2023 LiveLaw (SC) 1031

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
VIKRAM NATH; J., RAJESH BINDAL; J.
November 30, 2023
CIVIL APPEAL NO. 7890 OF 2023 (ARISING OUT OF S.L.P. (C) NO. 8292 OF 2021)

M/s BHARAT PETROLEUM CORPORATION LTD. AND ANOTHER
versus
ATM CONSTRUCTIONS PVT. LTD.

Civil Procedure Code, 1908; Order II Rule 2 - A suit for possession and suit for claiming damages for use and occupation of the property are two different causes of action. Hence, second suit filed claiming damages for use and occupation of the premises was maintainable after a suit for possession. *(Para 17)*

(Arising out of impugned final judgment and order dated 07-01-2021 in ANO. No. 1633/2020 in CS(CD)-62/2020 passed by the High Court of Judicature at Madras)

For Petitioner(s) Mr. V. Giri, Sr. Adv. Mr. Parijat Sinha, AOR Ms. Pallak Bhagat, Adv. Ms. Suveni Bhagat, Adv. Ms. Reshmi Rea Sinha, Adv. Mr. Devesh Mishra, Adv.

For Respondent(s) Mr. S.Nagamuthu, Sr. Adv. Mr. M. A. Chinnasamy, AOR Mrs. C Rubavathi, Adv. Mr. M Veeraragavan,, Adv. Mr. C Raghavendren, Adv. Mr. Ch. Leela Sarveswar, Adv. Mr. Devendra Pratap Singh, Adv. Mr. Sarubh Gupta, Adv. Mr. Vinod Kumar Teng, Adv. Mr. V Senthil Kumar, Adv.

J U D G M E N T

RAJESH BINDAL, J.

1. Leave granted.

2. Challenge in the present appeal is to the order dated 07.01.2021 passed by the High Court[1], vide which the application filed by the appellants/defendants under Order VII Rule 11(d) C.P.C. in the suit[2] filed by the respondent-plaintiff, was dismissed.

3. Briefly, the facts as available on record are that the respondent-plaintiff is presently the absolute owner of the property in dispute. It was originally owned by T. Padmanabhan, T. Sethuraman and T. Gopinath. At that time, M/s Burma Shell Oil Storage and Distribution Company of India Ltd. had taken the property on lease with effect from 01.01.1958 for the purpose of erecting pump service and filling station for storage of petrol, diesel and carrying on business in such products for a period of twenty years by entering a lease deed dated 08.01.1958. The said Company was the predecessor-in-interest of the appellants-defendants. The property was put to public auction owing to default in repayment of the loan availed by the owners. The same was purchased by Mrs. S. Bharwani in the auction. Sale deed was registered in her favour on 24.06.1978. The respondent-plaintiff had purchased the property from Mrs. S. Bharwani. Finally, the lease in favour of the appellants expired on 31.12.1997. Thereafter, as pleaded, the respondent-plaintiff issued notice to the appellants demanding surrender of possession. The same having not been done, first suit[3] was filed by the respondent-plaintiff in the year 2006. During the pendency of first suit, the suit in question was filed claiming liquidated damages for a period from 01.01.1998 till 31.12.2019 along with interest and future damages of ₹30,50,000/- per month from 01.01.2020 onwards till the date of handing over the vacant

[1] High Court of Judicature at Madras
[2] Civil Suit (Commercial Division) No. 62 of 2020
[3] Civil Suit NO. 711 of 2006

possession of the suit property. It is in the aforesaid suit that the appellants-defendants filed application under Order VII Rule 11(d) C.P.C. The same having been dismissed by the High Court, the matter is before this Court.

4. Mr. V. Giri, learned senior counsel for the appellants submitted that it is not a matter of dispute that the lease in favour of the appellants expired on 31.12.1997. The first suit for possession was filed by the respondent-plaintiff in 2006. At the stage of filing of the aforesaid suit, though the relief for damages for use and occupation was available to the respondent-plaintiff, however, the same was not claimed. It has been specifically pleaded in Paragraph No. XXI in the plaint that the respondent-plaintiff is entitled to damages for wrongful occupation of the premises by the appellants-defendants, but still while claiming the final relief, only possession was sought after removal of the structure, which existed thereon. The first suit was decreed on 30.10.2010.

