

Ashoka Builders & Promoters And Anr. vs Edward Keventer (Successors) P. Ltd And ... on 5 July, 1993

Equivalent citations: 51(1993)DLT421, 1993(26)DRJ533, (1994)107PLR29

JUDGMENT

S.C. Jain, J.

(1) M/S Ashoka Builders and Promoters and Another filed a suit for specific performance against M/s. Edward Keventer (Successors) P. Ltd and others. This suit relates to a part of the property being land situated at Block 48, Keventor Lane, Sardar Patel Marg, Chanakyapuri, New Delhi. The case of the plaintiffs is that they are entitled to a specific performance of an understanding between them and defendants No. 1 and 2 for carrying on the redevelopment of 25% of the said property in terms of the Memorandum of Understanding dated 22.6.1989. In this Suit defendants No. 2 and 3 filed two applications being I.A. No. 12771/92 and 12770/92 under Section 9, Order 2, Rule 2, and Order 7, Rule 11 read with Section 151 Civil Procedure Code for rejecting the plaint as barred by law under Order 2, Rule 2 Civil Procedure Code and defendant No. 1 took this plea in the written statement filed by it in para No.4 of the preliminary objections.

(2) The argument advanced by the learned counsel of these applicants/defendants is that on the same alleged facts and alleged cause of action the plaintiffs/respondents had filed Suit No. 594 of 1990 on 26.2.1990 for permanent and mandatory injunction relating to the same Memorandum of Understanding dated 22.6.1989 in respect of the same property against defendants No. 1 and 2, who are the only necessary parties in the present suit and other defendants are not necessary parties and in fact ought to be deleted. The said suit was filed for and on behalf of and for the benefit of the plaintiff No. 1. Along with the said Suit No. 594 of 1990 the plaintiff No.2 filed LA. No. 1622 of 1990 under Order 2, Rule 2 Cpc seeking permission to institute and file subsequently a suit for specific performance of the Contract/Memorandum of Understanding dated 22.6.1989 and in the alternative to claim damages. That prayer, as sought for by the plaintiff, was not granted by Nayar, J and the application was disposed of vide Order dated 19.10.1992. According to the learned counsel, no fresh suit can be filed for any further reliefs in respect of the same cause of action if they had been omitted from the previous suit. The plaintiffs were obliged to claim all reliefs in the previous Suit No. 594 of 1990 and having failed to do so without the leave of the Court they are barred from filing a subsequent suit for obtaining another relief in view of the provisions of Order 2 Rule 2 CPC. The Suit No. 594 of 1990 was based on the same Memorandum of Understanding dated 22.6.1989 and was filed against defendants No. 1 and 2, who are the only necessary parties in the present suit and other defendants are not necessary parties and in fact ought to be deleted. The said suit was filed for and on behalf of and for the benefit of the plaintiff No. 1.

(3) My attention was drawn towards the contents of and the reliefs sought in the earlier Suit No. 594/90 and the present Suit No. 1744/92. According to the learned counsel all the reliefs which the plaintiffs claim in the present Suit were available to them at the time of filing of the earlier suit.

Though the earlier suit has been termed as a suit for permanent injunction and mandatory injunction, but the relief claimed is on the basis of the same Memorandum of Understanding dated 22.6.1989 and that the relief claimed is the same i.e. directing defendants No. 1 and 2 to sign, execute or present such document or application which are necessary to fulfill the obligations cast on them under the said Memorandum of Understanding dated 22.6.1989. Infact the cause of action on the basis of which this Suit for specific performance has been filed was available to the plaintiffs at the time of filing of the earlier suit and they intentionally omitted the same and, therefore, this suit for specific performance is patently barred under the provisions of Order 2, Rule 2 CPC. My attention was also drawn to the fact that actually this Memorandum of Understanding dated 22.6.1989 was superseded by a Supplementary Memorandum of Understanding dated 20.11.1989 and Second Memorandum of Understanding dated 22.11.1989. All these Memoranda of Understanding were available at the time when the earlier suit was filed and it cannot be said by the plaintiffs that this suit for specific performance is based on a different cause of action.

