N.K.S.

Before S. S. Sandhawalia, C.J. and R. N. Mittal, J.

HARBIR KAUR AND ANOTHER,—*Appellants*

versus

CHARAN SINGH TIWANA AND OTHERS,—*Respondents.*

Regular Second Appeal No. 154 *of* 1975.

November 25, 1983.

Code of Civil Procedure (V of 1908)—*Section* 11 *Explanation IV and Order* 2, *Rules* 2 *and* 4—*Limitation Act (XXXVI of* 1963)—*Article* 3—*Suit for possession by partition of joint property—Plaintiff put in possession of his share in pursuance of the decree—Another*

suit by the plaintiff for rendition of accounts regarding rent—Whether barred under Order 2, Rule 2—Words 'cause of action'—Meaning of—Section 11 read with Explanation IV—Whether bars the subsequent suit—Suit for accounts—Whether could be filed within three years from the date when possession was obtained by the plaintiff.

Held, that the words 'cause of action' mean every fact which it would be necessary for the plaintiff to prove, if traversed in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. If the evidence to support the two claims are different then the causes of action are also different. There cannot be any doubt that different facts have to be traversed and different evidence has to be led in a suit for partition of joint property and in a suit for rendition of accounts regarding rent by a co-sharer against the other co-sharer. Both these types of suits are based on different causes of action and, therefore, the subsequent suit filed for rendition of accounts is not barred under Order 2, Rule 2 of the Code of Civil Procedure, 1908.

(Paras 6 and 13).

Held, that one of the conditions for applicability of section 11 of the Code is that the matter decided in an earlier suit must be directly and substantially in issue in the later suit. The words 'directly and substantially' have been explained in Explanation IV, which says that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The subject matter of the subsequent suit which was for rendition of accounts regarding rent was not the subject matter in the earlier suit which was for possession by partition of joint property. Consequently, the subsequent suit is not barred by section 11 of the Code.

(Para 14).

Held, that Article 3 of the Limitation Act, 1963 provides that a suit by a principal against his agent for movable property received by the latter and not accounted for can be filed within a period of three years from the date when the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates. The agency in the instant case would continue between the plaintiffs and the defedants till possession of the property was delivered under the decree to the plaintiffs. It is no body's case that any demand was made and refused during the period of agency. Consequently, the suit for rendition of accounts could be filed within three years after the termination of the agency.

(Para 19).

Nand Kishore Prasad Singh etc. *vs.* Parmeshwar Prasad Singh etc. AIR 1935, Patna 80.

Udekar *vs.* Chandra Sekhar Sahu etc. AIR 1961, Orissa 111.

DISSENTED FROM

Case referred by a learned Single Judge Hon'ble Mr. Justice Rajejndra Nath Mittal on April 19, 1983 to the Division Bench for the decision of an important question of law involved in this case. The Division Bench consisting of the Hon'ble the Chief Justice Mr. S. S. Sandhawalia and Hon'ble Mr. Justice Rajendera Nath Mittal finally decided tre case on November 25, 1983.

Regular Second Appeal from the decree of the Court of Shri Dev Bhushan Gupta, Additional District Judge, Patiala dated 7th October, 1974 affirming that of Shri S. N. Aggarwal, PCS, Additional Subordinate Judge III Class Patiala dated 12th December, 1973, dismissing the suit of the plaintiffs and leaving the parties to bear their own costs.

Hemant Kumar Gupta, Advocate, *for the Appellant.*

R. S. Bindra, Senior Advocate (Rajiv Bhalla and J.P.S. Bindra, Advocates, with him), *for the Respondents.*

JUDGMENT

Rajendra Nath Mittal, J.

(1) This is a second appeal by the plaintiffs against the judgment and decree of the Additional District Judge, Patiala, dated 7th October, 1974.