5. During the pendency of the aforesaid suit, the respondent-plaintiff filed the suit in question in January 2020 claiming liquidated damages of ₹1,28,90,000/- payable towards illegal occupation from 01.01.1998 till 31.12.2019 along with interest @ 12% per annum from 01.01.1998 till realization. Future damages @ ₹30,50,000/- per month from 01.01.2020 till the date of handing over vacant possession of the property in dispute were also claimed. It is the case of the parties that possession was handed over by the appellants to the respondent-plaintiff in June 2022.

6. The argument raised by learned senior counsel for the appellants is that from the pleadings in the first suit filed by the respondent-plaintiff it is evident that it had touched the issue of damages for use and occupation of the property in dispute, which could be claimed at that time, the lease having expired on 31.12.1997. However, still in the first suit filed in January 2006 only possession was sought. The relief, which was available and not claimed, is deemed to be omitted for which no fresh suit lies. The plaint in the suit in question filed by the respondent-plaintiff in the year 2020 was liable to be rejected under Order VII Rule 11(d) C.P.C., as the same was not maintainable. In the suit filed subsequently, the claim of the respondent-plaintiff is also barred by law for the reason that in the second suit filed in the year 2020, the claim is made for damages for use and occupation from the year 1998 onwards. To appreciate the contentions raised by the appellants-defendants, copy of the earlier suit and the judgment therein have been placed on record by the respondent-plaintiff along with the subsequent suit. It is not that any pleadings of the appellants-defendants are to be considered. He further referred to the provisions of Order II, Rules 2(2), (3) and especially (4) C.P.C. in terms of which without even seeking permission of the court, relief for damages for use and occupation of the premises can be joined in a suit for recovery of immoveable property. In support of his arguments, reliance was placed upon the judgment of this Court in **Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited**[4]**.**

7. On the other hand, Mr. S. Nagamuthu, leaned senior counsel for the respondent-plaintiff submitted that the application filed by the appellants-defendants was totally mis-conceived. It is the undisputed fact on record that the lease granted to the appellants expired on 31.12.1997. Despite that, they did not hand over vacant physical possession of the property in dispute to the lesser- respondent, who had purchased the same on 03.01.1997. The respondent-plaintiff did not have any choice but to file the first suit in 2006. In that also, all kinds of frivolous pleas were raised by the appellants making the respondent to contest the litigation for over a decade. The suit was initially decreed on

[4] (2013) 1 SCC 625

30.10.2010. After the lease expired on 31.12.1997, from January 1998 onwards the appellants were in occupation of the property in dispute without paying any damages for use and occupation thereof. The respondent-plaintiff filed a suit in January 2020 seeking a direction to the appellants-defendants to pay liquidated damages of ₹1,28,90,000/- along with interest @ 12% per annum from 01.01.1998 till realization. Future damages @ ₹30,50,000/- per month from 01.01.2020 till the date of handing over vacant possession of the property in dispute were also claimed. The calculation was on a very conservative estimate, the details whereof have been furnished in the suit. As there was huge delay on the part of the appellants to pay the damages for use and occupation of the property in dispute, interest was also claimed. As had been the attitude of the appellants in delaying the process of law, instead of defending the suit which otherwise was not defendable, an application was filed under Order VII Rule 11(d) C.P.C. for rejection of the plaint. The same was totally mis-conceived. There is no bar in filing a separate suit for claiming damages for use and occupation of the property in dispute, in case in the first suit pertaining to the same premises, only possession was claimed. The law thereon is well settled. Even the High Court has also referred to the judgments starting from a Full Bench of Madras High Court in **Ponnammal v. Ramamirda Aiyar and two others**[5]. Subsequently, the matter was considered by the Full Bench of Punjab and Haryana High Court in **Sadhu Singh etc. v. Pritam Singh, Etc.**[6] Same view was endorsed. Even this Court in **Gurbux Singh v. Bhooralal**[7] had settled the issue that even if damages for use and occupation had not been claimed in a suit filed earlier seeking possession of the property, a fresh suit being a distinct cause of action is maintainable. In view of the aforesaid settled position of law, the subsequent suit filed by the respondent-plaintiff cannot be said to be barred under any law. It was further submitted that the issue with regard to maintainability of the suit in terms of Order II Rule 2 C.P.C. has already been framed and the matter will be examined by the Trial Court after the parties lead evidence. Even if the appellants-defendants had any objection with regard to any part of the claim made in the suit being beyond limitation or otherwise, the issue can always be raised and tried.