(4) Reliance was placed on various decisions by the learned counsel for the applicants/defendants reported as Mohammad Khalil Khan and Others vs Mahbub Ali Mian and Others {AIR (36) 1949 P.C. 78}, A.B.C. Laminart Pvt Ltd and Another vs A.P. Agencies, Salem, Kanhaya Lal Ram Narayan and Co. vs Union of India, Duncan Brothers & Co. vs Jeetmull Greedharee Lall {[1892] 2nd 19 Cal 372}, Sundara Ramanujam Naidu vs Sivalingam Pillai and Another [ASR 1924 Madras 360], Sardar Balbir Singh vs. Atma Ram Srivastava, Praphullachandra and Others vs Rajbai and Others, Murti vs Bhola Ram and Another [2nd Vol. XVI Allahabad 165], Krishnaji Ramchandra vs Raghunath Shankar and Another, Canning Mitra Phoenix Ltd vs M/s Popular Constructions and Another, Raja Bahadur Shiv Lal Moti Lal vs Rajee Vappa Pampanna ([1909] I.C. {Vol. 1} 319), Taran Krishna Bhowmik vs Samiruddin and Others [Air 1917 Calcutta 568], Dr. V.D. Angal vs State of Maharashtra, Maksud Ali vs Nargis Dye ({ 1892} 2nd Calcutta 323), Abdul Hakim Khan and Others vs Karan Singh and Another { 1915} 3 Allahabad Law Journal 929, Amir Din Shahab Din vs Shiv Dev Singh Jhanda Singh (AIR 1947 Lahore 102), N.M. Rayalu Ayyar and Others vs. S.S. Ramudu Ayyar and another {AIR 1926 Madras 934}, Lalla Ram vs. Naresh Chand and Another, Ganesh Ramchandra Thakur. vs Gopal Lakshman Thakur and Another {AIR 1943 Bombay 12}, Mohammad Khalil Khan and Another vs Mahboob Ali Mian and Others { Air 1942 Allahabad 122 }, Pilcher vs Hinds {1879} Chancery Division Vol. XI 905, Haridas Mondal vs Anath Nath Mitra { Air 1961 S.C. 141} and S.N. Ramachandra vs State of Karnataka and Others in support of the contention that a claimant cannot maintain two separate suits in respect of the same cause of action. Much stress has been placed upon the decision of the Privy Council reported as Mohammad Khalil Khan and Others vs Mahbub Ali Mian and others [AIR {36} 1949 P.C. 78] wherein the claim for the properties situated at different places was available at the time of filing the earlier suit, but the claim regarding the property at Shahjahanpur was not included; therefore, in the second suit in which the claim for the second property situated at Shahjahanpur was made was held to be barred by the provisions of Order 2, Rule 2 CPC. According to the learned counsel, if a plaintiff fails to make a claim which he is entitled to make in respect of the cause of action in the first suit, then he is precluded from doing the same in a second suit in respect of the claim so omitted. According to the learned counsel applying the rule to the facts of the present case, this suit for specific performance is barred under Order 2, Rule 2 CPC. because it relates to the same part of the property being land situated at Block 48, Keventor Lane, Sardar Patel Marg, Chanakyapuri, New Delhi. The cause of action arose from the

same document i.e. the Memorandum of Understanding dated 22.6.1989. No new cause of action had arisen in favor of the plaintiffs entitling them to file a fresh suit. According to him, this relief of specific performance was available to them when they filed the earlier Suit No. 594/90 and they omitted the same without obtaining the permission of the Court and, therefore, this suit for specific performance is barred under Order 2 Rule 2 CPC.

(5) Learned counsel for the plaintiffs/respondents countered the arguments advanced by the learned counsel for the defendants/applicants and submitted that the provisions of Order 2 Rule 2 Civil Procedure Code have no applicability to the facts and circumstances of the present case. According to him, Order 2, Rule 2 Civil Procedure Code is based on the principle that no one should be vexed twice for the one and the same cause. The rule does not preclude a second suit based on a distinct and separate cause of action. For the applicability of Order 2, Rule 2 Civil Procedure Code the conditions which must be satisfied by the applicant are (a) the previous and the present suit must arise out of the same cause of action, (b) they must be between the same parties; and (c) that the earlier suit must have been decided on merits.

(6) According to the learned counsel for the plaintiffs/respondents, in the present case none of these conditions are fulfilled in as much as neither the two suits arise out of the same cause of action, for a cause of action of a suit for injunction is distinct from the cause of action for a suit for specific performance; It is the right and its infringement and not the ground or origin of the right and its infringement which constitute the cause of action. Some of the parties to the present suit are not even parties to the first suit and the earlier suit has not yet been decided on merits by this Court and is still pending adjudication. The law does not require a plaintiff to claim all causes of action which it may have against the defendant in respect of the corpus or the subject matter of the suit. It does not require that when a single transaction gives rise to the two separate causes of action they should all be contained in one suit. The suit for injunction is for quia timet action - the same was based on the apprehension of the plaintiff therein that the defendants therein had been harbouring intentions of causing injury and invoked the jurisdiction of this Court to prevent the defendants from doing so. The cause of action was one for injunction alone which was ripe for enforcement at that time. It has been further alleged that though the present suit has been filed on a different cause of action, but in the earlier suit the plaintiffs filed an application, being I.A. No. 1622/90 under Order 2, Rule 2 Civil Procedure Code seeking the leave of the Court to file a suit for specific performance. In the reply filed by the present applicants/ defendants there was not a whisper that the plaintiff was not entitled to claim the relief of specific performance and that having failed to do so, is not entitled to file a further suit for specific performance. According to the learned counsel for the plaintiffs respondents. Order 2, Rule 2 Civil Procedure Code does not place any restriction or limitation on the exercise of the Court's power and it does not either expressly or necessarily provide that power under Order 2, Rule 2 Civil Procedure Code should be exercised at a particular stage only. Nayar, J did not reject that application filed by the plaintiffs under Order 2, Rule 2 Civil Procedure Code in the earlier suit, but it was only disposed of by observing that the application has become infructuous, on account of the fact that the plaintiffs had filed Suit No. 1744/92 for specific performance in this Court during the pendency of that application and permission was granted to the parties to agitate their respective rights in Suit No. 1744/92 which is pending before this Court for consideration in accordance with law. According to the learned counsel, this older does not help the

