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VALLABH DAS

v.

DR. MADAN LAL & ORS.

April 2, 1970

B

[J. C. SHAH AND K. S. HEGDE, JJ.]

Code of Civil Procedure (Act 5 of 1908), O. 23, R. 1—Withdrawal of suit by plaintiff—Court imposing condition for filing fresh suit on the same subject-matter—Meaning of 'subject-matter'.

C

P was the owner of the suit properties. He had no children. He gifted some of his properties to his wife on June 14, 1943. On April 29, 1946 the first respondent instituted a suit for a declaration that he was the adopted son of P and for partition and possession of his share in the family property. The first respondent claimed to have been adopted on July 12, 1943, P denied the said adoption and alleged that in fact he had adopted the appellant on April 10, 1946. In view of that allegation the appellant was added as a supplemental defendant in the said suit, but no relief was claimed against him. During the pendency of that suit P died. Thereafter the first respondent moved the court to withdraw the suit. He was permitted to withdraw the same with liberty to file a fresh suit on the same cause of action on condition that he paid the defendants' costs of that suit before instituting a fresh suit. Thereafter P's widow bequeathed her properties to the first respondent and died soon after. On November 29, 1951 the first respondent brought a fresh suit without having paid the costs of the appellant in the earlier suit. The appellant resisted the suit on several grounds. However the trial court and the High Court decided in favour of the first respondent. Thereupon by special leave the present appeal was filed by the appellant. The main question that fell for consideration was whether the suit under appeal was maintainable when the condition precedent imposed by the court in the earlier suit—namely, the payment of defendants' costs by the plaintiff before bringing a fresh suit on the same cause of action—had not been complied with.

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HELD : (i) Rule 1, O. 23, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The expression 'subject-matter' is not defined in the Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit it cannot be said that the subject-matter of the second suit is the same as in the previous suit. [213 G—214 B]

G

(ii) The non-fulfilment of the condition imposed by the Court at the time of withdrawal of the first suit did not bar the present suit because the subject-matter of the two suits was not the same.

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In the first suit the first respondent was seeking to enforce his right to partition and separate possession. In the present suit he sought to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between the first respondent and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff was seeking possession of the suit properties from a trespasser.

In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause of action, namely, the series of transactions which formed the basis of the title to the suit properties arose on the death of his adoptive father and mother. [214 B-D]

Mere identity of some of the issues in the two suits did not bring about an identity of the subject matter in the two suits. [214 D-E]

The appeal must accordingly be dismissed.

Rakhma Bai v. Mahadeo Narayan, I.L.R. 42 Bom. 1155 and *Singa Reddy v. Subba Reddy*, I.L.R. 39 Mad. 987, approved and applied.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 615 of 1966.

Appeal by special leave from the judgment and decree dated June, 25, 1962 of the Bombay High Court, Nagpur Bench in Appeal No. 191 of 1956 from original Decree.

B. R. L. Iyengar, S. K. Mehta, for the appellant.

S. N. Kherdekar, G. L. Sanghi and A. G. Ratnaparkhi, for respondent No. 1.

The Judgment of the Court was delivered by

Hegde, J. One Prem Sukh was the owner of the suite properties. Parvatibai was his wife. They had no children. Prem Sukh gifted some of his properties to his wife on June 14, 1943. Dr. Madan Lal's (1st respondent in this appeal) case is that Prem Sukh adopted him on July 12, 1943. Thereafter it is said that Prem Sukh adopted on April 10, 1946, the appellant Vallabh Das. On April 29, 1946, Dr. Madan Lal instituted a suit for a declaration that he is the adopted son of Prem Sukh and for partition and possession of his share in the family properties. Prem Sukh denied the adoption pleaded by Dr. Madan Lal. On the other hand he alleged that Vallabh Das was his adopted son. In view of that allegation, Vallabh Das was added as a supplemental defendant in that suit. No relief was claimed against him. During the pendency of that suit Prem Sukh died. Thereafter Dr. Madan Lal moved the court to withdraw the suit. He was permitted to withdraw the same with liberty to file a fresh suit on the same cause of action on condition that he pays the defendants' costs of that suit before instituting a fresh suit. Thereafter Parvatibai bequeathed her properties to Dr. Madan Lal and died soon after. The suit from which this appeal arises was brought on November 29, 1951 even before the costs of Vallabh Das (the appellant herein) in the previous suit had been paid. Vallabh Das resisted the suit on various grounds. He contended that Dr. Madan Lal was not adopted by Prem Sukh; even if he

- A had been adopted, that adoption was not valid under the Benaras School of Hindu law by which the parties were governed as Madan Lal was a married man on July 12, 1943 and lastly the suit as brought is not maintainable as Dr. Madan Lal had not paid the costs due to him under the order in the previous suit before instituting the present suit. Both the trial court as well as the High Court in appeal rejected every one of the contentions taken by Vallabh Das and decreed the suit as prayed for. Thereafter this appeal was brought after obtaining special leave from this Court.

- C The *factum* of the adoption has been upheld both by the trial court as well as by the High Court. There is evidence to support that finding. No convincing circumstance was brought to our notice requiring us to review the evidence over again. This Court ordinarily does not interfere with concurrent findings of fact. We see no justification to disturb the concurrent finding of fact arrived at by the trial court and the High Court.

- D As regards the validity of the adoption, the contention of Vallabh Das that the adoption was invalid rests on the plea that on July 12, 1943, Dr. Madan Lal was a married man. This plea has been negatived by the trial court as well as by the High Court. They have come to the conclusion that Dr. Madan Lal was not a married man on that date and that he was married subsequently. Here again there is no good ground for us to interfere with the finding of fact reached by those courts.

- F The only contention that was seriously pressed before us on behalf of the appellant was that the suit under appeal is not maintainable as the condition precedent imposed by the court in the earlier suit namely the payment of defendants' costs by the plaintiff before bringing a fresh suit on the same cause of action had not been complied with. We do not think that this contention is well founded.

- G Rule 1, Order 23, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The terms imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property

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which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr. Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between Dr. Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the previous suit as well as in the present suit the *factum* and validity of adoption of Dr. Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent even which conferred certain rights on him. Mere identity of some of the issues in the two suits does not bring about an identity of the subject matter in the two suits. As observed in *Rakhma Bai v. Mahadeo Narayan*⁽¹⁾, the expression "subject matter" in Order 23, Rule 1, Code of Civil Procedure means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words "subject matter" means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis C.J. in *Singa Reddi v. Subba Reddi*⁽²⁾, that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject matter as the first suit.

For the reasons mentioned above this appeal fails and the same is dismissed with costs.

G.C.

Appeal dismissed.

(1) I.L.R. 42 Bom. 1155.

(2) I.L.R. 39 Mad. 987.