

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

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Date of decision: 19th November, 2013

+ RFA 499/2013 & CM No.17147/2013 (for condonation of 108 days delay in filing the appeal).

RAGHUBIR KUMAR DHAWAN Appellant

Through: Mr. Prag Chawla, Adv.

Versus

M/S SWIFT MOTORS (P) LTD. AND ORS Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 11th April, 2013 of the Court of the Addl. District Judge-15 (Central) Delhi of dismissal of CS No.48/2012 filed by the appellant for recovery of Rs.6,50,000/- with interest, on the ground of the relief claimed therein being barred by time as well as on the ground of suit being barred by Order II Rule 2 of the CPC.

2. The appeal came up for hearing first on 29th October, 2013 when after hearing the counsel for the appellant/plaintiff it was *prima facie* observed that there was no infirmity in the impugned judgment and decree. On request of the counsel for the appellant/plaintiff the appeal was adjourned to today and the Trial Court record requisitioned. Even though this is a first appeal

which is ordinarily required to be admitted and thereafter heard, considering the nature of the controversy and the ground on which the suit filed by the appellant/plaintiff has been dismissed, it was felt that no purpose would be served in unnecessarily admitting the same and keeping the same pending. The counsel for the appellant/plaintiff has today been heard further. Even though the appeal is accompanied with an application for condonation of 108 days delay in filing the appeal but considering that after hearing counsel for the appellant/plaintiff, no merit is found in the appeal, it is not deemed expedient to deal with the application for condonation of delay.

3. The appellant on 21st April, 2012 instituted the suit from which this appeal arises, for recovery of Rs.6,50,000/- with *pendente lite* and future interest jointly and severally from the first two respondents/defendants i.e. M/s. Swift Motors (P) Ltd. and M/s. GE Capital TFS Ltd., pleading:-

- (a). that the appellant/plaintiff is carrying on business of transport in the name and style of M/s. Punjab Road Line Transport Corporation;
- (b). that the appellant/plaintiff was in the month of October, 2002 approached by Mr. Sanjiv Trehan, Director of the

respondent/defendant no.1 for sale of two trucks bearing No.HR-38D-5737 and HR 38D-5738; after negotiations a total sale consideration of Rs.4 lacs was agreed;

- (c). that as the said two trucks were hypothecated with the respondent/defendant no.2, a tripartite meeting of the appellant/plaintiff, Mr. Sanjiv Trehan of the respondent/defendant no.1 and the representative of the respondent/defendant no.2 took place in the office of the respondent/defendant no.2 in which the respondent/defendant no.2 agreed to issue a No Objection Certificate (NOC) in respect of the said two trucks if the appellant/plaintiff paid an amount of Rs.2,50,000/- over and above the amount which was due and payable to the respondent/defendant no.2 by the respondent/defendant no.1;
- (d). that in terms of the above, the appellant/plaintiff paid a total sum of Rs.2,50,000/- vide cheque dated 12th November, 2002 to the respondent/defendant no.2 and a sum of Rs.4 lacs to the respondent/defendant no.1 vide cheque dated 7th October, 2002 and the possession of the said two trucks was handed over to

the appellant/plaintiff and the appellant/plaintiff remains in possessions of the said two trucks;

- (e). that the respondent/defendant no.1 also executed all relevant documents pertaining to the transfer of the said two trucks in favour of the appellant/plaintiff and also assured that NOC will be got issued from the respondent/defendant no.2;
- (f). that however NOC was not given to the appellant/plaintiff and upon the appellant/plaintiff approaching the respondent/defendant no.1, they started avoiding the appellant/plaintiff; the respondent/defendant no.2 also refused to give NOC to the appellant/plaintiff;
- (g). that the appellant/plaintiff thus instituted a suit for permanent and mandatory injunction against the two respondents/defendants (though the appellant/plaintiff has not pleaded the date of filing of the said suit but on perusal of the record the same is found to have been instituted on 23rd August, 2004);

- (h). that the said suit was however dismissed vide judgment dated 24th April, 2010; and,
- (i). that on account of non-issuance of NOC, the appellant/plaintiff is unable to make use of or sell the said two trucks and the same are nothing more than metal scrap for the appellant/plaintiff,

further pleading that the cause of action for the suit last accrued on the dismissal on 24th April, 2010 of the suit for permanent and mandatory injunction, the suit from which this appeal arises, for recovery of Rs.6,50,000/- jointly and severally from the respondents/defendants was filed.

4. The appellant/plaintiff after the institution of the suit filed an application under Order 1 Rule 10 of the CPC for impleadment of Shri Gangadhar Udayn Dravid and Ms. Anuradha Dravid both Directors of the respondent/defendant no.1 as respondents/defendants no.3&4 to the suit. Since till then the respondents/defendants no.1&2 had not been served with the summons of the suit, the said application was allowed vide order dated 29th November, 2012 and Shri Gangadhar Udayn Dravid and Ms. Anuradha Dravid were impleaded as defendants no.3&4.

