

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on : July 06, 2012
Judgment Pronounced on: July 18, 2012

+ RFA(OS) 50/2009

RANBIR SINGH Appellant
Represented by: Mr.Rajeev Virmani, Sr.Advocate
instructed by Mr.P.K.Mullick,
Mr.Mohan Rao & Mr.Niraj Singh,
Advocates.

versus

DALBIR SINGH & ORS. Respondents
Represented by: Mr.Raman Kapur, Sr.Advocate
instructed by Mr.Aviral Tiwari,
Advocate for R-1.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. Undisputedly, respondent No.1 Dalbir Singh, was the recorded bhumidar of 40 bigha and 16 biswa of land comprised in khasras No.1656, 1657, 1658, 1659, 1672, 1673, 1674, 1675 and 1666, Mauja Chattarpur, Tehsil Mehrauli, Delhi (hereinafter referred to as the 'Suit Property') and that his son-in-law Karnail Singh, acting on the basis of the General Power of Attorney allegedly executed by Dalbir Singh, had sold the suit property to respondent No.3, M/s Homestead. Dalbir Singh had filed a suit, bearing No.2830/1991 in this Court, alleging therein that he is the owner of the suit land and that his son-in-law had fraudulently sold the suit property to respondent No.3, M/s Homestead, by forging his signatures on a power of attorney. Prayer made in the suit was to declare the nine

sale deeds executed by his son-in-law, conveying title in the suit property in favor of respondent No.3, as null and void. Due to change in pecuniary jurisdiction of this Court, the aforesaid suit came to be transferred to the court of District Judge, Delhi and got renumbered as Suit No.389/1993 in which suit, on being informed by respondent No.3 that it had sold the property to the appellant, the appellant was impleaded as a defendant.

2. In the year 1994 the respondent No.1 filed an application in suit No.2830/1991 (re-numbered as 389/1993) praying therein that he be permitted to withdraw the said suit stating that he has amicably settled the matter with his son-in-law and respondent No.3.

3. Vide order dated 29.04.1994 the learned Additional District Judge dismissed suit No.2830/1991 (re-numbered as 389/1993) as withdrawn.

4. In the year 1996, respondent No.1 filed an application in suit No.2830/1991(re-numbered as 398/1993) praying therein that the order dated 29.04.1994 dismissing said suit as withdrawn be set aside alleging that his counsel has got withdrawn the said suit by playing fraud upon him.

5. Vide order dated 18.10.1996, the learned Additional District Judge allowed the aforesaid and hence restored suit No.2830/1992.

6. In the meantime, the appellant purchased the suit property from the respondent No.3 by way of nine registered sale deeds and the suit property got mutated in the name of the appellant in the revenue records and it was at this stage

that respondent No.1 impleaded appellant as a co-defendant in suit No.2830/1992.

7. On 21.06.1997 the appellant filed a suit bearing No.300/1997 claiming a decree for permanent injunction before the Additional District Judge, Delhi, alleging therein that he is the owner of the suit property as he has lawfully purchased the same from the respondent No.3. The appellant further alleged that the possession of the suit property has remained with him from the date of its purchase by him and that the respondent No.1, Dalbir Singh, was attempting to dispossess him from the suit property. Prayer made in the suit was to restrain the respondent No.1 from dispossessing the appellant from the suit property. Along with the said suit, the appellant filed an application under Order XXXIX Rule 1 and 2 CPC, praying that respondent No.1 be restrained from dispossessing him from the suit property till the disposal of the suit. Vide order dated 23.06.1997, the learned Additional District Judge granted an ex-parte ad-interim injunction in favour of the appellant.

8. Thereafter the appellant filed an application under Order XXXIX Rule 2A in suit No.300/1997, alleging therein, that respondent No.1 had forcibly dispossessed him from the suit property on 24.06.1997 and since this act was in violation of the order dated 23.06.1997, respondent No.1 be punished.

9. The respondent No.1 not only opposed the prayer in the suit filed by the appellant but even filed a counter claim, pleading that the suit property has been in his possession since the year 1951 and that he has not dispossessed the

appellant from the suit property on 24.06.1997, as claimed by the appellant. Prayer made in the counter claim was to pass a decree of permanent injunction against the appellant from interfering with the possession of the respondent No.1 in the suit property.

