

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRP No.728/2002**

% **Date of decision: 15th December, 2009**

ROSHAN LALPetitioner

Through: Mr. Ashok Agrawal, Advocate.

Versus

SMT. MAN MOHAN KAUR & ORS. ... Respondents

Through: Mr. T.N. Saxena, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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

RAJIV SAHAI ENDLAW, J.

1. This revision petition under Section 115 of the CPC has been preferred with respect to the order dated 6th March, 2002 of the Additional District Judge holding the suit of the petitioner/plaintiff for the relief of recovery of possession of portions of ground, first and second floor of property No.C-8, Housing Society, NDSE, Part-I, New Delhi from the respondents, to the extent of the recovery of portions of the ground floor and first floor, to be barred under Order 2 Rule 2 of the CPC. The suit was ordered to survive only in respect of recovery of possession of portions of the second floor of the property.

2. Notice of this petition was issued and the Trial Court record sent for, though subsequently the same was sent back. The respondents have filed their counter affidavit.

The petition has been languishing for the last seven years. The counsels for the parties have been heard.

3. Though no plea as to the maintainability of the revision petition has been raised by the counsel for the respondents, neither in the counter affidavit filed nor during oral hearing but so as not to form a precedent or not to create a confusion, it is clarified that the order holding the suit or a part of it to be barred by Order 2 Rule 2 of the CPC is a decree within the meaning of Section 2 (2) of the CPC and being a decree would be appealable and the revision petition would not lie. However, it would not serve the ends of justice, if this Court at this stage in view of the same refuses to entertain this petition or relegates the petitioner to the remedy of appeal. Not only did the respondents not raise any objection in this regard, but this Court also having entertained the petition and issued notice thereof, compels me to now dispose of the matter on merits, since the appeal against the order also lies before a Single Judge only of this Court, though before a different roster.

4. It is expedient to set out the facts. The property No.C-8, Housing Society, NDSE, Part-I, New Delhi belonged to one Sh. Tula Ram who died leaving wife Smt. Prem Lata and adopted son viz. the respondent no.1 herein. The respondent no.2 is the wife of the respondent no.1. Smt. Prem Lata being the widow of Sh. Tula Ram, after the demise of Sh. Tula Ram, filed a suit for permanent injunction against the respondents herein and also against the father and brothers of the respondent no.2 herein. In the plaint in the said earlier suit, copy whereof has been handed over by the counsel for the petitioner during the course of the hearing, it was stated that Sh. Tula Ram executed a Will in the shape of a declaration and in which he debarred the respondent no.1 from inheriting any share in the aforesaid house or in any of the immovable properties of Sh. Tula Ram; that the respondents had harassed Sh. Tula Ram and Smt. Prem Lata during their lifetime and for this reason Sh. Tula Ram had executed the declaration-cum-Will aforesaid. It was further pleaded in the plaint in the earlier suit that on the demise of Sh. Tula Ram his wife Smt. Prem Lata had become absolute and sole owner of the property; that on the ground floor

of the said property there were various tenants and one shop was in unauthorized and illegal possession of the respondent no.1; that the respondent no.1 was merely a licensee of Sh. Tula Ram and was allowed to live in one room and after the death of Sh. Tula Ram occupied the other rooms also and continued to be a licensee and which license terminated on the death of Sh. Tula Ram; that Smt. Prem Lata requested the respondents to vacate the shop and the house on the first floor but they refused and rather beat and harass Smt. Prem Lata; that on 5th July, 1994, the defendants in that earlier suit had asked Smt. Prem Lata to sign some paper for transfer of the property. It was pleaded in the plaint that the cause of action for filing the suit arose on 5th July, 1994 when the defendants in the suit extended the illegal threats to transfer the property and raised unauthorized construction thereon. The suit was, therefore, instituted in the Court of Civil Judge, Delhi for a decree for permanent injunction restraining the defendants in that suit from selling, transferring or parting with possession of the property aforesaid.

5. The suit from which this petition arises was instituted by the petitioner herein, also pleading that the property belonged to Sh. Tula Ram and on demise of Sh. Tula Ram, Smt. Prem Lata had become the owner thereof; that Smt. Prem Lata had instituted the suit aforesaid for permanent injunction; that the respondents continued to harass Smt. Prem Lata and owing whereunto Smt. Prem Lata executed a Will bequeathing the property to the petitioner herein; that the respondent no.1 was allowed to occupy one shop, one godown on the ground floor and part of the first floor and second floor of the said house as licensee of Sh. Tula Ram and “were allowed to continue to reside as licensee of late Smt. Prem Lata”; that after the death of Smt. Prem Lata, the petitioner/plaintiff became the owner of the property by virtue of Will of Smt. Prem Lata and terminated the license of the respondent no.1 vide notice dated 13th December, 1997 and upon the failure of the respondents to vacate the property, the suit was filed for the relief of possession and mesne profits. The property was valued for the relief of possession at Rs.2,00,000/- and for the relief of mesne profits at Rs.95,000/-. A copy of the plaint in the said second suit has also been handed over in the course of hearing.