(2) Briefly, the facts are that the plaintiffs and the defendants were the joint owners of the property in dispute. A suit was instituted by the plaintiffs for possession by partition with regard to it. It was decreed in favour of the plaintiffs who, in pursuance of the decree, took possession of their share through the Court on 27th November, 1970. It was on rent with the tenants at the rate of Rs. 103 P.M. Out of the rent, the plaintiffs have been receiving Rs. 28 P.M. and the defendants the balance amount. The case of the plaintiffs is that no account of the rent received by the defendants was rendered by them to the plaintiffs from July, 1964, onwards. Consequently, they filed a suit for rendition of accounts and for recovery of the amount found due to them.

(3) The suit was contested by defendant No. 1 only was *inter alia* pleaded that it was barred under Order 2, Rule 2 and Section 11 of the Code of Civil Procedure, that it was not within limitation and that no suit for rendition of account was maintainable for the reason that the exact amount was known to them.

(4) The trial Court held that the suit was not barred by Order 2, Rule 2 and section 11 of the Code defendant No. 1 was accounting party and that it was within limitation. However, regarding the maintainability of the suit for rendition of accounts it came to the conclusion that the suit for rendition of accounts was not maintainable. In view of this finding, it dismissed the suit. In appeal by the plaintiffs before the Additional District Judge, it was held that the suit for rendition of accounts was maintainable, but the finding of the trial Court that the suit was not barred under Order 2, Rule 2 and section 11 of the Code was reversed and it was held that it was barred under Order 2, Rule 2 *ibid.* In view of the latter finding, the appeal was dismissed. The plaintiffs have come up in second appeal to this Court.

(5) The first question that arises for determination is whether the suit is barred under Order 2, Rule 2 of the Code. In order to determine the issue, it will be relevant to read Rules 2 and 4 or Order 2, which are as follows:—

"2. Suit to include the whole claim.—

(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 jurisdiction of any Court.

(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.

(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.

* * * * *

(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—

(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:

* * * * *

It is evident from Rule 2 that if the plaintiff fails to sue for whole of the claim arising out of the same cause of action and in case he is entitled to more than one relief in regard to the same cause of action and omits to sue for any relief, he shall not be entitled to sue afterwards for the portion of the claim or the relief so omitted. Rule 4 further provides that in a suit for recovery of immovable property, no cause of action, except those mentioned in clauses (a), (b) and (c) can be joined with that suit without the permission of the Court. In order to interpret the Rules, it is necessary to see as to what the words "cause of action" mean. The words have not been defined in the Code and it is not possible to give a general definition.

(6) Lord Esher, Master of Rolls, in *Read* v. *Brown* (1889) 22 QBD 128, adopted the definition of the words 'cause of action' as given in *Cooks* v. *Gill* (1) which is as follows:—

> "...... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

The definition has been approved by the Privy Council in *Mohammad Khalil Khan and others* v. *Mahbub Ali Mian and others*, (2). There it was further observed that if the evidence to

(1) Law Rap 8 C.P. 107.
(2) A.I.R. 1949 Privy Council 78.

support the two claims was different then the causes of action were also different. There cannot be any doubt that different facts have to be traversed and different evidence has to be led in a suit for partition of joint property and in a suit for rendition of accounts regarding rent by a co-sharer against the other co-sharer. Therefore, both these types of suits are based on different causes of action.

(7) The matter may be examined from another point of view. Rule 4 *ibid* provides that no cause of action except those mentioned in clauses (a), (b) and (c) can be joined without the permission of the Court with the suit for recovery of immovable property. Clause (a) refers to suits for mesne profits and arrears of rent, which shows that these suits are based on different causes of action. The suit for recovery of share of rent from a co-tenant in substance stands on the same footing as the suit for mesne profits. It has been held by my learned brother S. S. Sandhawalia, J. (as he then was), speaking for the majority, in the Full Bench judgment reported as *Sadhu Singh and others* v. *Pritam Singh etc.*, (3) that Order 2, Rule 2 of the Code of Civil Procedure does not bar a suit for mesne profits filed subsequently to a suit for possession of the property because the claim for those accrued mesne profits had not been earlier included therein. The following observations may be read with advantage:—

