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

+ **RFA No.88/2005**

Date of decision: 30th September, 2008

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SYNDICATE BANK Appellant
Through : Mr. Ajant Kumar and
Ms. Anubha Bhardwaj, Advs.

versus

RAJ KUMAR TANWAR Respondent
Through : Ms. Anjana Gosain, Adv.

CORAM :-
THE HON'BLE MR.JUSTICE PRADEEP NANDRAJOG
THE HON'BLE MR. JUSTICE J.R. MIDHA

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.

Pradeep Nandrajog, J. (Oral)

1. Heard learned counsel for the parties.
2. Though various grounds have been urged in the Memorandum of Appeal, learned counsel for the appellant restricts submissions to only one point. Learned counsel urges that the bar of Order 2 Rule 2 of the Code of Civil Procedure was squarely attracted in the facts and circumstances of the instant case and hence urges that in view of the ratio of law laid down by the Hon'ble Supreme Court in the decision reported 2007 (8) SCC 600 Shiv Kumar

Sharma vs Santosh Kumari, the suit filed by the respondent ought to have been rejected as being barred under Order 2 Rule 2 of the Code of Civil Procedure, 1908.

3. The relevant facts on which the bar of Order 2 Rule 2 of the Code of Civil Procedure has been predicated is that the respondent, who is the landlord, had filed a suit on 31.01.1996, seeking ejectment of the appellant from the tenanted premises stating that the lease having come to an end by efflux of time and even otherwise terminated by a notice, the landlord was entitled to recovery possession of the tenanted premises.

4. The second suit, being the suit in question, was filed by the landlord claiming damages for unauthorized use and occupation for the period when tenancy was stated to have been determined and till the date of the suit which was filed on 7.1.1999.

5. The claim for mesne profits has been decreed for the period 07.01.1996 onwards.

6. Since appeal has been urged on the plea of bar of Order 2 Rule 2, we need not note any fact other than the one relevant to consider the bar of Order 2 Rule 2.

7. Order 2 Rule 2 of the Code of Civil Procedure reads as under:-

“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 this claim in order to bring the suit within the 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.”

8. To appreciate the bar of Order 2 Rule 2, with respect to a claim for mesne profits or damages, Order 2 Rule 3 and 4 also need to be noted. They read as under:-

“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.

(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-matter at the date of instituting the suit.

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“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 mense 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:

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."

9. Discussing the ambit of Order 2 Rule 2, a Division Bench of this Court, in the decision dated 24.02.2004 disposing of FAO(OS) No. 350/2001 M/s U.K. Paints Sales vs. M/s Madho Ram Budh Singh observed as under:-

"The principle enshrined under Order 2 Rule 2 is aimed against a multiplicity of suits in respect of the same cause of action. The Rule is based on the principle that a party should not be vexed twice for the one and the same cause of action. However, the said rule must be applied with caution. The plea of bar under Order 2 Rule 2 defeats, what otherwise may be legitimate claim of a party, and therefore, care must be taken to see that complete identity of cause of action is established. Can it be said that the recovery of damages for unauthorized use and occupation of a premises for different periods constitutes a single cause of action. To our mind it does not. Cause of action to recover rent for a premises or damages for unauthorized use and occupation would arise each month for which possession is retained by the tenant or the person in unauthorized occupation as the case may be. Reference may be made to the decision of the Calcutta High Court reported as ILR 1973 (1) CAL 343. It was held that recovery of rent from

Badrapad to Kartik 1377, B.S. would not bar a subsequent suit for recovery of rent from Baisakh to Shrawan 1377 B.S. The principle of law was set out with clarity by the judgment of the Privy Council reported as 26 IC 228 titled Payana vs. Panna Lal. It was held that the rule is directed to securing the exhaustion of the relief in respect of cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction."

10. In the case of **S. Santosh Singh and Others V. S. Gurbux Singh – MANU/DE/0704/2001**, the Division Bench of this Court, following the three Full Bench decisions of the Madras High Court, Bombay High Court and Punjab and Haryana High Court and one Single Judge judgment of this Court held that the subsequent suit for possession was not barred by Order 2 Rule 2 of the Code of Civil Procedure. The relevant portion of the judgment is reproduced below:-

"12. Full Bench of Madras High Court in **Ponnamal v. Ramamirda Aiyar and others A.I.R. 1915 Madras 912** considered the following question:-

"If a plaintiff sues for possession only when he might have joined in the same action claims for profits and damages, is it 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."

13. The answer was given in affirmative holding that claims for recovery of possession of land and claims for mesne profits are separate causes of action. If the 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.

14. Full Bench of Bombay High Court in **Shankarlal Laxminarayan Rathi and others v. Gangabisen Maniklal Sikchi and another MANU/MH/0071/1972** also answered a similar question holding that claims for damages and claim for mesne profits are regarded as distinct and separate causes of action from the cause of action for recovery of immovable property.

15. Similar view was expressed by Full Bench of Punjab Haryana High Court in **Sadhu Singh and others v. Pritam Singh Son of Narain Singh and another MANU/PH/0007/1976** saying that Order 2 Rule 2 of Civil Procedure Code does not bar a suit for mesne profits filed subsequently to a suit for possession of the property because the claim for accrued mesne profits had not been earlier included therein.