applicants/defendants in arguing that the application moved under Order 2, Rule 2 Civil Procedure Code was rejected earlier and on that ground this suit for specific performance is not maintainable. The learned counsel submitted that the relief of specific performance is a different and distinct relief from the relief of permanent injunction restraining the defendants from doing certain acts. This suit for specific performance is, therefore, not barred under Order 2, Rule 2 CPC. Commenting upon the decisions cited by the learned counsel for the applicants/defendants, the learned counsel for the plaintiffs/respondents argued that each case has to be decided on the facts of that very case. The facts of different cases cannot be the same.

(7) As far as the legal position is concerned, it is well known that Order 2, Rule 2 Cpc is based on the salutary principle that a defendant or defendants should not be twice vexed for the same cause by splitting the claim and the reliefs. To preclude the plaintiff from so doing it is provided that if he omits any part of the claim or fails to claim a remedy available to him in respect of that 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. But the rule does not preclude a second suit based on a distinct cause of action. Sub-rule (3) of Rule 2 provides that 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.

(8) In this case a perusal of the record shows that the earlier suit filed by the plaintiffs/respondents being Suit No 594/90 was for permanent injunction and mandatory injunction. That suit was filed on 26.2.1990. At the time of filing of that suit the apprehension of the plaintiffs was that the defendants 1 & 2 might enter into a fresh collaboration agreement with third parties mortgaging, encumbering, transferring, leasing out, selling, parting with possession and/or alienating the land in dispute and that they might not exploit the order of the Urban Development Minister communicated vide letter dated 1.12.1989 to the disadvantage/exclusion of the plaintiffs.

(9) In the supplementary Memorandum of Understanding dated 20.11.1989 as per clause 2 time was granted up to 28.2.1990 with the stipulation that in the event of co developers i.e. the plaintiffs securing on or before 28.2.1990 both the permissions stipulated in Clause 5 of the Memorandum of Understanding dated 22.6.1989 with the permission regarding proposed community facilities, the Memorandum of Understanding dated 22.6.1989 shall stand restored and the parties shall be bound-by the terms and conditions thereof. The existence of these Memoranda of Understandings has been alleged by the applicants themselves. It means that at the time when the earlier suit was filed, some time was left for fulfilling some of the conditions as contained in the Memorandum of Understanding. According to the plaintiffs they were able to get the orders from the Minister for Urban Development in compliance of clause 5 of the Memorandum of Understanding dated 22.6.1989. Apprehending that the defendants might not exploit the permission so granted and might not enter into a fresh agreement with a third party, that suit for permanent and mandatory injunction was filed. The second suit for specific performance is not based on the same cause of action. As has been observed by the Privy Council in Mohammad Khalil Khan and Others vs. Mahbub Ali Mian and Others (supra) it is the right and its infringement and not the ground or origin of the right and its infringement, which constitute the cause of action. There is a distinction

between cause of action and the right of action as has been discussed in a Full Bench decision of Allahabad High Court in Sardar Balbir Singh vs. Atma Ram Srivastava . A right of action is a right to presently enforce a cause of action - a remedial right affording redress for the infringement of a legal right belonging to some denote person; a cause of action is the operative facts which give rise to such right of action. The right of action does not arise until the performance of all conditions precedent to the action. At the time of filing the first suit some time was left for fulfilling the other terms of the agreement and, therefore, the cause of action for filing the suit for specific performance was not available at that time. If the relief claimed in the subsequent suit was not available to a plaintiff, at the time of filing of the first suit, then Order 2, Rule 2 Civil Procedure Code will not apply as the subsequent suit is based on a separate and distinct cause of action.

(10) In order that a plea of a bar under 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 and (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. 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.

(11) On the basis of the record now available before me, I am not inclined to allow the applications filed by the defendants No.2 and 3 being I.A.No. 12771/92 and 12770/92 under Section 9, Order 2, Rule 2, and Order 7, Rule 11 read with Section 151 Civil Procedure Code for rejecting the plaint as barred by law under Order 2, Rule 2 Civil Procedure Code and the request made by defendant No. 1 in para 4 of the preliminary objections in the written statement for dismissing the plaint of the plaintiffs in view of the provisions of Order 2, Rule 2 Civil Procedure Code and Order, 7, Rule 11 read with Section 151 CPC. Both these applications are, therefore, dismissed.