plea under 0. 2. r. 2, Civil Procedure Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. As the plea is basically founded on the identity of the cause of action in the two suits the ,defence which raises the bar has necessarily to establish the ,cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the

plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. It is not impossible that reliefs were claimed without the necessary averments to justify their grant. From the mere use of the words `mesne profits' therefore one need not necessarily infer that the possession of the defendant was alleged to be wrongful. It is also possible that the expression 'mesne profits' has been used in the present plaint without a proper appreciation of its significance in law. What matters is not the characterisation of the particular sum demanded but what in substance is the ,allegation on which the claim to the sum was based and as regards the legal relationship on the basis of which that relief was sought. If is because of these reasons that we consider that a plea based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. We therefore consider that the order of remand passed by the learned Additional District Judge which was confirmed by the learned Judge in the High Court was right. The merits of the suit have yet to be tried and this has been directed by the order of remand which we are affirming.

The appeal fails and is dismissed. In the circumstances of the case there will be no order as to costs. Appeal dismissed.