10. While the afore-noted suits were pending adjudication, the appellant filed an application under Section 145 of the Code of Criminal Procedure before the concerned Sub-Divisional Magistrate, alleging therein that there exists a dispute between him and respondent No.1 in respect of the suit property which is likely to cause a breach of peace. Vide order dated 11.07.2000, the learned Sub-Divisional Magistrate opined that a dispute exists between the appellant and respondent No.1 in respect of the suit property. Holding that the dispute is likely to cause breach of peace the learned Sub-Divisional Magistrate passed an order dated 14.11.2000 under Section 146 of the Code of Criminal Procedure directing the attachment and appointing the Station House Officer, Police Station Mehrauli as the receiver of the suit property. Thus, the property became custodia legis.

11. Aggrieved by the orders dated 11.07.2000 and 14.11.2000 passed by the learned Sub-Divisional Magistrate, the respondent No.1 filed a revision petition under Sections 397 and 401 of the Code of Criminal Procedure before a learned Single Judge of this Court who allowed the same as per order dated 16.07.2001 and directed possession of the property to be entrusted to respondent No.1.

12. Aggrieved by the order dated 16.07.2001 passed by the learned Single Judge of this Court, the appellant filed a petition seeking Leave to Appeal before the Supreme Court and upon Leave being granted, vide order dated 20.03.2002 the Supreme Court disposed of the appeal in following terms:-

“On perusal of the relevant papers on the record and consideration of the contentions raised by learned counsel for the parties, we are of the view that in the context of the facts of this case, the order passed by the High Court setting aside the order dated 11.7.2000 passed under Section 145(1) as well as the order dated 14.11.2000 passed under Section 146(1) Cr.P.C is unassailable.

However, the High Court was in error in dealing with the Revision Petition as if it was exercising appellate jurisdiction. The High Court has dealt with the developments in the case relating to acquisition of title, the allegations of fraudulent transfers by Karnail Singh and M/s Homestead and the circumstances in which the suit was dismissed as withdrawn. Keeping in view the limited scope of the proceeding under Section 145, Cr.P.C these questions were not material for determination of the main issues in the case. The Court, while dealing with a proceeding under Section 145, Cr.P.C is mainly concerned with possession of the property in dispute on the date of the preliminary order and dispossession, if any, within two months prior to that date; the Court is not required to decide either title to the property or right of possession of the same. The question for determination before the High Court in the present case was one relating to the validity or otherwise of preliminary order passed by the learned Sub-Divisional Magistrate under Section 145(1) Cr.P.C and sustainability of the order of attachment passed under Section 146 (1) Cr.P.C. For deciding the questions it was neither necessary nor relevant for the High Court to have considered the matters relating to title and right of possession

of the property. Further, both the parties in the case have filed suits seeking decree of permanent injunction against each other and in the suit filed by the appellant an order of interim injunction has been passed and an objection petition has been filed by the respondent no.1. The suit and the interim order are pending further consideration before the civil court.

In these circumstances, we are of the view that while maintaining the order of the High Court quashing the preliminary order passed by the Sub-Divisional Magistrate under Section 145(1) and the order of attachment of the property under Section 146(1) Cr.P.C leave should be granted to the parties to approach the civil court for appropriate interim order and the civil court should deal with the application for interim order without being influenced by the observations made/findings recorded by the High Court in the impugned judgment. It is ordered accordingly.

In order to enable the parties to approach the civil court for interim order and with a view to avoid further complication in the matter, the interim order passed by this Court on 18.1.2002 directing status quo regarding possession of the property in dispute to be maintained shall remain in force for a period of three weeks from today.”
(*Emphasis Supplied*)

13. Thereafter, on 06.04.2002 the appellant filed a suit registered as No.802/2002 for declaration on the original side of this Court alleging that:- (i) he is the owner of the suit property as he had lawfully purchased the same from the respondent No.3, the registered owner of the suit property, between the years 1995 and 1996 by way of nine registered sale deeds and the suit property was mutated in his name in the revenue records in the year 1996; (ii) the possession of the suit property has been with him since the date of its purchase by him; (iii) the respondent No.1, through his