5. The respondents/defendants no.1,3&4 were not served with the summons of the suit. The respondent/defendant no.2 M/s. GE Capital TFS Ltd. contested the suit by filing a written statement on the ground:-

- (i). that there is no privity between the appellant/plaintiff and the respondent/defendant no.2;
- (ii). that the respondent/defendant no.1 had taken a loan from the respondent/defendant no.2 on 9th June, 1999 for an amount of Rs.5,41,702/- for financing of each of the two trucks;
- (iii). that the respondent/defendant no.1 defaulted in payment of EMIs and complaint cases under Section 138 of the Negotiable Instruments Act, 1881 were filed which, till the filing of the written statement on 1st February, 2013 were still pending;
- (iv). that unless and until the loan amount is cleared off, the vehicles cannot be sold by the respondent/defendant no.1;
- (v). that the respondent/defendant no.2 had the right to re-possess the vehicles under the Loan Agreement and the action of the respondent/defendant no.1 of transferring possession of the vehicles to the appellant/plaintiff was illegal and invalid;

- (vi). that the suit for recovery of Rs.6,50,000/- was barred by time;
- (vii). denying that any payment of Rs.2,50,000/- was made by the appellant/plaintiff to the respondent/defendant no.2;
- (viii). that the suit was also barred by principles of *res judicata* and constructive *res judicata* on the ground of dismissal of the earlier suit filed by the appellant/plaintiff; and,
- (ix). denying any tripartite meeting as alleged by the appellant/plaintiff.

6. The appellant/plaintiff filed a replication to the written statement aforesaid of the respondent/defendant no.2 reiterating his case and denying the contents of the written statement; with respect to the defence of *res judicata*, it was stated that the relief claimed in the instant suit was different from the relief claimed in the earlier suit; with respect to the defence of limitation, it was pleaded that the suit was not required to be filed within three years of 12th November, 2002 when the amount of Rs.2,50,000/- was paid by the appellant/plaintiff to the respondent/defendant no.2 since the suit was not based on any loan or financial transaction but on account of breach of implied terms and conditions of the sale transaction, since the

respondent/defendant no.2 had failed to issue NOC despite receiving the sum of Rs.2,50,000/- from the appellant/plaintiff. It was further pleaded that since the suit for mandatory injunction for the relief of directing the respondent/defendant no.2 from issuing NOC had been dismissed on 24th April, 2010 and whereafter the only remedy available to the appellant/plaintiff was to seek refund of money paid, the suit filed within three years of 24th April, 2010 was within limitation.

7. The learned Addl. District Judge on the basis of the pleas aforesaid in the written statement of the respondent/defendant no.2, vide order dated 19th March,2013 framed the following two preliminary issues:-

- “1. Whether the suit is hit by principles of res judicata? OPD*
- 2. Whether the suit is within limitation? OPP*

and observing that the said issues did not require any evidence as they were pure questions of law, listed the suit for arguments on the said issues.

8. The learned Addl. District Judge has decided the two preliminary issues against the appellant/plaintiff and resultantly has dismissed the suit, finding/observing/holding:-

- A. that according to the appellant/plaintiff also, the cause of action initially accrued in the year 2002; mere issuance of reminders by the appellant/plaintiff to issue NOCs will not enhance the limitation;
- B. that the relief of recovery of money was available to the appellant/plaintiff at the time of filing the earlier suit but the appellant/plaintiff neither claimed the said relief nor sought any permission to sue subsequently for the said relief; thus the instant suit was barred by Order II Rule 2 CPC;
- C. the respondents/defendants no.1&2 were parties to the earlier suit also which was dismissed on 24th April, 2010 observing that there was no question of issuance of NOCs to the appellant/plaintiff and the findings in the earlier suit are binding on the respondents/defendants no.3&4 also;
- D. that the addition of respondents/defendants no.3&4 to the instant suit, who were sued only as Directors of the respondent/defendant no.1, would not make any difference; and,

E. that the issue in question had already been adjudicated upon in the earlier suit.

9. The appellant/plaintiff is not found to have placed on the Trial Court record any record of the earlier suit filed by him against the respondents/defendants no.1&2. However the respondent/defendant no.2 is found to have placed on the Trial Court record, a copy of the judgment dated 24th April, 2010 supra in the earlier suit being Suit No.188-04 bearing Unique Id No.02401C5627942004 filed by the appellant/plaintiff and a perusal whereof shows:-

- (I). that the case set up by the appellant/plaintiff in the plaint in the earlier suit was the same as in the plaint in the instant suit;
- (II). that the appellant/plaintiff in the earlier suit had sought the relief of permanent injunction restraining the respondents/defendants no.1&2 for re-possessing the trucks and of mandatory injunction directing the respondents/defendants no.1 &2 to issue NOC to enable the appellant/plaintiff to have the said trucks transferred in his name;

