

Before : G. R. Majithia, J.

SADHU SINGH,—Appellant.

versus

KAUR SINGH,—Respondent.

Regular Second Appeal No. 606 of 1979.

25th November, 1991.

Code of Civil Procedure, 1908 (V of 1908)—O. 9 Rls. 8 & 9—Suit for permanent injunction restraining defendant from digging water course on plaintiff's land—Suit dismissed under O. 9 rl. 8—Second suit under O. 9 rl. 9 barred—Principle of recurring cause of action inapplicable—Term 'cause of action' defined.

Held, that dismissal of a suit under O. 9 rl. 8 of the Code precludes the plaintiff from bringing a fresh suit in respect of the same cause of action under O. 9 rl. 9 of the Code. In considering whether the cause of action in the subsequent suit is the same or not as the cause of action in the previous suit the test to be applied is : Are the causes of action in the two suits in substance—not technically—identical ? If both the suits are substantially based on the same cause of action, the bar to file a fresh suit under O. 9 rl. 9 of the Code will apply. The term 'cause of action' is to be construed with reference rather to the substance than to the form of action. Substantially, the causes of action in both the suits are 'same'. The dismissal of the suit under the provisions of O. 9 rl. 8 of the Code will bar the second suit under O. 9 rl. 9 of the Code and the principles of recurring cause of action will be inapplicable.

(Paras 11 & 12)

Regular Second Appeal from the decree of the Court of Shri Gurpartap Singh Chahal, Addl. District Judge, Barnala dated the 29th day of December, 1978 reversing that of Shri A. C. Aggarwal, PCS Sub Judge Ist Class Barnala dated the 21st January, 1978 and dismissing the suit of the plaintiff, leaving the parties to bear their own costs.

Claim :—Suit for permanent injunction restraining the defendant from digging the water course or for restoring any water course through the land owned and possessed by the plaintiff measuring 22 kanals 8 marlas khasra No. 100/18/8-0, 12/7-8, 23/7-0. situated in the area of Barnala.

Claim in Appeal :—For reversal of the order of the lower appellate court.

Viney Mittal, Advocate with Raman Walia, Advocate, for the appellant.

K. S. Grewal, Advocate, for the respondent.

JUDGMENT

G. R. Majithia, J.

The plaintiff has come up in regular second appeal against the judgment and decree of the First Appellate Court affirming in appeal those of the trial Judge, whereby his suit for issuance of permanent injunction to restrain the defendant-respondent from digging any water course or from restoring any water-course or from digging a water-course through the land measuring 22 kanals, 8 marlas, comprising in Khasra No. 100/18, 19 and 23, situated at Barnala, was dismissed.

(2) The Facts:—

The plaintiff-appellant (hereinafter, referred to as the plaintiff), filed a suit for perpetual injunction on the ground that there was no sanctioned water-course passing through the land in suit; that the respondent-defendant (hereinafter, referred to as the defendant) wanted to dig a water course through the land in suit forcibly with the unlawful help of canal Authorities; that in the previous suit, the defendant had taken a plea that the order dated October 13, 1972 of the Sub-Divisional Canal Officer was in his favour; that he had got the water-course restored pursuant to that order and the same had been demolished by the plaintiff; that the suit was dismissed as withdrawn with permission to file a fresh suit; that, in fact, no water-course existed in the land of the plaintiff; that there was no order passed by the canal-authorities,—*vide* which a water-course had been sanctioned for the defendant through the land of the plaintiff and that the order, if any, was illegal.

(3) The defendant contested the suit on the ground that a water-course was in existence for taking canal water through his fields and had been demolished by the plaintiff; that the same had been restored under the orders of the canal authorities with the police help; that the plaintiff again demolished the water course; that the plaintiff brought a suit for injunction on August 12, 1975 and the same was dismissed under order 9 rule 8 of the Code of Civil Procedure (hereinafter, referred to as the Code) and as such, the instant suit is barred.

