

SHIV KUMAR SHARMA

v.

SANTOSH KUMARI

SEPTEMBER 18, 2007

[S.B. SINHA AND H.S. BEDI, JJ.]

Code of Civil Procedure, 1908—O 2 r. 2—Suit to include the whole claim—Parties in possession of shop belonging to each other—Transfer of possession of shop—Non-performance of contract by appellant—Decree in favour of respondent for possession of shop owned by him against appellant—Challenge to—High Court holding in favour of respondent and directing appellant to pay compensation to respondent and giving him liberty to claim damages/mesne profit in a separate suit—Propriety of—Held: High Court not correct in framing additional issues of its own which did not arise for consideration—Respondent having omitted to claim damages by way of mesne profit cannot be permitted to get the same indirectly—High Court did not have the requisite jurisdiction in equity to pass such directions—Thus, that part of the order of High Court not sustainable—However, appellant directed to pay Rs 50,000/- as costs to respondent besides costs awarded by courts below—Constitution of India, 1950—Article 142—Equity.

Appellant and respondent entered into an agreement to sell their respective properties - shop-A and shop-B to each other for a certain price. Parties gave vacant possession of the property in their possession to each other. However, registered sale deed could not be executed. Respondent filed suit for possession of shop-B and for permanent injunction against the appellant. Trial Court held in favour of the respondent and against the appellant. Aggrieved, appellant filed appeal. During pendency of the appeal, respondent got back possession of the premises. High Court held that the appellant was to pay sum of Rs. 1,50,000/- to the respondent in respect of

A transferring the title and possession of shop-A and as such directed
appellant to pay 6% interest per annum from the date the agreement
was executed till the date of actual payment and gave liberty to the
respondent to claim relief by way of damages/ mesne profits in a
separate suit filed before the competent court. Hence the present
B appeal.

Disposing of the appeal, the Court

HELD: 1.1. A suit is ordinarily tried on the issues raised by
the parties. The plaintiff-respondent did not ask for payment of
C damages by way of mesne profit or otherwise. If the plaintiff was to
ask for a decree, he was required to pay requisite court fees on the
amount claimed. In such a situation, having regard to Order XX, Rule
12 CPC, a preliminary decree was required to be passed. A
proceeding for determination of the actual damages was required
D to be gone into. [Para 14] [24-D-F]

1.2. In terms of Order II, Rule 2 of the Code, all the reliefs which
could be claimed in the suit should be prayed for. Order II, Rule 3
provides for joinder of causes of action. Order II, Rule 4 is an
exception thereto. For joining causes of action in respect of matters
E covered by Clauses (a), (b) and (c) of Order II, Rule 4, no leave of
the court is required to be taken. Even without taking leave of the
court, a prayer in that behalf can be made. A suit for recovery of
possession on declaration of one's title and/or injunction and a suit
for mesne profit or damages may involve different cause of action.
F For a suit for possession, there may be one cause of action; and for
claiming a decree for mesne profit, there may be another. In terms
of Order II, Rule 4 of the Code, however, such causes of action can
be joined and therefor no leave of the court is required to be taken.
If no leave has been taken, a separate suit may or may not be
G maintainable but even a suit wherefor a prayer for grant of damages
by way of mesne profit or otherwise is claimed, must be instituted
within the prescribed period of limitation. Damages cannot be granted
without payment of court fee. In a case where damages are required
to be calculated, a fixed court fee is to be paid but on the quantum
H determined by the court and the balance court fee is to be paid when

a final decree is to be prepared. [Para 16] [26-B-E]

1.3. If the respondent intended to claim damages and/ or mesne profit, in view of Order II, Rule 2 of the Code itself, he could have done so, but he chose not to do so. For one reason or the other, he, therefore, had full knowledge about his right. Having omitted to make any claim for damages, the plaintiff cannot be permitted to get the same indirectly. Law in this behalf is absolutely clear. What cannot be done directly cannot be done indirectly.

[Para 17] [26-F-G]

1.4. Scope and ambit of jurisdiction of the High Court in determining an issue in an appeal filed in terms of section 96 CPC (which would be in continuation of the original suit) and exercising the power of judicial review under Articles 226 and 227 of the Constitution of India would be different. While in the former, the court, subject to the procedural flexibility as laid down under the statute is bound to act within the four corners thereof, in adjudicating a lis in exercise of its power of judicial review, the High Court exercises a wider jurisdiction. No doubt, the court in an appropriate case, even in a civil suit may mould a relief but its jurisdiction in this behalf would be confined to Order VII, Rule 7 CPC.

[Para 18] [26-H; 27-A-B]

Bay Berry Apartments Pvt. Ltd. and Anr. v. Shobha and Ors., (2006) 10 SCALE 596 and *U.P. State Brassware Corpn. Ltd. and Anr. v. Udai Narain Pandey*, [2006] 1 SCC 479, relied on.