attorney Karnail Singh, had sold the suit property to the respondent No.3 in the year 1991, which position is reflected in Jamabandi and Khasra Gidwani for the year 1991; (iv) in view of the steep rise in the price of the suit property the respondent No.1 turned dishonest and attempted to regain the ownership/possession of the suit property by illegal methods; (v) since the respondent No.1 was attempting to interfere with his possession in the suit property he filed suit bearing No.300/1997 seeking a decree of permanent injunction restraining the respondent No.1 from dispossessing him from the suit property, in which suit an ad-interim injunction was granted in his favour; (vi) despite an order passed by the court in suit No.300/1997 restraining the respondent No.1 from dispossessing him from the suit property he i.e. the respondent No.1 forcibly dispossessed him from the suit property; (vii) the respondent No.3 had produced three documents viz., reports dated 01.04.1997 09.05.1997 and 13.05.1997 prepared by DCP, Patwari and Sub-Divisional Magistrate respectively, before learned Single Judge in the revision petition filed by him to show that the power of attorney by virtue of which Karnail Singh had sold the property to respondent No.3 was forged and that the suit property has always remained in the use and occupation of the respondent No.1, which documents are patently false; and (ix) the suit property has been in the possession of the SHO, PS Mehrauli since the passing of the order dated 20.03.2002 by the Supreme Court. Prayer made in the suit was to declare the appellant as the owner of the suit property and the reports dated 01.04.1997 09.05.1997 and

13.05.1997 prepared by DCP, Patwari and Sub-Divisional Magistrate respectively as null and void.

14. In the written statement filed, the respondent No.1 pleaded that:- (i) the suit is barred by virtue of provisions of Section 34 of the Specific Relief Act inasmuch as the appellant ought to have sued for possession of the suit property apart from seeking declaration of his title in the suit property in view of the fact that the appellant was not in the possession of the suit property on the date of the filing of the suit; (ii) the suit is barred by virtue of provisions of Order II Rule 2 CPC as the present suit i.e. suit No.802/2002 and suit No.300/1997 earlier instituted by the appellant against the respondent No.1 are based on "same" cause of action; and (iii) the appellant is not the lawful owner of the suit property for the reason the respondent No.3 who had allegedly conveyed title to the suit property in favour of the appellant had no title in the suit property as the power of attorney purportedly executed by the respondent No.1 in the favor of his son-in-law Karnail Singh by means of which the respondent No.3 claimed to have acquired title to the suit property is a forged document.

15. In view of the fact that the respondent No.1 had challenged the very maintainability of the suit in the written statement filed by him, vide order dated 03.09.2008, the learned Single Judge settled following two preliminary issues relating to maintainability of the suit:-

"(1) Whether the suit for declaration simpliciter, without prayer for possession is maintainable in view of averments made in paragraph 8 of the plaint?

(2) Whether the suit is maintainable as the plaintiff had already filed Suit No.300/1997 before the Civil Judge, Delhi in respect of the land in question?”

16. Vide impugned judgment dated 19.12.2008, the learned Single Judge has decided issue No.1 in favour of the appellant but has decided issue No.2 against him and thus has rejected the plaint filed by the appellant. With respect to issue No.1, it has been held by the learned Single Judge that the suit in question is maintainable in view of the dictum of law declared by the Supreme Court and this Court, in the decisions reported as (1965) 3 SCR 655 Deo Kuer v Sheoprasad Singh and AIR 1971 Del 310 Autolite Financers v Swastika Finance Corporation respectively. Holding that there is no requirement to ask for possession where the property is in *custodia legis*. With respect to second issue, it has been held by the learned Single Judge that a careful reading of the plaints in suits Nos.802/2002 and 300/1997 instituted by the appellant against the respondent No.1 brings out that both the suits are based on ‘same’ cause of action.

17. Aggrieved by the impugned judgment dated 19.12.2008 passed by the learned Single Judge the appellant has filed the present appeal.

18. In support of the appeal, learned senior counsel appearing for the appellant advanced following 2 submissions:-

A That while holding that the suit No.802/2002 filed by the appellant is barred under the provisions of Order II Rule 2 CPC the learned Single Judge has misread the operative

portion of the order dated 20.03.2002 passed by the Supreme Court, in that, the learned Single Judge failed to appreciate that the said suit was filed by the appellant pursuant to the liberty granted to him by the Supreme Court vide order dated 20.03.2002.