> "...... It has been authoritatively held that the provision is plainly directed against the twin evils of the splitting up of claims and splitting up of remedies. It is obviously intended to avoid a multiplicity of actions. However, even a plain reading of the rule makes it evident that it is intended clearly to apply only to a claim based on one cause of action. It does not bar the bringing of a second suit if it is based on a distinct and separate cause of action. It is elementary that except where a statutory provision provides otherwise, two suits may be brought upon facts which give rise to two distinct causes of action. In order to attract the application of Rule 2, the previous suit as well as the subsequent suit must arise out of a single and indivisible cause of action and secondly the suit must be substantially between the same parties.
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> Now, it is an elementary canon of construction that the provisions of a statute are to be read harmoniously and

(3) A.I.R. 1976 Pb. & Hary. 38.

an interpretation is to be avoided which may render any part thereof otiose. Applying this salutary principle, the provisions of Rule 2 and Rule 4 above quoted must be construed as complementary to each other. Now the very opening words of Rule 4 are a clear pointer to the fact that this provision treats a claim for the recovery of immovable property and a claim for mesne profits thereof as two distinct and separate causes of action......"

(8) I shall now advert to the case law on the point. A similar matter came up before a Full Bench of Madras High Court in *Ponnamal* v. *Ramamirda Aiyar and others,* (4). In that case, the plaintiff, who was a co-tenant in a property, filed a suit for partition and obtained a decree against the defendants. She then filed a suit for mesne profits. The Full Bench observed that if a plaintiff sues for possession only when he might have joined in the same action claims for profits and damages, it is open to him to sue subsequently for the profits which became payable before the institution of the suit and which might have been included in such suit. It was further observed that the claim for recovery of land and claims for mesne profits are separate causes of action. It appears from the facts that the plaintiff had claimed a share of profits which has been termed as mesne profits in the judgment. In fact, the amount claimed in that case was not mesne profits as defined in the Code of Civil Procedure.

(9) This case was followed by a Division Bench of the Bombay High Court in *Rama Kallappa Pujari etc.* v. *Saidappa Sidrama etc.,* (5). In that case also the plaintiff instituted a suit for partition in 1920 and obtained a decree for possession. of his share. Ultimately, he got possession by metes and bounds in 1928. The plaint did not contain any claim for mesne profits past or future. Thereafter, he filed a suit for recovery of mesne profits in respect of his share of joint property accrued between the date of the decree in 1920 and the date in 1928 when he got possession of his share. A preliminary issue was raised whether the suit was barred under the provisions of Order 2, Rule 2, Code of Civil Procedure. Beaumont, C.J., observed that a claim for future mesne profits does not arise on the same cause of action as a claim for possession of the land. Hence, where plaintiff sues for partition and possession of property with no

(4) A.I.R. 1915 Madras 912.
(5) A.I.R. 1935 Bombay 306.

prayer for mesne profits, a subsequent suit for future mesne profits is not barred by Order 2, Rule 2 of the Code.

(10) Similar view was taken by a Full Bench of Bombay High Court in *Gangadhar Gopalrao Deshpande etc.* v. *Sripad Annarao Deshpande etc.*, (6). In that case, the objection was taken that the suit was barred under Explanation V to 11 of the Code. The Full Bench presided over by Beaument, C.J., repelled the contention with the observations that after a suit for partition of land and mesne profits for past and future had been brought and decided and the decree fails to award the claim to future mesne profits, a second suit to recover mesne profits from the institution of the suit or the date of the decree till delivery of possession is not barred under Section 11, Explanation V. The above ratio is equally applicable when an objection is raised on the basis of Order 2, Rule 2 of the Code.