6. The respondents filed written statement, copy whereof was also handed over during the course of hearing. In the said written statement no plea of Order 2 Rule 2 of the CPC was taken. The counsel for the petitioner contends that the court of Additional District Judge where the second suit was pending however of its own, in view of the statement in the plaint in the second suit that earlier a suit for permanent injunction had been filed by Smt. Prem Lata, considered the aspect of Order 2 Rule 2 of the CPC and by the order impugned in this petition held the suit qua the portions of the ground floor and the first floor which were the subject matter of the earlier suit for injunction filed by Smt. Prem Lata to be barred by Order 2 Rule 2 of the CPC. The Trial Court in arriving at the said conclusion held that the properties in the two suits were common except for the second floor; that the petitioner/plaintiff herein also describes the respondents as licensees under Smt. Prem Lata; that the notice got issued by the petitioner/plaintiff to the respondents of termination of license did not create any new cause of action in favour of the petitioner because Smt. Prem Lata herself has pleaded that she had asked the respondents to vacate and that since license of the respondents 1 & 2 stood terminated during the lifetime of Smt. Prem Lata and she was fully entitled to sue for possession and mesne profits and having not done so and having confined the relief in the first suit to that of injunction only, the second suit for possession and mesne profits qua ground floor and first floor was barred by Order 2 Rule 2 of the CPC.

7. The counsel for the petitioner has made only one submission. He has contended that the earlier suit for injunction filed by Smt. Prem Lata was not decided on merits; that on 16th August, 1995, the respondents which were defendants in that suit had made a statement that the suit be decreed; In view of the admission of the claim by the defendants in that suit, the suit was decreed and a decree sheet was drawn up.

8. Per contra, the counsel for the respondent has relied on:-

- (i) ***Sardar Balbir Singh Vs. Atma Ram Srivastava*** AIR 1977 Allahabad 211 (FB) which is however not found to support the case of the respondents. It rather

distinguishes a cause of action from a right of action and lays down that there may be several rights of action and one cause of action and rights may accrue at different times from the same cause.

- (ii) ***Gajanan R. Salvi Vs. Satish Shankar Gupte*** AIR 2004 Bombay 455 where an earlier suit for injunction simplicitor, without the relief of specific performance of agreement to sell which was also available was held to bar a subsequent suit for specific performance.
- (iii) ***Shankar Sitaram Sontakke Vs. Balkrishna Sitaram Sontakke*** AIR 1954 SC 352 where also the plea of Order 2 Rule 2 was upheld.
- (iv) ***Bhau Daji Khade Vs. Patlu Malu Sable*** AIR 1923 Bombay 63 where also on facts the plea of Order 2 Rule 2 was upheld.
- (v) ***Indubai Vs. Jawaharlal*** AIR 1990 MP 80 laying down the ingredients for applicability of Order 2 Rule 2 of the CPC.

9. Order 2 Rule 2 of the CPC is based on the principle that the defendant should not be twice vexed for one and the same cause. It does not require that when a transaction or right gives right to several causes of action they should be all combined in one suit or that the plaintiff must lay his claim alternatively in the same suit for those different causes of action. The rule is directed against two evils, the splitting of claim and the splitting of remedies. The rule does not preclude a second suit based on a distinct and a separate cause of action. To make the rule applicable, three conditions must be satisfied, viz. first that previous and the present suits must arise out of the same cause of action; secondly, they must be between the same parties; and thirdly that the earlier suit must have been decided on merits. However the rule being penal in nature has to be considered strictly though mandatorily.

10. The Trial Court in the present case committed a grave illegality in, in the absence of the plea of the Order 2 Rule 2 of the CPC in the written statement, entertaining the said plea and apparently in the absence of the records of the first suit. The Supreme Court in **Rekaldas A. Oswal Vs. Deepak Jewellers** (1999) 6 SCC 40 has held that plea of bar of Order 2 Rule 2 must be taken expressly, if not taken, the court should not entertain and decide the plea suo moto. The Supreme Court in **Bengal Waterproof Limited v. Bombay Waterproof Manufacturing Company** AIR 1997 SC 1398 has also held that the plea under Order 2 Rule 2 cannot be inferred and in the absence of being carved out in the pleadings and the pleadings/record of the earlier suit being brought before the Court. It is this error which appears to have led the Trial Court to have decided the suit on Order 2 Rule 2 of the CPC without noticing that in the earlier suit on the basis whereof the suit for possession qua the ground floor and the first floor has been held to be barred, no finding on merits or decision was given.

