REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.3056-3057 OF 2017
(Arising out of S.L.P.(C) Nos.28075-28076 of 2014)

Jayantilal Chimanlal Patel Appellant

Versus

Vadilal Purushottamdas Patel Respondent

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. The appellant-landlord instituted HRP Suit No.686 of 1992, seeking permanent injunction against the original tenant, the predecessor-in-interest of the respondents herein, restraining them from constructing any permanent structure on the tenanted premises and further from subletting the same or transfer it in any manner. The

learned trial Judge *vide* judgment and decree dated 12th March, 1999, partially decreed the suit restraining the respondents from subletting or transferring the suit premises.

3. Being grieved by the aforesaid judgment, the appellant preferred Civil Appeal No.79 of 1999. It is necessary to state here that the appellant also initiated an action for eviction forming the subject matter of HRP Suit No.1804 of 1998 before the Small Causes Court, Ahmedabad, on the ground that the respondent-original tenant had erected permanent structure on the premises without the consent of the landlord. It is apt to note here that the same is one of the grounds as find mention under Section 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, (for short, 'the 1947 Act') which is applicable in the State of Gujarat.

4. The learned trial Judge dismissed the suit being hit by the principle of Order 2 Rule 2 of the Code of Civil Procedure, as well as on merits.

5. The said judgment and decree was assailed in Civil Appeal No.61 of 2004. The appeal arising out of the first suit and the appeal arising out of the second suit were taken up together and were dismissed by the common judgment dated 24th March, 2006.

6. The dissatisfaction of the non-success compelled the appellant to file two civil revision applications, namely, Civil Revision Application Nos.172 and 173 of 2006. The High Court by the common order dated 1st April, 2014, dismissed both the civil revision applications.

7. It is submitted by Ms. Pyoli, learned counsel appearing for the appellant that all the courts have fallen into error by applying the principle under Order 2 Rule 2 of the Code of Civil Procedure when the plaint in the earlier suit was not proved being marked as an exhibit. Additionally, it is urged by her that the High Court has not addressed to the merits of the case, but has been totally guided by the issue that the suit was barred by Order 2 Rule 2.

8. Mr. Tanmay Agarwal, learned counsel appearing for the respondents, *per contra*, would contend that the High Court has correctly appreciated the spirit of Order 2 Rule 2 of the Code of Civil Procedure by taking into consideration the findings recorded in the earlier judgment and, therefore, this Court should not entertain any attack on the judgment on the said score. As far as the delineation on the merits is concerned, it is urged by Mr. Agarwal that the analysis made by the High Court on that score, especially in paragraphs 10 and 10.1, are absolutely unimpeachable.

9. To appreciate the submissions raised at the Bar, we have carefully perused the common order passed by the High Court in both the civil revision applications. As we find that the High Court has adverted at length to the facet of Order 2 Rule 2. On a scrutiny of the entire judgment, we do not find that there is any mention that the plaint in the earlier suit was proved.

10. In this context, learned counsel for the respondent has drawn our attention to the Constitution Bench decision in ***Gurbux Singh vs. Bhooralal***[1]. In the said case, this Court while considering the issue of Order II Rule 2 has opined thus:-

> "6. .....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 Order 2 Rule 2 of the 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 CS 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2 Rule 2 of the 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 appellant'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 Order 2 Rule 2 of

[1] AIR 1964 SC 1810

the Civil Procedure Code was not maintainable.

> 7. .....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 Order 2 Rule 2 of the 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."
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> [Emphasis supplied]

11. From the aforesaid statement of law, it is clearly discernible that filing of the plaint of earlier suit and proving it as per law is imperative to sustain the plea of Order 2 Rule 2 CPC. Unless that is done, the stand would not be entertainable.

12. In this regard, we may refer to the Full Bench decision of the High Court of Patna in ***Jichhu Ram and Others vs. Pearey Pasi and Another***[2], wherein the Full Bench was called upon to appreciate the ratio laid down in the case of ***Gurbux Singh*** (supra). In that context, the Full Bench has held thus:-

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[2] AIR 1967 Patna 423

> "7. These observations are fatal to the defendants' contention in this litigation. Though the bar of Order 2, rule 2, was one of the issues expressly raised before the original court (issue no.5), the defendants did not prove the plaint in the previous rent suit. The only documents proved on their behalf are copies of the order sheets in the execution case (Exts. A and B). Mr. Chatterji, however, urged that from certain admissions made in the plaint in this litigation this Court should reasonably infer what was the nature of the allegation in the previous rent suit, and by this process of reasoning decide whether the cause of action in the two suits was identical. This approach was condemned by their Lordships of the Supreme Court in the aforesaid judgment with these words:
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> > "As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on the basis of inferential reasoning."
>
> Their Lordships condemned the action of the learned trial Judge in that court in inferring "what the cause of action should have been from a reference to the previous suit contained in the plaint as a matter of deduction." I must, therefore, reject this contention of Mr. Chatterji."

13. Though Mr. Tanmay Agarwal, learned counsel for the respondents has made enormous effort to distinguish the decision in ***Gurbux Singh*** (supra), in our considered opinion, the same is not distinguishable. It is mandatory that to sustain a plea under Order 2 Rule 2 of the Code of Civil Procedure, the defendant is obliged under law to prove the plaint and the proof has to be as per the law of evidence. We have no hesitation in saying that the ratio in ***Gurbux***

Singh (supra) has been properly appreciated by the Full Bench of the High Court of Patna in ***Jichhu Ram*** (supra).

14. In view of the aforesaid, we are not able to sustain the conclusion arrived at by the High Court on the basis that the suit instituted by the plaintiff-appellant was hit by Order 2 Rule 2 CPC. However, the controversy does not end there. The trial court and the appellate court have adverted to the merits of the case, that is, whether the tenant had constructed any permanent structure without the consent of the landlord. It is manifest that the High Court has not adverted to the same.

15. In view of the aforesaid, we are inclined to remit the matter to the High Court for proper appreciation of the material on record and to deal with the contentions raised by the appellants therein in accordance with law within the parameters of the revisional jurisdiction. We may hasten to clarify that if the High Court from the original records finds that the plaint had been brought on record and proved as per law, it would be bound to advert to the plea of Order 2 Rule 2 within the parameters of the said principle. Be it noted, if the plaint has not been brought on record and proved, prayer for

amendment shall not be entertained to bring the plaint on record by way of additional evidence by taking recourse to Order XLI Rule 27 of the Code of Civil Procedure. In that event, the High Court shall proceed only to deal with the merits of the case, that is, whether the plaintiff has made out a case under Section 13(b) of the 1947 Act.

16. We may hasten to add that as far as the revision arising out of refusal of the order of injunction is concerned, it does not deserve to be dwelt upon by the High Court as we do not see there is any justification to do so. The conclusion on that score by the High Court is justified. Therefore, the civil appeal arising out of Civil Revision Application No.172 of 2016, stands dismissed. What is required to be deliberated by the High Court is whether the grounds urged for eviction have been established by the landlord or not. That is the subject matter of Civil Revision Application No.173 of 2006. The same alone shall be dealt with.

17. In view of the aforesaid, the appeal relating to eviction is allowed and the judgment of the High Court in that regard is set aside and the matter is remitted to the High Court for reconsideration on merits. There shall be no order as to costs. As we are remitting the matter, we

request the High Court to dispose of the civil revision application within six months.

.....J.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

.....J.
(Mohan M. Shantanagoudar)

New Delhi;
February 21, 2017.