(11) A learned single Judge of the Lahore High Court in *Jai Kishen Das etc.* v. *Pashori Lal etc.*, (7) also took the same view. The relevant observations are as follows:—

> "As regards the claim for the period subsequent to the partition suit there is no doubt that the institution of the partition suit must be held to have effected a severance in the status of the family and the plaintiffs would be entitled to claim their share of the income from that date. The learned counsel for the petitioners has urged that even this claim should have been included in the previous suit for partition, and has cited A.I.R. 1927 All. 716. But that case seems to have been decided more or less on the practice prevalent in the Allahabad Courts. The cause of action for the claim for the period, subsequent to the institution of the partition suit had certainly not arisen when that suit was instituted and I do not see how Order 2, Rule 2, Civil Procedure Code, can bar the claim for the subsequent period. I, therefore, hold that plaintiffs are entitled to a decree for the subsequent period."

(6) A.I.R. 1938 Bombay 231.

(7) A.I.R. 1932 Lahore 448.

References may now be made to the cases referred to by Mr. Bindra. He has mainly placed reliance on *Nand Kishore Prasad Singh etc.* v. *Parmeshwar Prasad Singh etc.*, (8), and *Udekar* v. *Chandra Sekhar Sahu etc.*, (9). No doubt, the facts of the cases before the Patna High Court and the Orissa High Court were somewhat similar to those of the present case but, with great respect to the learned Judges, I am unable to persuade myself to agree with them. Mr. Bindra also made a reference to *Naba Kumar Hazra and another v. Radhashyam Mahish and others,* (10), *Babburu Basavayya and others* v. *Babburu Guravayya and another,* (11), *Ram Narain Prasad Sah* v. *Ramji Prasad Sah etc.* (12) *Damisetti Satyanarayana Murthi etc.* v. *Damisetti Bhavanna etc.,* (13) and *Simma Krishnamma* v. *Nakka Latchumanaidu etc.*, (14).

(12) The facts in *Naba Kumar Hazra's case* (supra) were different. In that case, a prayer had been made for the accounts which had been either abandoned or not pressed by the plaintiff at a subsequent stage. Consequently, the observations are of no assistance in deciding the present controversy. The other cases are also distinguishable. In all those cases, the provisions of law interpreted by the learned Judges were Order 20, Rules 18 and 12 or Rule 18 of the Code. Therefore, I am of the view that Mr. Bindra cannot derive any benefit from those cases also. From the cases referred to by the learned counsel for the parties, it is evident that there is difference of opinion between the High Courts but I have preferred to follow the view of the Bombay High Court.

(13) After taking into consideration all the aforesaid circumstances, I am of the opinion that the present suit is not barred under Order 2, Rule 2 of the Code.

(14) The next question that requires determination is whether the suit is barred under Section 11 read with Explanation IV of the Code. One of the conditions for applicability of Section 11 is that the matter decided in an earlier suit must be directly and substantially in issue in the later suit. The words 'directly and substantially' have been explained in Explanation IV, which says that any

(8) A.I.R. 1935 Patna 80.
(9) A.I.R. 1961 Orissa 111.
(10) A.I.R. 1931 Privy Council 229.
(11) A.I.R. 1951 Madras 938.
(12) A.I.R. 1956 Patna 244.
(13) 1957 A.P. 766.
(14) A.I.R. 1958 A.P. 520.

matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The subject matter of this suit admittedly was not the subject-matter in the earlier suit. It also could not be made the subject-matter of that suit because the earlier suit was based on different cause of action. The matter has already been dealt above. Consequently, I am of the opinion that the suit is not barred under the aforesaid section.

(15) Faced with this situation, Mr. Bindra sought to urge that the suit for rendition of accounts was not maintainable by the plaintiffs as the amount recoverable by them could be ascertained at the time of filing of the suit.