11. I am of the opinion that where the earlier suit was not contested by the parties and was not decided on merits, as in the present case, the question of the subsequent suit even if on the same cause of action being barred by Order 2 Rule 2 of the CPC does not arise. Reliance in this regard can be placed on **Amar Singh Vs Man Phool** MANU/PH/0394/1991. Observations to the said effect can also be found in the Division Bench judgment of this court in **State Bank of India Vs Sanjeev Malik** 1996 (36) DRJ 484.

12. I am even otherwise not satisfied as to the applicability of Order 2 Rule 2 as to the two suits in the present case. It cannot be lost sight of that the first suit was by a mother against the son; the mother after the demise of her husband though claiming to be an exclusive owner of the property was only seeking to restrain the son from dealing with the property but not wanting to dispossess the son from the property. The second suit was filed after the demise of the mother and by the petitioner claiming to be owner. From a reading of the plaint in the first suit, it cannot be said that the cause of action for that suit was against of the respondents for refusing to vacate the premises inspite of

termination of the license. The cause of action for the first suit was the threat meted out by the respondents to transfer the property. The suit was filed to redress that threat only and in the face of the pleadings it cannot be said that any cause of action for the relief of possession had then accrued. Though, it was pleaded that the license granted by Sh. Tula Ram to the respondents to use the property terminated on the demise of Sh. Tula Ram and Smt. Prem Lata had also asked the respondents to vacate but in the cause of action paragraph in the plaint, the date of cause of action given was not of the date of death of Sh. Tula Ram or of the date on which Smt. Prem Lata called upon the respondents to vacate the premises. The only date given was of when the respondents were stated to have attempted to make Smt. Prem Lata sign certain papers for transfer of the property. The law does not compel a person to seek dispossession of a licensee specially when such licensee is a close relative or a child and the law cannot be understood as depriving such person or his successors from claiming the relief of possession from such licensee merely because earlier a suit for keeping the licensee in check was filed. The Trial Court also glossed over an important averment in the second suit; in paragraph 5 of the plaint, it was mentioned that after the death of Sh. Tula Ram, Smt. Prem Lata had allowed the respondents to continue in the property, thus, it was not the case of the petitioner/plaintiff in the plaint that the possession/occupation of the respondents/defendant on the property was illegal since the demise of Sh. Tula Ram and since Smt. Prem Lata had asked the respondents to leave the property. The cause of action pleaded in the second suit from which this petition arises was certainly distinct from the cause of action for the first suit.

13. For Order 2 Rule 2 of the CPC to apply, it is also necessary that the first suit should have been instituted in the court competent to grant relief claimed in the subsequent suit which is sought to be barred under Order 2 Rule 2 of the CPC. The first suit was valued for the purpose of court fees at Rs.130/- and filed in the Court of the lowest pecuniary jurisdiction. It was not the case of the respondents who in any case had failed to take any plea under Order 2 Rule 2 of the CPC nor held by the trial court that the suit for possession could also lie in the Court of the minimum pecuniary jurisdiction. The

second suit for possession was filed on the basis of the market value of the property and in the Court of the Additional District.

14. This court in *Citibank N.A. v. Juggilal Kamlatpat Jute Mills Co. Ltd.* AIR 1982 Delhi 487 has held that an earlier suit by the bank against principal debtor on the basis of equitable mortgage without impleading surety therein did not bar a subsequent suit based upon deed or guarantee against both principal debtor and surety. It was held that the cause of action in both the suits was different. Similarly, in *State of Maharashtra v. National Construction Company* AIR 1996 SC 2367, the first suit to enforce bank guarantee was held not to bar a second suit to claim damages for breach of contract relating to which bank guarantee was given. Similarly, this Court in *Jaswant Rai Vs. Lal Chand* 1981 2 Rent Law Reporter 125 has also held that a suit for mandatory injunction directing the defendant to vacate and to remove things in the shop on the basis of a claim of a master against the servant did not bar a subsequent suit for possession based upon title against unauthorized occupation. It was held that since the relief for possession was not necessary for the first suit to succeed and the same could lie without said relief for possession being claimed, the relief for possession could not be said to have been abandoned and the bar of Order 2 Rule 2 is not attracted. Similarly this court in *Girdhari Lal Dhara Vs. Amin Chand* MANU/DE/0856/2001 held a subsequent suit for possession to be not barred by earlier suit for mesne profits.

14. The petition therefore succeeds. The order dated 6th March, 2002 holding the suit for possession qua ground floor and first floor to be barred by Order 2 Rule 2 of the CPC is set aside. The petitioner/plaintiff shall be entitled to approach the Trial Court for adjudication of the claim for possession of the ground and the first floor of the property along with claim for possession of the second floor for which the suit was continued before the Trial Court. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

December 15, 2009/gsr