B That the learned Single Judge has failed to appreciate the legislative intent behind Order II Rule 2 of the Code of Civil Procedure. Learned counsel argued that the rule is based on the principle that a party should not be vexed twice for the 'one and same' cause of action. The emphasis under the rule is on the same cause of action and not on various causes which may flow from the acts of the parties. In said regards, counsel pointed out the decision of the Privy Council reported as 26 IC 228 Payana v Pannalal, wherein it was held that the philosophy under Order II Rule 2 CPC has to be applied with caution, for the reason the claims which are otherwise legitimate may result in the same being jettisoned and that the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one action, different causes of action, even though they arise from the same transaction. It was argued by the learned counsel that suit No.300/1997 and Suit No.800/2002 are based on 'distinct' cause of action, inasmuch as whereas in suit No.300/1997 the appellant sought to protect his possession in the suit property, in suit No.802/2002 he sought declaration of his title to the suit property and consequently restoration of the possession of the suit property. In support of his submission that the suits Nos.300/1997 and 802/2002 are based on distinct cause of action, learned senior counsel placed strong reliance upon

decision of the Supreme Court reported as AIR 1993 SC 1756 Inacio Martins v Narayan Hari Nayak.

19. To appreciate the first submission advanced by the learned senior counsel for the appellant, we again reproduce the relevant portion of the order dated 20.03.2002 passed by the Supreme Court:-

“On perusal of the relevant papers on the record and consideration of the contentions raised by learned counsel for the parties, we are of the view that in the context of the facts of this case, the order passed by the High Court setting aside the order dated 11.7.2000 passed under Section 145(1) as well as the order dated 14.11.2000 passed under Section 146(1) Cr.PC is unassailable.

However, the High Court was in error in dealing with the Revision Petition as if it was exercising appellate jurisdiction. The High Court has dealt with the developments in the case relating to acquisition of title, the allegations of fraudulent transfers by Karnail Singh and M/s Homestead and the circumstances in which the suit was dismissed as withdrawn. Keeping in view the limited scope of the proceeding under Section 145, Cr.PC these questions were not material for determination of the main issues in the case. The Court, while dealing with a proceeding under Section 145, Cr.PC is mainly concerned with possession of the property in dispute on the date of the preliminary order and dispossession, if any, within two months prior to that date; the Court is not required to decide either title to the property or right of possession of the same. The question for determination before the High Court in the present case was one relating to the validity or otherwise of preliminary order passed by the learned Sub-Divisional Magistrate under Section 145(1) Cr.PC and sustainability of the order of attachment passed under Section 146 (1) Cr.PC. For deciding the questions it was neither necessary nor relevant for the High Court to have

considered the matters relating to title and right of possession of the property. Further, both the parties in the case have filed suits seeking decree of permanent injunction against each other and in the suit filed by the appellant an order of interim injunction has been passed and an objection petition has been filed by the respondent no.1. The suit and the interim order are pending further consideration before the civil court.

In these circumstances, we are of the view that while maintaining the order of the High Court quashing the preliminary order passed by the Sub-Divisional Magistrate under Section 145(1) and the order of attachment of the property under Section 146(1) Cr.PC leave should be granted to the parties to approach the civil court for appropriate interim order and the civil court should deal with the application for interim order without being influenced by the observations made/findings recorded by the High Court in the impugned judgment. It is ordered accordingly.

In order to enable the parties to approach the civil court for interim order and with a view to avoid further complication in the matter, the interim order passed by this Court on 18.1.2002 directing status quo regarding possession of the property in dispute to be maintained shall remain in force for a period of three weeks from today."
(Emphasis Supplied)

20. As is evident from the factual narrative noted herein above, while passing the order dated 20.03.2002, the Supreme Court was dealing with the issue of legality of the order dated 16.07.2001 passed by the learned Single Judge of this Court, setting aside the orders dated 11.07.2001 and 14.11.2001 passed by the Sub-Divisional Magistrate under Sections 145 and 146 Cr.P.C. respectively. After examining the material on record, the Supreme Court came to the conclusion that the learned Single Judge had rightly set aside the orders passed by the Sub-Divisional Magistrate directing