1.5. It cannot be said that the High Court had the requisite jurisdiction in equity to pass the impugned decree, in a situation of this nature. In England, the Court of Equity exercises jurisdiction in equity. The courts of India do not possess any such exclusive jurisdiction. The Courts in India exercise jurisdiction both in equity as well as law but exercise of equity jurisdiction is always subject to the provisions of law. If exercise of equity jurisdiction would violate the express provisions contained in law, the same cannot be done. Equity jurisdiction can be exercised only when no law operates in the field. [Paras 19 and 21] [27-C, E-F]

A *Fibrosa v. Fairbairn* (1943) AC 32; *Nelson v. Larholt* (1948) 1 KB 339 and *Cumberland Consolidated Holdings Ltd. v. Ireland* (1946) 1 All ER 284, referred to.

B 1.6. A court of law cannot exercise its discretionary jurisdiction de'hors the statutory law. Its discretion must be exercised in terms of the existing statute. [Para 22] [27-G]

C 1.7. The High Court was not correct in framing the additional issues of its own which did not arise for consideration in the suit or in the appeal. Even otherwise, the High Court should have formulated the points for its consideration in terms of Order XXI, Rule 31 of the Code. On the pleadings of the parties and in view of the submissions made, no such question arose for its consideration. In any event, if a second suit was maintainable in terms of Order II, Rule 4 of the Code, no leave was required to be granted therefor. A D civil court does not grant leave to file another suit. If the law permits, the plaintiff may file another suit but not on the basis of observations made by a superior court. [Para 23] [28-C-D]

Shamsu Suhara Beevi v G. Alex and Anr., [2004] 8 SCC 569, referred to.

E 1.8. In view of the aforementioned findings, it is not necessary to determine the question as to whether in a situation of this nature, the plaintiff was entitled to damages. He might have been entitled thereto but no prayer having been made, that part of the judgment of the High Court which is impugned cannot be sustained. However, F in exercise of discretionary jurisdiction under Article 142 of the Constitution of India and having regard to the conduct of the defendant, appellant is directed to pay sum of Rs 50,000 as costs in favour of the respondent in terms of Section 35A of the Code, besides G the costs already directed to be paid by Trial Judge as also by the High Court. [Para 24] [28-E-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4341 of 2007.

H From the Judgment and Order dated 28.08.2006 of the High Court of Delhi at New Delhi in R.F.A. No. 229 of 2004.

Ashok Bhasin, Shantanu Rastogi and R.S. Lambat for the Appellant. A

Geeta Luthra, D.N. Goburdhan, Pinky Anand, Piyush Singhal and Riva Gujral for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted. B

2. Propriety or otherwise of certain directions issued by a Division Bench of the Delhi High Court is in question in this appeal which arises out of a judgment and order dated 28.8.2006 passed by the said Court in RFA No. 229 of 2004. C

3. The basic fact of the matter is not in dispute.

4. The parties had entered into an agreement to sell their respective properties situate at 598/1, Gali Kaitwali, Sangtrashan, Paharganj, Delhi and 1241, Sangtrashan, Paharganj, Delhi for a price which was subsequently determined at Rs. 4,75,000/- and Rs. 3,25,000/- respectively. Appellant's title over the property which was owned and possessed by him appeared to be defective; although the said agreement was acted upon partially in terms whereof both the parties gave vacant possession of the property in their possession to the other. D E

5. However, no registered deed of sale could be executed. Respondent issued a notice on or about 21.03.1996 asking the appellant to hand over possession. Respondent thereafter filed a suit praying *inter alia* for the following reliefs: F

"(a) a decree for possession in favour of the Plaintiff and against the Defendant in respect of shop bearing No. 1241, situated on the ground floor duly shown in red colour in Annexure 'A' forming part of building bearing No. 1241, Bazar Sangtrashan, Paharganj, New Delhi. G

(b) by means of a decree for permanent injunction in favour of the Plaintiff against the Defendant that the Defendant be restrained from selling, alienating, letting or otherwise parting with possession of the shop situated on ground floor or any part thereof shown in red colour in the Plan Annexure 'A' forming part of Building No. 1241, H

A Bazar Sangtrashan, Paharganj, New Delhi.

(c) Costs of the suit by awarded."

B 6. The defence raised by the appellant in his written statement was that he had all along been ready and willing to perform his part of the contract but the plaintiff became dishonest when the value of the property in the area increased and he started demanding more money from him on the plea that his business on the ground floor of the property had flourished in no time and the value of the property was more than the agreed sale consideration.

C On the pleadings of the parties, the learned Trial Judge framed the following issues:

"(i) Whether the suit is not maintainable in view of the provisions of Sections 38 and 41 of the Specific Relief Act?