(4) On the pleadings of the parties, the following issues were framed:—

1. Whether there is a sanctioned khal by the canal authorities through the suit land ? O.P.D.

2. Whether the suit is not maintainable as alleged ? O.P.D.
3. Whether this Court has no jurisdiction to try the suit ? O.P.D.
4. Whether order of restoration of Khal in dispute is without jurisdiction, *null* and *void* ? O.P.P.
5. Whether plaintiff is entitled to the injunction prayed for ? O.P.P.
6. Whether the suit is bad for non-joinder of necessary parties ? O.P.D.
7. Relief.

(5) The trial Judge decided issue No. 1 against the defendant; issue No. 2 was not pressed, resultantly, the same was also decided against the defendant. Under issue No. 3, it was held that the Civil Court had jurisdiction to entertain the suit; issue No. 4 was decided in favour of the plaintiff and against the defendant and it was held that the order of restoration was without jurisdiction; issue No. 5 was decided in favour of the plaintiff and it was held that he was entitled to the injunction prayed for and issue No. 6 was not pressed by the defendant and it was accordingly decided against the defendant. On the ultimate analysis, the suit was decreed.

(6) The defendant assailed the judgment and decree of the trial Court in appeal.

(7) The First Appellate Court framed an additional issue, which runs thus :—

“Whether the previous suit was dismissed under order 9 Rule 8 C.P.C. and the present suit is barred ? O.P.D.”

(8) It called for report under Order 41 Rule 25 of the Code. The trial Judge decided the additional issue in favour of the plaintiff and against the defendant.

(9) The First Appellate Court on appeal reversed the decision of the trial Judge on the additional issue and held that the present suit was based on the same cause of action as the earlier one and the dismissal of the earlier suit under Order 9 Rule 8 of the Code barred the present suit. The First Appellate Court affirmed the findings of the trial Judge under issue Nos. 1, 3, 4 and 5. The findings

of the trial Judge under issue Nos. 2 and 6 were also affirmed on the ground that these were not pressed before the trial Judge. The First Appellate Court on appraisal of evidence came to the conclusion that the defendant failed to establish that a water-course was sanctioned by canal authorities or it was being run as a matter of right under some agreement or by prescription; that if such a water-course at some stage was constructed without the consent of the plaintiff and had run for some time, it was an illegal act and the canal authorities were not authorised to order its restoration under section 30-FF of the Northern Canal and Drainage Act (for short, the Act). It also came to the conclusion that the jurisdiction of the Civil Court was not barred since the orders passed by the canal-authorities were beyond jurisdiction and that the bar created by Section 30-G of the Act was not attracted when the canal authorities had acted beyond their jurisdiction and passed orders, which were devoid of legal sanction. It also came to the conclusion that the defendant failed to establish that a water course was sanctioned for taking water through the fields of the plaintiff. If the defendant was making a claim of digging a water-course through the land of the plaintiff, this act amounted to trespass and the plaintiff could approach for restraining the defendant from committing illegal action. However, the First-Appellate Court non-suited the plaintiff on the technical ground that the dismissal of the earlier suit barred the maintainability of the present suit. There is no dispute that the plaintiff brought a suit against the defendant on almost identical grounds as in the instant case. The suit was dismissed by the trial Judge with the following observations:—

“The case was fixed up for rebuttal evidence of the plaintiff for 14th December, 1973, but on that day the plaintiff was not present and at the request of the learned counsel for the plaintiff the case was adjourned for statement of the plaintiff on 18th October, 1973 and the plaintiff was also burdened with cost of Rs. 10. On that day the undersigned was away to Hoshiarpur on official duty, therefore, the case was set up for 19th December, 1973 for proper order and on that day it was fixed up for today for statement of the plaintiff. But today, neither the plaintiff nor his counsel has put in appearance in Court nor any costs has been tendered for payment to the opposite party. Therefore, from these facts it appears that the plaintiff is not interested to pursue his case. Hence, the suit of the plaintiff is dismissed under Order 9 Rule 10 C.P.C.”