attachment and appointing SHO, PS Mehrauli as the receiver of the suit property. Having resolved said issue, a further problem arose before the Supreme Court i.e. who should be handed over the possession of the suit property. Whereas the appellant contended that he is entitled to get the possession of the suit property since the respondent No.1 had forcibly dispossessed him from the suit property on 24.06.1997, the respondent No.1 contended that he is entitled to the possession of the suit property as the suit property has remained in his possession since the year 1951 and that the appellant never came into possession of the suit property at any point of time. While finding a solution to the said problem, the Supreme Court noted that : *“both the parties in the case have filed suits seeking decree of permanent injunction against each other and in the suit filed by the appellant an order of interim injunction has been passed and an objection petition has been filed by the respondent no.1. The suit and the interim order are pending further consideration before the civil court”*. After noting the factum of pendency of civil suits filed by the appellant and respondent No.1 against each other, the Supreme Court resolved the deadlock with respect to grant of possession of the suit property by granting liberty to the parties to approach the civil court and obtain an interim order in respect of possession of the suit property and directed that the suit property shall remain in the possession of SHO, PS Mehrauli, till such an interim order is obtained by either of the parties. The expression *“both the parties in the case have filed suits seeking decree of permanent injunction against each other and in the suit filed by the appellant an*

order of interim injunction has been passed and an objection petition has been filed by the respondent no.1. The suit and the interim order are pending further consideration before the civil court” in the order dated 20.03.2002 clearly shows that the intention of the Supreme Court was to grant liberty to the parties to approach the civil court (s) where the suits filed by them against each other were pending and obtain an interim order in respect of the possession of the suit property. By no stretch of imagination, it can be said that the Supreme Court intended that the parties should approach the civil court for grant of an interim order by way of filing a fresh suit. Had that been the case, there was no occasion for the Supreme Court to have noted the factum of pendency of suits filed by the parties against each other while granting liberty to them to approach the civil court for grant of an interim order in respect of the possession of the suit property. In this view of the matter, the first submission advanced by the learned counsel for the appellant is fallacious as it is based on a misreading of the order dated 20.03.2002 passed by the Supreme Court.

21. This takes us to the second issue involved in the present appeal: Whether the suit No.802/2002 filed by the appellant was barred in view of the provisions of Order II Rule 2 CPC?

22. Order II Rule 2 of the Code of Civil Procedure, 1908 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 his 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 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.

(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.

Explanation – For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

23. To understand Order II Rule 2 one has to understand what is meant by the expression ‘cause of action’.

24. A plain reading of Order II Rule 2 shows that mandate of law is that when a cause accrues, all actions which are required to be taken; based on the said cause have to be included in one proceeding unless leave of the court is sought, and obtained, under Order II Rule 2 of the Code of Civil Procedure. The policy of law behind this rule is that it is in the interest of the State and the citizens that litigation is brought to an end at the earliest and that no person is vexed twice for the same cause.

25. Cause of action has been explained or defined by judges in different opinions. Language may vary, but content of each decision is that a cause of action is a factual

situation, the existence of which, entitles one person to obtain against another a relief from a court of law. Contours of cause of action mean every fact, which, if traversed, would be necessary for the plaintiff to prove the same in order to obtain a decree.

26. A meaningful reading of expressions 'cause of action' and 'whole of claim' in their textual setting in Order II Rule 2, means, as observed by the Privy Council in the report published as (1914) 41 IA 142 *Payana v Panna Lana* that the rule is directed to secure the exhaustion of reliefs in respect of a cause of action. As explained, the rule does not require inclusion of different causes of action arising from the same transaction.

27. In the decision reported as AIR 1949 PC 78 *Mohammad Khalil Khan v Mahbub Ali Mian* the Privy Council has laid down following five principles for determining the applicability of Order II Rule 2 CPC in a given case:-

“The principles laid down in the cases thus far discussed may be thus summarized:

(1) The correct test in cases falling under Order 2, Rule 2 is “whether the claim in the new suit, is in fact, founded on cause of action distinct from that which was the foundation for the former suit. (**Moonshee Busloor Ruheem v Shumsoonissa Begum**)

(2) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment. (**Read v Brown**)

(3) If the evidence to support the two claims is different then the causes of action are also different (**Brunsdan v Humphery**)

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical (**Brunsdan v Humphery**)

(5) The cause of action has no relation whatsoever to the defence that may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers "to the media upon which the plaintiff asks the court to arrive at a conclusion in his favor". (**Muss. Chand Kour v Partab Singh**)"

28. In the backdrop of above legal principles, we proceed to determine whether the suits Nos.300/1997 and 802/2002 are based upon same cause of action.