D (ii) Whether the suit has not been properly valued for the purposes of court fee and jurisdiction?

(iii) Whether the agreement dated 30.5.95 as alleged is executed between the parties?

E (iv) Whether the agreement dated 30.5.95 is forged and fabricated? If so, to what effect.

(v) Whether the defendant is the owner of property No. 598/1, Gali Kaitwali, Sangtrashan, Paharganj, New Delhi?

F (vi) Whether the Plaintiff is entitled to the possession and injunction prayed for?

(vii) Relief."

G 7. The suit was decreed. The learned Trial Judge passed the decree for possession in respect of the shop premises bearing No. 1241, Gali Kaitwali, Bazar Sangtrashan, Paharganj, New Delhi. A decree for permanent injunction was also passed restraining the defendant from selling, alienating, letting or otherwise parting with the possession of the shop situated on ground floor or any part thereof.

H 8. Aggrieved thereby and dissatisfied therewith, the appellant

preferred an appeal before the High Court. During pendency of the appeal, the said decree was acted upon by the parties. Plaintiff got back possession of the premises in question.

A Division Bench of the High Court, however, sought to explore the possibility of an amicable settlement between the parties. It referred the parties to the High Court Mediation Centre but it did not succeed.

9. The short question which was posed and answered by the High Court was as to whether the defendant had any subsisting legal right to stay in occupation of the shop owned by the plaintiff and if he did not have any such right, as to whether restoration of possession could be demanded back by him as a condition precedent for surrender of possession of shop No. 1241.

10. The said question was answered in favour of the plaintiff and against the defendant.

The High Court, however, did not stop there. It raised a question as to whether transfer of possession of the shop in possession of the plaintiff to the defendant would suffice and provide for an equitable solution without any further direction to the defendant to compensate the plaintiff for non-payment of the amount which he had to pay to the plaintiff under the agreement executed between them.

The High Court noticed that the defendant was required to pay a sum of Rs. 1,50,000/- to the plaintiff over and above the price specified in the agreement in respect of transferring the title and possession of shop No. 598/1 but he did not pay. The High Court, therefore, thought it fit to direct payment of suitable amount of compensation to the plaintiff. It was opined that grant of 6% interest per annum calculated from 30th May, 1995 till the date of actual payment would serve the purpose.

It was further directed:

"Subject to all just exceptions including limitations, liberty is given to the plaintiff to claim relief by way of damages/ mesne profits in a separate suit filed before the competent court."

11. Appellant is, thus, before us.

A 12. Mr. Ashok Bhasin, learned senior counsel appearing on behalf of the appellant would submit that the impugned directions are not legally sustainable as the parties hereto had been in possession of the shop premises belonging to other and in that view of the matter the question of payment of any damages or compensation by way of mesne profit or
B otherwise did not and could not arise.

C 13. Ms. Geeta Luthra, learned counsel appearing on behalf of the respondent, on the other hand, would submit that damages could have been granted in the facts and circumstances of this case particularly when the appellant himself accepted that his business had flourished at the premises belonging to the plaintiff.

D The learned counsel would furthermore contend that although Order II, Rule 2 of the Code of Civil Procedure (Code) bars a second suit; Rule 4 of the said Order being an exception thereto, the High Court cannot be said to have committed any error in passing the impugned judgment.

E 14. A suit is ordinarily tried on the issues raised by the parties. The plaintiff - respondent did not ask for payment of any damages. No prayer for payment of damages by way of mesne profit or otherwise was also made by the plaintiff. If the plaintiff was to ask for a decree, he was required to pay requisite court fees on the amount claimed. In such a situation, having regard to Order XX, Rule 12 of the Code, a preliminary decree was required to be passed. A proceeding for determination of the actual damages was required to be gone into.

F 15. Order II, Rules 2, 3 and 4 of the Code read as under:

"2. Suit to include the whole claim

G (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

H (2) Relinquishment of part of claim. --Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so

omitted or relinquished.

A

(3) Omission to sue for one of several reliefs.--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.

B

Explanation.--For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

C

3 . Joinder of causes of action

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

D

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

E

4. Only certain claims to be joined for recovery of immovable property

No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except-

F

(a) claims for mesne profits or arrear 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

G

(c) claims in which the relief sought is based on the same cause of action :

H

A 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."

B 16. In terms of Order II, Rule 2 of the Code, all the reliefs which could be claimed in the suit should be prayed for. Order II, Rule 3 provides for joinder of causes of action. Order II, Rule 4 is an exception thereto. For joining causes of action in respect of matters covered by Clauses (a), (b) and (c) of Order II, Rule 4, no leave of the court is required to be taken. Even without taking leave of the court, a prayer in that behalf can be made. A suit for recovery of possession on declaration of one's title C and/ or injunction and a suit for mesne profit or damages may involve different cause of action. For a suit for possession, there may be one cause of action; and for claiming a decree for mesne profit, there may be another. In terms of Order II, Rule 4 of the Code, however, such causes of action D can be joined and therefor no leave of the court is required to be taken. If no leave has been taken, a separate suit may or may not be maintainable but even a suit wherefor a prayer for grant of damages by way of mesne profit or otherwise is claimed, must be instituted within the prescribed period of limitation. Damages cannot be granted without payment of court fee. In a case where damages are required to be calculated, a fixed court E fee is to be paid but on the quantum determined by the court and the balance court fee is to be paid when a final decree is to be prepared.