(10) The suit is stated to have been dismissed under Order 9 Rule 10 of the Code, but it appears that wrong provision of Order 9 Rule 10 of the Code has been quoted. The ratio of the order indicates that it was dismissed under Order 9 Rule 8 of the Code.

(11) Dismissal of a suit under Order 9 Rule 8 of the Code precludes the plaintiff from bringing a fresh suit in respect of the same cause of action under Order 9 Rule 9 of the Code. In considering whether the cause of action in the subsequent suit is the same or not as the cause of action in the previous suit the test to be applied is : Are the causes of action in the two suits in substance—not technically—identical ? If both the suits are substantially based on the same cause of action, the bar to file a fresh suit under Order 9 Rule 9 of the Code will apply. The term 'cause of action' is to be construed with reference rather to the substance than to the form of action. Substantially, the causes of action in both the suits are same.

(12) The learned counsel for the plaintiff maintains that the plaintiff has a recurring cause of action and the second suit although substantially on the same cause of action will not be barred under the provisions of Order 9 Rule 9 of the Code and in support of his submission, he relied upon the principles laid-down in the authorities that the dismissal of a suit for redemption or partition will not bar the maintainability of second suit for the same relief. The principles laid-down in those authorities will not be attracted. Section 60 of the Transfer of Property Act says that the right to redeem could be exercised so long as it had not been extinguished by act of the parties or by decree of a Court. It was in the light of these provisions that in *Thota China Subba Rao and others v. Mattapalli Raju and others* (1), it was laid-down that the rule contained under Order 9 Rule 9 of the Code had no application to the suit for redemption. Similarly, the bar created under Order 9 Rule 9 of the Code does not apply to a suit for partition. The right to enforce partition is a legal incident of a joint tenancy, and as long as such tenancy subsists, any of the joint tenants may sue for partition of the joint property. The second suit for redemption or partition being not barred under Order 9 Rule 9 of the Code, is entirely on different footing. The instant suit was for permanent injunction to restrain the defendant from digging water-course in the land of the plaintiff. The dismissal of the suit under the provisions of Order 9 Rule 8 of the Code will bar the

(1) A.I.R. 1950 F.C.I.

second suit under Order 9 Rule 9 of the Code and the principles of recurring cause of action will be inapplicable.

(13) It is unfortunate that the plaintiff has to suffer because of wrong advice given to him. If correct advice had been given to him, he would have moved for restoration of his earlier suit dismissed under Order 9 Rule 8 of the Code instead of resorting to a fresh suit on the same cause of action, which is obviously barred under Order 9 Rule 9 of the Code.

(14) For the reasons stated above, the appeal fails and is dismissed, but with no orders as to costs.

J.S.T.

Before : I. S. Tiwana & G. R. Majithia, JJ.

ROHTASH SINGH KHARAB AND OTHERS,—*Petitioners.*

versus

THE STATE OF HARYANA AND OTHERS,—*Respondents.*

Civil Writ Petition No. 9385 of 1987.

31st May, 1991.

Punjab Civil Service (Executive Branch) Rules, 1930—Rls. 5, 6, 9 & 17—Filling up of vacancies—State Government sending requisition to H.P.S.C. for filling up of 8 vacancies to service for year 1982—Posts advertised and written test held in 1984—Final result declared in September, 1985—Further vacancies arising for year 1985—Requisition sent to Commission in October, 1985—Claim to such posts by candidates who appeared for 1984 batch—Held, no judicially enforceable right accrues to them to claim for posts advertised for subsequent year—Purpose of such rules—Defined.

Held, that a candidate who is placed on the merit list prepared as a result of the competitive examination held by the Commission for filling up the vacancies for a particular year will not ipso facto be entitled to be considered for appointment against the vacancies which were to be filled up as a result of the competitive examination held in a subsequent year. The purpose for which these Rules were framed is to select the best out of the meritorious candidates for recruitment to the Service. The competitive examination is to be held every year. A candidate who was ineligible for any reason in a particular year may become eligible to appear in the competitive