29. The prayer made by the appellant in suit No.300/1997 was the grant of a decree of permanent injunction restraining the respondent No.1 from dispossessing the appellant from the suit property. A perusal of the plaint filed by the appellant in suit No.300/1997 brings out that in suit No.300/1997, the appellant sought to resist the alleged invasion of his possession in the suit property by the respondent No.1 by asserting that he is the owner of the suit property as he has purchased the same from the respondent No.3 by way of nine registered sale deeds. Thus, in order to succeed in suit No.300/1997 the appellant was required to prove that he had acquired title to the suit property by having purchased the same from the respondent No.3, a lawful owner of the suit property. Meaning thereby, that the cause of action which had arisen in suit No.300/1997 was relating to the question whether the appellant had acquired title to the suit property.

30. As already noted herein above, suit No.802/2002 was filed by the appellant after he was allegedly dispossessed

from the suit property by the respondent No.1. The prayer made by the appellant in suit No.802/2002 was grant of a decree of declaration that he is the lawful owner of the suit property. A perusal of the plaint filed by the appellant in suit No.802/2002 brings out that in said suit the appellant asserted that he is the owner of the suit property and in view thereof the possession of the suit property which was forcibly taken from him by the respondent No.1 is required to be restored to him. Thus, in order to succeed in suit No.802/2002 the appellant was yet again required to prove that he had acquired title to the suit property, in that, he had purchased the suit property from the respondent No.3, a lawful owner of the suit property. Meaning thereby, that the cause of action which had arisen in suit No.802/2002 was also premised on the question whether the appellant had acquired title to the suit property.

31. In Inacio's case (supra), relied upon by the learned counsel for the appellant, the facts were that on 26.10.1998, one Inacio Martins instituted a suit for declaration and an injunction to restrain the respondents from dispossessing him from the suit property, which suit was dismissed by the trial court on the ground that Inacio Martins was no more in possession of the suit property during the pendency of the suit, and therefore, a suit for mere declaration simpliciter would not lie. Thereafter Inacio filed another suit for restoration of the possession of the suit property on the ground that he was the lawful tenant in the suit property and since he had not been dispossessed in accordance with law, the defendants who were mere trespassers in the suit property are liable to be evicted. The aforesaid suit was

decreed by the trial court, which decree was affirmed by the first appellate court. However, in second appeal, the High Court set aside the decree passed by the trial court, amongst others, on the ground that the second suit filed by the Inacio against the defendants was barred under the provisions of Order II Rule 2 CPC as the same was based on same cause of action as the earlier suit instituted by Inacio against the defendants. In appeal, the Supreme Court set aside the decision of the High Court and affirmed the decree passed by the trial court. The issue relating to Order II Rule 2 CPC was dealt by the Supreme Court in the following terms:-

“5. The next contention which found favour with the High Court was based on the language of Order 2 Rule 2(3) of the Code of Civil Procedure. The submission regarding constructive res judicata was also based on this very provision. Now Order 2 concerns the framing of a suit. Rule 2 thereof requires that the plaintiff shall include the whole of his claim in the framing of the suit. Sub-rule (1) of Rule 2, inter alia, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If he relinquishes any claim to bring the suit within the jurisdiction of any court he will not be entitled to claim that relief in any subsequent suit. However, sub-rule (3) of Rule 2 provides that 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. It is well known that Order 2 Rule 2 CPC is based on the salutary principle that a defendant or defendants should not be twice vexed for the same cause by splitting the claim and the reliefs. To preclude the plaintiff from so doing it is provided that if he omits any part of the claim or fails to claim a remedy available to him in respect of that cause of action he will thereafter be precluded from so doing in any subsequent litigation that he may