8. Heard learned counsel for the parties and perused the paper book.

9. The respondent-plaintiff is the absolute owner of the property in dispute. It was originally owned by T. Padmanabhan, T. Sethuraman and T. Gopinath. At that time, M/s Burma Shell Oil Storage and Distribution Company of India Ltd. had taken the property on lease with effect from 01.01.1958 for a period of twenty years by executing a lease deed dated 08.01.1958. The said Company was the predecessor-in-interest of the appellants-defendants. The property was put to auction for recovery of loan availed by the owners. The same was purchased by Mrs. S. Bharwani in the auction. Sale deed was registered in her favour on 24.6.1978. The respondent-plaintiff had purchased the property from Mrs. S. Bharwani. Finally, the lease in favour of the appellants expired on 31.12.1997. Thereafter, as pleaded, the respondent-plaintiff issued notice to the appellants seeking possession. The same having not been done, the first suit filed by the respondent-plaintiff was decreed 30.10.2010. During the pendency of the first suit, the appellants-defendants sought to invoke Section 9 of the Tamil Nadu City Tenants Protection Act, 1921 claiming right to purchase the property, but failed in that process as well. In the first suit filed by the respondent-plaintiff, the prayer was only for seeking possession of the property. In the suit in question filed in the year 2010, the prayer was made for claiming damages for use and

[5] ILR (1915) XXXVIII 829
[6] 6 ILR (1976) 1 P&H 120
[7] AIR 1964 SC 1810

occupation of the property from 01.01.1998 onwards, as admittedly the lease in favour of the appellants expired on 31.12.1997. Copy of the plaint and the judgment in the first suit have been placed on record by the respondent-plaintiff along with the second suit.

10. Application under Order VII Rule 11(d) C.P.C. was filed by the appellants-defendants for rejection of the plaint. It was on the ground that a subsequent suit only for claiming damages for use and occupation of the property in dispute, for which a suit for possession was filed earlier without claiming any damages for use and occupation, will not be maintainable in terms of Order II Rule 2 C.P.C.

11. The primary issue which requires consideration by this Court to appreciate the arguments regarding maintainability of the subsequent suit is with reference to cause of action. The first suit was filed by the respondent for possession, whereas the second suit was filed for damages for use and occupation of the property after expiry of the lease period.

12. Paragraphs in the two suits mentioning the cause of action are extracted below:

"Suit for possession

"XXI. The plaintiff submits that after the statutory intervention, the first renewal period by virtue of Section 5 & 7 of the Burma-Shell Acquisition of Undertakings in India Act, the defendants got the lease deed executed for a period of 20 years from 01.01.1978. The said first renewal period expired on 31.12.1997. The plaintiff submits that the Apex Court as well as the Madras High Court have clearly held that the statutory right of the defendant Corporation to renew the lease can be exercised only one time and no more. Hence, the possession of the defendants in the plaint schedule property after the expiry of the first renewal period i.e. 31.12.1997 is that of a trespasser. The plaintiff submits that till date they have not received any rental from the defendants. The plaintiff is entitled to damages for the wrongful occupation of the premises by the defendants. Hence the possession of the defendants is wrongful, and the suit is therefore laid for recovery of possession of the actual demised premises.

XXI. The cause of action for the suit arose at Madras on 08.01.1958, when the defendants as it then stood as Burma-Shell Oil & Storage Company Limited entered into a contract of lease with plaintiff's predecessor in title and was let into possession of the plaint schedule property, on 31.07.1997, when the plaintiff purchased the said property from the predecessor in title of the plaint schedule property; on 23.07.2005 when the plaintiff through its lawyers sent a registered notice calling upon the defendants to surrender possession of the plaint schedule property and on 01.08.2005 when the first defendant by its letter dated 02.08.2005 addressed to the lawyers of the plaintiff declined to surrender possession of the plaint schedule and on subsequent dates."