F 17. If the respondent intended to claim damages and/ or mesne profit, in view of Order II, Rule 2 of the Code itself, he could have done so, but he chose not to do so. For one reason or the other, he, therefore, had full knowledge about his right. Having omitted to make any claim for damages, in our opinion, the plaintiff cannot be permitted to get the same indirectly.

G Law in this behalf is absolutely clear. What cannot be done directly cannot be done indirectly.

H 18. Scope and ambit of jurisdiction of the High Court in determining an issue in an appeal filed in terms of Section 96 of the Code of Civil Procedure (which would be in continuation of the original suit) and exercising the power of judicial review under Articles 226 and 227 of

the Constitution of India would be different. While in the former, the court, subject to the procedural flexibility as laid down under the statute is bound to act within the four corners thereof, in adjudicating a lis in exercise of its power of judicial review, the High Court exercises a wider jurisdiction. No doubt, the court in an appropriate case, even in a civil suit may mould a relief but its jurisdiction in this behalf would be confined to Order VII, Rule 7 of the Code of Civil Procedure. [See *Bay Berry Apartments Pvt. Ltd. and Anr. v. Shobha and Ors.* (2006) 10 SCALE 596 and *U.P. State Brassware Corpn. Ltd. and Anr. v. Udai Narain Pandey*, [2006] 1 SCC 479]

19. Submission of Ms. Luthra that the High Court had the requisite jurisdiction in equity to pass the impugned decree, in a situation of this nature, therefore, in our opinion, is not correct.

20. Learned Trial Judge has relied upon *Fibrosa v. Fairbairn*, (1943) AC 32 and *Nelson v. Larholt*, (1948) 1 KB 339. In support of its findings, reliance has also been placed by Ms. Luthra on *Cumberland Consolidated Holdings Ltd. v. Ireland*, (1946) 1 All ER 284.

Those decisions have no application to the facts and circumstances of the instant case.

21. In England, the Court of Equity exercises jurisdiction in equity. The courts of India do not possess any such exclusive jurisdiction. The Courts in India exercise jurisdiction both in equity as well as law but exercise of equity jurisdiction is always subject to the provisions of law. If exercise of equity jurisdiction would violate the express provisions contained in law, the same cannot be done. Equity jurisdiction can be exercised only when no law operates in the field.

22. A court of law cannot exercise its discretionary jurisdiction de'hors the statutory law. Its discretion must be exercised in terms of the existing statute.

In *Shamsu Suhara Beevi v. G. Alex and Anr.*, [2004] 8 SCC 569, this Court, while dealing with a matter relating to grant of compensation by the High Court under Section 21 of the Specific Relief Act in addition to the relief of specific performance in the absence of prayer made to

A that effect either in the plaint or amending the same at any later stage of the proceedings to include the relief of compensation in addition to the relief of specific performance, observed:

B "Grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable consideration court cannot ignore or overlook the provisions of the statute. Equity must yield to law".

C 23. We, therefore, are of the opinion that the High Court was not correct in framing the additional issues of its own which did not arise for consideration in the suit or in the appeal. Even otherwise, the High Court should have formulated the points for its consideration in terms of Order D of the Code. On the pleadings of the parties and in view of the submissions made, no such question arose for its consideration. In any event, if a second suit was maintainable in terms of Order II, Rule 4 of the Code, as was submitted by Ms. Luthra, no leave was required to be granted therefor. A civil court does not grant leave to file another suit. If the law permits, the plaintiff may file another suit but not on the basis of observations made by a superior court.

E 24. In view of our findings aforementioned, it is not necessary for us to determine the question as to whether in a situation of this nature, the plaintiff was entitled to damages. He might have been entitled thereto but no prayer having been made, that part of the judgment of the High Court which is impugned before us cannot be sustained.

F However, in exercise of our discretionary jurisdiction under Article 142 of the Constitution of India and having regard to the conduct of the defendant, we direct that the costs shall be payable by the appellant in favour of the respondent in terms of Section 35A of the Code, besides the costs already directed to be paid by the learned Trial Judge as also G by the High Court. We direct the appellant to pay a sum of Rs. 50,000/- by way of costs to the respondent.

25. The appeal is disposed of with the aforementioned directions.

N.J.

Appeal disposed of.

H