commence if he has not obtained the prior permission of the court. But the Rule does not preclude a second suit based on a distinct cause of action. It may not be out of place to clarify that the doctrine of res judicata differs from the rule embodied in Order 2 Rule 2, in that, the former places emphasis on the plaintiff's duty to exhaust all available grounds in support (if his claim while the latter requires the plaintiff to claim all reliefs emanating from the same cause of action. The High Court is, therefore, clearly wrong in its view that the relief claimed is neither relevant nor material. Now, in the fact-situation of the present case, as we have pointed out earlier, the first suit was for an injunction and not for possession of the demised property. The first suit was dismissed on the technical ground that since the plaintiff was not in de facto possession no injunction could be granted and a suit for a mere declaration of status without seeking the consequential relief for possession could not lie. **Once it was found that the plaintiff was not in actual physical possession of the demised property, the suit had become infructuous.** The cause of action for the former suit was not based on the allegation that the possession of the plaintiff was forcibly taken sometime in the second week of June, 1968. The allegation in the former suit was that the plaintiff was a lessee and his possession was threatened and, therefore, he sought the court's assistance to protect his possession by a prohibitory injunction. When in the course of that suit it was found that the plaintiff had in fact been dispossessed, there was no question of granting an injunction and the only relief which the court could have granted was in regard to the declaration sought which the court held could not be granted in view of the provisions of Specific Relief Act. Therefore, the cause of action for the former suit was based on an apprehension that the defendants were likely to forcibly dispossess the plaintiff. The cause of action for that suit was not on the premise that he had in fact been illegally and forcibly dispossessed and needed the court's assistance to be restored to possession. Therefore, the subsequent suit was based on a distinct cause of action not found in the former suit and hence we do not think

that the High Court was right in concluding that the suit was barred by Order 2 Rule 2(3) of the Code of Civil Procedure. It may be that the subject matter of the suit was the very same property but the cause of action was distinct and so also the relief claimed in the subsequent suit was not identical to the relief claimed in the previous suit. The High Court was, therefore, wrong in thinking that the difference in the reliefs claimed in the two suits was immaterial and irrelevant. In the previous suit the relief for possession was not claimed whereas in the second suit the relief was for restoration of possession. That makes all the difference. We are, therefore, of the opinion that the High Court was completely wrong in the view that it took based on the language of Order 2 Rule 2(3) of the Civil Procedure Code. (*Emphasis Supplied*)

32. A reading of the decision in Inacio's case (supra) brings out that the Supreme Court has dealt with the issue relating to applicability of Order II Rule 2 CPC with reference to the meaning of expression 'cause of action', by highlighting the distinct causes on which the two suits were premised.

33. In Inacio's case (supra), in coming to the conclusion that two suits filed by Inacio were based on distinct cause of action the Supreme Court has proceeded on the premise that when first suit for prohibitory injunction filed by Inacio was dismissed as he was not found to be in possession, in affect the suit was infructuous.

34. We may note the decision of the Supreme Court reported as AIR 2008 SC 2033 Anathula Sudhakar v P. Buchi Reddy wherein the Supreme Court had summarized the position in regard to suits for prohibitory injunction relating to immovable property in following terms:-

“17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the

issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case. (Emphasis Supplied)

35. In the instant case, the plaint filed by the appellant in suit No.300/1997 contained averments regarding title of the appellant to the suit property. As already noted herein above, the respondent No.1 had filed a counter claim in suit No.300/1997 claiming himself to be the title-holder of the suit property and denying title of the appellant to the suit property. The right to possession claimed by the plaintiff was based on title and so was the counter claim. The existence of power of attorney purportedly executed by the respondent No.1 in favor of his son-in-law and the fact that son-in-law of the respondent No.1 had sold the suit property to the respondent No.3 by means of said power of attorney were not in dispute. The fact that respondent No.3 had further sold the suit property to the appellant was also not in dispute. The only area of dispute between the parties was whether the power of attorney purportedly executed by the respondent No.1 in favour of his son-in-law was a forged or genuine document. In view of said factual position and afore-noted dictum of law laid down by the Supreme Court in Sudhakar's case (supra), the court dealing with suit No.300/1997 is competent to decide the issue of title of the

suit property and hand over the possession of the suit property to the parties based on finding arrived by it with respect to title of the suit property. In view thereof, suit No.300/1997 has not become infructuous when the appellant allegedly lost possession of the suit property during the pendency of said suit. In these circumstances, the decision of Inacio's case (supra) relied upon by the learned senior counsel for the appellant is clearly distinguishable and the issue has to be decided keeping in view the decision of the Supreme Court in Anathula Sudhakar's case (supra) guided by the observations of the Privy Council in Mohammad Khalil Khan's case (supra).

36. In view of above discussion, we hold that the learned Single Judge has rightly held that suit No.802/2002 was barred under the provisions of Order II Rule 2. We thus affirm the impugned judgment dated 19.12.2008 passed by the learned Single Judge and consequently dismiss the appeal leaving the parties to bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

JULY 18, 2012
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