Suit for damages for use and occupation of property

"13. The cause of action for the suit arose within the jurisdiction of this Hon'ble Court on 01.01.1958 when the lease under the predecessors-in-title and the erstwhile Burma Shell Oil Storage and Distribution Company had commence; on 08.01.1958 when the said lease deed was executed by the parties; on 20.01.1976 when the Government of India acquired the equity shares of the Burma Shell Oil Storage and Distribution Company and incorporated the Bharat Petroleum Corporation Ltd., on the dates between 1976 and 1978 when the predecessor-in-title of the suit property availed loan from the Egmore Benefit Society, brought the property to public auction and Mrs. S. Bharwani purchased the suit property in public auction; on 01.01.1978 when the renewed period of lease has commenced; on 06.07.19078 when the defendant had requested Mrs. S. Bharwani, the then title holder to grant extension of lease from 01.01.1978; on 27.07.1978 and on 18.10.1978 when the said Mrs. S. Bhawani caused further notices to the defendants to vacate the suit property; on 17.11.1978 when the defendants informed the said Mrs. S. Bharwani that they have the statutory right under the Burma Shell Acquisition of Undertaking in India Act; on 14.11.1996 when the plaintiff entered into the agreement for sale of the suit property; on

03.01.1997 when the Deed of Sale in favour of the plaintiff was registered; on 02.12.1997 when the said Mrs. Bharwani has caused a notice demanding vacant possession; on 01.091.1998 when the extended period of lease in respect of the suit property had expired; on 09.01.1998 when the said has issued demand notice to vacate the suit property, on 10.1.2000 when the said Mrs. Bharwani issued another notice for vacant possession of lease for another 30 years was rejected; in the year 2006, when the suit for eviction in O.S. No. 711 of 2006 was filed in the City Civil Court; on 27.11.2009 when the Defendants filed the Petition in I. A. No. 6009 of 2009 under Section 9 of the City Tenants Protection Act, in the year 2010 when the CMA 20 of 2010 was filed before the III Additional Judge, City Civil Court, Chennai; on 15.2.2010 when the CMA was dismissed; on 30.10.2010 when the suit in O.S. No. 711 of 2006 was decreed; in the year 2010, when the Defendants preferred the A.S. No. 361 of 2010; in the year 2011, when the Defendants preferred a SLP in the Hon'ble Supreme Court of India against the orders passed in CRP above; in the year 2011, when the Defendants filed CRP No. 610 of 2011 before the Hon'ble Court, Madras against the Orders passed in CMA; on 09.01.2012, when the CRP was dismissed by the Hon'ble High Court; and each and every day thereafter."

13. Similar issue was considered by a Full Bench of Allahabad High Court in **Ram Karan Singh v. Nakchhad Ahir**[8]. In the aforesaid case, a suit for recovery of possession and mesne profits was filed on 24.08.1925. In the suit, the plaintiff claimed mesne profits upto the date of filing of the suit. The suit was decreed in favour of the plaintiff. Future and pendente lite mesne profits were neither claimed nor refused in that suit. Possession of the land was delivered on 01.04.1927. The plaintiff then instituted a second suit for recovery of mesne profits from the date of institution of the first suit i.e., 24.08.1925 till the date of delivery of possession, i.e., 01.04.1927. The Full Bench opined that a subsequent suit for claiming mesne profits where an earlier suit claiming possession and mesne profits upto the date of filing of the suit was already decided, was maintainable. Relevant paragraph thereof is extracted below:

"It seems to us that the cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits. The provisions of Order 2 Rule 4, indicate that the legislature thought it necessary to provide specially for joining a claim for mesne profits with one for recovery of possession of immovable property, and that but for such an express provision, such a combination might well have been disallowed. A suit for possession can be brought within twelve years of the date when the original dispossession took place and the cause of action for recovery of possession accrued. *The claim for mesne profits can only be brought in respect of profits within three years of the institution of the suit and the date of the cause of action for mesne profits would in many cases be not identical with the original date of the cause of action for the recovery of possession. Mesne profits accrue from day to day and the cause of action is a continuing one, and arises out of the continued misappropriation of the profits to which the plaintiff is entitled. …"*

(Emphasis supplied)

14. Subsequently, a Full Bench of Punjab & Haryana High Court in **Sadhu Singh's case (supra)** considered the following question:

"Whether Order 2, rule 2 of the Code of Civil Procedure, 1908, bars 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."