16. A Single Judge of this Court in **Prem Nath Kapur v. Gurdit Singh and others RSA No. 35/67** decided on 28.10.1971 reported as 1971 R.L.R. (Note) 126 held that a suit for recovery of possession of property is based on a distinct cause of action from a claim for recovery of mesne profits, although a large field of controversy is common to both and overlaps. He held that in a suit for recovery of possession cause of action is complete the moment trespass has been committed and the plaintiff is required to establish his title to the property and the obligation of the defendant to surrender its possession to him. Limitation for such a suit is 12 years. On the other hand in a suit for recovery of mesne profits, the plaintiff has to allege continuous deprivation of the property for which mesne profits are claimed. In such a suit the plaintiff may also incidentally be required to prove his title and right to obtain the profits and the liability of the defendant to pay the same but the cause of action for mesne profits continues from day to day and for that reason different articles for limitation have been prescribed for each, suit for mesne profits may also be filed in small Cause Court while suit for possession cannot be so filed."

"19.Otherwise also, we are in full agreement with the view expressed in the three Full Bench decisions aforementioned and by learned Single Judge of this Court in Prem Nath Kapur's case (supra) and we hold that the suit

filed by the plaintiff/respondent for possession was not barred under Order 2 Rule 2 of the Code.”

11. Needless to state, it is settled law that the rule enshrined in Order 2 Rule 2 is directed at securing the exhaustion of the relief in respect of a cause of action and is not intended to include in one and the same action, different causes of action, even though they arise from the same transaction.

12. As per Rule 3, it is permissible for a plaintiff to unite in the same suit several causes of action against the same defendant or defendants. Rule 6 empowers a court to order separate trial of different causes of action joined in one suit if the court is satisfied that the joinder of causes of action in one suit may embarrass or delay the trial.

13. Now, Rule 4 of Order 2 guides the court that in a suit for recovery of possession, no cause of action can be joined other than the cause of action enumerated in Clauses (a), (b) and (c) thereof.

14. Thus, the Code of Civil Procedure itself clarifies that an action for recovery of immovable property is a distinct cause of action vis-a-vis a cause of action for a claim for mesne profits.

15. If the two are different causes of action, the bar of Order 2 Rule 2 of the Code of Civil Procedure would obviously be not attracted.

16. It is trite that a cause of action to recover damages or

mesne profits against a person in unauthorized occupation of a property accrues each month.

17. What is relevant to be noted in the instant case that the second suit i.e., the suit in question, was filed on 7.1.1999 and sought recovery of mesne profits for the period post filing of the earlier suit seeking ejectment, which suit we note was filed on 31.1.1996.

18. The decision of the Hon'ble Supreme Court in Shiv Kumar Sharma's case itself recognizes the distinction in various causes of action contemplated in relation to an immovable property and recognizes a distinction when suit for possession of immovable property is filed and a claim for mesne profits is made. In para 20 of the decision, the Hon'ble Supreme Court noted as under:-

“20. In terms of Order 2 Rule 2 of the Code, all the reliefs which could be claimed in the suit should be prayed for. Order 2 Rule 3 provides for joinder of causes of action. Order 2 Rule 4 is an exception thereto. For joining causes of action in respect of matters covered by Clauses (a), (b) and (c) of Order 2 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. 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 2 Rule 4 of the Code, however, such causes of action can be joined and therefore 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 wherefore 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 determined by the court and the balance court fee is to be paid when a final decree is to be prepared.”

19. Learned counsel for the appellant highlighted the observations in the next succeeding para i.e., para 21 where the Hon’ble Supreme Court has opined as under:-

“21. If the respondent intended to claim damages and/or mesne profit, in view of Order 2 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.”

20. The observations of the Hon’ble Supreme Court have to be read and understood with reference to the final opinion expressed by the Lordships in para 29 and 30 of the decision wherein following has been observed:-

“29. 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 41 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 2 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.

30. 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."

21. It would be relevant to note that the Lordships of the Hon'ble Supreme Court were seized of certain observations made by the Division Bench of this court dealing with RFA No.229/2004. The observations were set out by the Lordships in the Supreme Court in para 13 of the decision. The observations of the Division Bench of this court were as under:-

"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"

22. The Hon'ble Supreme Court held that a Civil Court cannot grant leave to file another suit. Only if law permits, can the plaintiff file another suit.

23. The Hon'ble Supreme Court clearly held that the maintainability of the second suit, if at all filed, would have to be adjudicated with reference to the authority/entitlement to institute the suit as per law and not on the liberty granted by the Division Bench.

24. In other words, the ratio of the decision of the Hon'ble Supreme Court in Shiv Kumar case could be stated in the following words:-

No Civil Court can grant liberty to resort to a civil action and an issue of maintainability of a civil suit has to be decided with reference to the law applicable.

25. We hold that the ratio of law laid down by the Division Bench of this court in U.K. Paint's case (supra) and *S. Santosh Singh's* case (supra) is squarely attracted in the instant case.

26. We find no merits in the appeal.

27. The appeal is dismissed.

28. Costs shall follow.

29. Since the appeal has been dismissed, the decretal amount deposited by the appellant is directed to be paid over to the respondent.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

SEPTEMBER 30, 2008

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