(16) I have duly considered the argument but am not impressed with the same. It is true that the plaintiffs had stated that the rent of the house was Rs. 103 P.M. out of which they were receiving Rs. 28 P.M. and the remaining rent was being received by the defendants. However, they further averred in the plaint that it was not possible for them to ascertain the exact amount due to them as it was within the knowledge of the defendants as to how much amount they received. From the allegations in the plaint, it is clear that the plaintiffs are not claiming whole of their share out of the balance amount which the defendants were entitled to receive from the tenants. On the other hand, they were making a claim of their share out of the amount of rent received by the defendants from the date of institution of the suit till the date of delivery of possession. In that situation, I am of the opinion that the plaintiffs could not claim a definite amount from the defendants and therefore, they could file a suit for rendition of accounts. In the above view, I am fortified by the observations of Full Bench of this Court in *Firm Ram Dev Jai Dev* v. *Seth Kaku,* (15), wherein it was observed that a suit for account was not necessarily confined between a principal and agent. Wherever it was necessary, in order to ascertain the amount of money due to the plaintiff, he might ask the Court to pass a preliminary decree for accounts to be taken by or under the supervision of the Court.

(17) Mr. Bindra made a reference to *Firm Joint Hindu Family Diwan Chand Sant Ram* v. *Bhagat Ram and others,* (16) *and Triloki*

(15) A.I.R. 1950 E.P. 92.
(16) A.I.R. 1946 Lahore 82.

Nath Dhar v. *Dharmarth Counsel Srinagar and others*, (17) (Full Bench). In the former case, in addition to other observations it was also observed that in a suit for accounts, the plaintiff must satisfy the Court that it is not possible for him to get any relief except by calling upon the defendant to render the accounts to him and if he does so, the suit for accounts would lie. These observations rather help Mr. Gupta. *In Triloki Nath Dhar's case* (supra) the Full Bench observed that the scope of suit for accounts is limited to a certain number of cases for instance between one partner against another, between the beneficiary against the executor or administrator, between mortgagor against the mortgagee, between *cestui que* trust against a trustee and between principal against an agent. But no suit for accounts can be maintained by a promisee against a promisor or as between two contracting parties. The examples given in the case are only illustrative and not exhaustive. The learned Judges were dealing with a case between the two contracting parties. In my view, the case is thus distinguishable. Therefore, I repel the submission of the learned counsel for the respondents and hold that the suit for rendition of accounts was maintainable.

(18) The next question that arises for determination is whether the suit is within limitation. The learned counsel for the appellants contends that the suit is governed by Article 3 of the Limitation Act and if that article is applied it is within limitation. He places reliance on *Madanna Virayya* v. *Mudanna Adenna and others*, (18).

(19) I have considered the argument and find force in it. Article 3 provides that a suit by a principle against his agent for movable property received by the latter and not accounted for can be filed within a period of three years from the date when the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates. The Article is equivalent to Article 89 of the Limitation Act, 1908, which was interpreted by their Lordships in *Mudanna Virayya's case* (supra). It was held there that a claim by a member of Hindu joint family against the manager of the joint property in respect of certain family outstandings alleged to have been collected and misappropriated by the latter, is governed by Article 89. It is now to be seen as to when the cause of action in the present case will arise. The agency in the present case would continue between the

(17) A.I.R. 1975 J.&K. 70.

(18) A.I.R. 1930 Privy Council 18.

plaintiffs and the defendants till possession of the property was delivered under the decree to the plaintiffs. It has not been shown that any demand was made and refused during the period of agency. Consequently, the suit could be filed within three years after the termination of the agency. The possession was delivered to the plaintiffs, as already stated above, on 27th November, 1970, and the suit for rendition of accounts was filed on 19th January, 1971. Thus, the suit was within limitation. I hold accordingly.

(20) The trial Court held that defendant No. 1 was the accounting party. That finding has not been challenged.

(21) For the aforesaid reasons, I accept the appeal, set aside the judgment and decree of the appellate Court and pass a preliminary decree for rendition of accounts for the rent received by the defendants in favour of the plaintiffs with costs throughout.

S. S. Sandhawalia, C.J.—I agree.