14.1 The same was answered in negative by majority.

15. The Full Bench judgment of Allahabad High Court in **Ram Karan Singh's case (supra)** was quoted with approval in **Indian Oil Corporation Ltd. v. Sudera Realty Pvt.**

[8] AIR 1931 All 429

Ltd.[9] opining therein that the cause of action claiming mesne profits accrue from day to day and the cause of action is a continuing one. Relevant paragraphs 64 and 65 thereof are extracted below:

"64. The case of the respondent is that the plea of limitation was not pressed before the learned Single Judge and was also not taken up before the Division Bench. It is further contended that a claim for mesne profits involves a liability, which accrues on a day- to-day basis. In this regard, attention is drawn to ***Ram Karan Singh and others v. Nakchhed Ahir and others, AIR 1931 Allahabad 429***, which has been referred to by this Court in the Judgment reported in ***Raptakos Brett and Company Limited v. Ganesh Property, (2017) 10 SC 643*** and we may notice only paragraph-21 of ***Raptakos Brett and Company Limited*** (supra):

"21. Bench of the Allahabad High Court while examining the issue of maintainability of second suit for pendente lite and future mesne profits where earlier suit for possession and past mesne profits has already been decided has held as follows : (SCC Online All)

"It seems to us that the cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits. The provisions of Order 2 Rule 4, indicate that the legislature thought it necessary to provide specially for joining a claim for mesne profits with one for recovery of possession of immovable property, and that but for such an express provision, such a combination might well have been disallowed. A suit for possession can be brought within twelve years of the date when the original dispossession took place and the cause of action for recovery of possession accrued. *The claim for mesne profits can only be brought in respect of profits within three years of the institution of the suit and the date of the cause of action for mesne profits would in many cases be not identical with the original date of the cause of action for the recovery of possession. Mesne profits accrue from day to day and the cause of action is a continuing one, and arises out of the continued misappropriation of the profits to which the plaintiff is entitled. …"*

(Emphasis supplied)

65. In the said passage, what has been considered, was the issue relating to the maintainability of the second Suit for pendente lite and future mesne profits, in a situation, where an earlier suit for recovery of possession and for past mesne profits had been decided. We notice that what the Court has essentially held is that but for Order IV Rule 2[10] of the CPC, as it stood specifically providing for joining a claim for mesne profits with one for recovery of possession of an immovable property, such a joining together of claims in one suit, may have been not allowed. It is thereafter stated that a claim for mesne profits can only be brought in respect of profits within three years of the institution of the suit. Still further, it is found that the date of cause of action for action for mesne profits may not coincide with the date of cause of action for recovery of possession. It is thereafter that the statement which is relied upon by the respondent has been made. The Court held that mesne profits accrue from day-to-day, and the cause of action is a continuing one. It arises out of the continued misappropriation of the profits, which a plaintiff is entitled to."

16. If considered in the light of the facts of the case in hand, it is undisputed that the respondent-plaintiff is the absolute owner of the property in dispute at present. The lease of the property in favour of the appellants by the predecessors-in-interest of the respondents expired on 31.12.1997. After a prolonged litigation, the possession was handed over to the respondent only in June 2022. The first suit was filed seeking possession of the property. No claim was made regarding mesne profits. Subsequent suit was filed claiming damages for use and occupation of the property from 1998 onwards.

17. In view of the enunciation of law, as referred to above, suit for possession and suit for claiming damages for use and occupation of the property are two different causes of

[9] 2022 SCC OnLine SC 1161: 2022:INSC: 926
[10] Apparently, there is an error. It should be Order II Rule 4

action. There being different consideration for adjudication, in our opinion, second suit filed by the respondent claiming damages for use and occupation of the premises was maintainable. The application filed by the appellants for rejection of the plaint was rightly dismissed by the Courts below. However, the appellants are well within their right to raise the issue, if any part of the claim in the suit is time-barred but the entire claim cannot be said to be so.

18. The judgment in **Virgo Industries (Eng.) Private Limited's** case (supra), relied upon by learned counsel for the appellants is distinguishable as in that case, on the date the suit for injunction was filed, even as per the averments in the plaint, the cause of action to file suit for specific performance had arisen but was not claimed. Under those circumstances, this Court held that the subsequent suit would be barred under Order II Rule 2 C.P.C.

19. In view of our aforesaid discussions, we do not find any merit in the present appeal. The same is, accordingly, dismissed.

There shall be no order as to costs.