- (III). that the respondent/defendant no.1 in its written statement to the earlier suit had denied any sale of the two trucks to the appellant/plaintiff and also denied having executed any documents of transfer of the said two trucks in favour of the appellant/plaintiff;
- (IV). that the respondent/defendant no.2 in its written statement to the earlier suit had denied any tripartite meeting as alleged by the appellant/plaintiff and also denied having ever agreed to issue NOC in favour of the appellant/plaintiff and had controverted the entitlement of the respondent/defendant no.1 to sell the said two trucks in favour of the appellant/plaintiff; the respondent/defendant no.2 had also denied receipt of Rs.2,50,000/- from the appellant/plaintiff.
- (V). on the pleadings of the parties, the following issues were framed on 19th January, 2005 in the earlier suit:-

“1) Whether the suit is bad for non-joinder of necessary parties as alleged in preliminary objection no. 4 of WS of defendant no. 1? OPD-1

2) Whether suit is not maintainable against defendant no. 2 in view of preliminary objection no. 1 of the WS of defendant no. 2? OPD-2

3) *Whether the suit is not maintainable in view of preliminary objection no. 4 of WS of defendant no. 2 ? OPD-2*

4) *Whether the plaintiff is entitled to the decree of permanent injunction as prayed for ? OPP*

5) *Whether plaintiff is entitled to the decree of mandatory injunction as prayed ? OPP*

6) *Relief."*

(VI). that though the appellant/plaintiff filed his affidavit by way of examination-in-chief but despite grant of several opportunities for more than 40 months, failed to either present himself as a witness or examine any other witness and the evidence of the appellant/plaintiff was closed vide order dated 7th August, 2009;

(VII). that the respondents/defendants no.1&2 also had not led any evidence; and,

(VIII). that since the onus of the main issue being Issue No.(4) was on the appellant/plaintiff and the appellant/plaintiff had failed to lead any evidence, the said issue was decided against the appellant/plaintiff and resultantly the suit was dismissed.

10. The counsel for the appellant/plaintiff has argued that the instant suit from which this appeal arises is not barred by the principles of *res judicata*

because while the relief in the earlier suit was of mandatory injunction directing the issuance of NOC, the relief in the instant suit was of recovery of Rs.6,50,000/- paid by the appellant/plaintiff. It is further argued that the cause of action for the appellant/plaintiff to recover back the price paid by him for the said two trucks occurred only when the relief earlier claimed of issuance of NOC to enable the appellant/plaintiff to have the trucks transferred to his name was denied to him by dismissal of the earlier suit filed by the appellant/plaintiff and prior thereto there was no cause of action for the appellant/plaintiff to recover back the price. It is yet further argued that the limitation for such a suit would be governed by Article 47 of the Schedule to the Limitation Act, providing limitation of three years for a suit for money paid upon an existing consideration which afterwards fails, commencing from the date of failure of consideration. It is contended that the consideration for the agreement of the appellant/plaintiff with the respondents/defendants no.1&2 was issuance of NOC by the respondent/defendant no.2 to enable the appellant/plaintiff to have the trucks transferred in his name and whereafter only the appellant/plaintiff can beneficially ply the same and the said consideration failed only when the

relief of issuance of NOC was denied to the appellant/plaintiff by dismissal of the suit earlier filed by him in this regard.

11. The counsel for the appellant/plaintiff however fairly admits that the case is not so pleaded in the plaint.

12. Irrespective of the same, I am not satisfied. The judgment of a Court, of dismissal of a suit, cannot furnish a cause of action to any party for legal proceedings save for availing remedies against the said judgment. The Supreme Court recently in *Union of India Vs. M.K. Sarkar* (2010) 2 SCC 59, though in the context of a direction of the Court to consider a representation, held that the date of such decision cannot be considered as furnishing a fresh cause of action for reviving a dead issue or time barred dispute and that the issue of limitation or delay and laches is to be considered with reference to the original cause of action and not with reference to the date on which the order is passed in compliance of a Court's direction. It was yet further held that neither a Court's direction issued without examining the merits, to consider a representation, nor a decision given in compliance of such direction will extend the limitation or erase the delay and laches.

13. Order II Rule 2 of the CPC requires a suit to include the whole of the claim which a plaintiff is entitled to make in respect of a cause of action and further provides that where the plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted. It further clarifies that where a person is entitled to more than one relief in respect of the same cause of action, he may sue for all or any of such reliefs but if omits except with the leave of the Court to sue for all such reliefs, he shall not afterwards sue for any relief omitted.

14. The learned Addl. District Judge is correct in holding the provisions of Order II Rule 2 of the CPC to squarely apply to the facts of the present case. Even if the contents of the plaint are to be believed, the appellant/plaintiff on the failure of the respondents/defendants no.1&2 to provide NOC to enable the appellant/plaintiff to have the trucks transferred in his name, was entitled to the relief of directing the respondents/defendants no.1&2 to furnish NOC to him and alternatively to the relief of recovery of the sale consideration claimed to have been paid by him. The appellant/plaintiff however chose to sue only for the relief of mandatory injunction and omitted to sue for the alternative relief of recovery of the monies claimed to have been paid by him. He can not subsequently be

allowed to sue for the relief of recovery which he had omitted to make in the first suit.

15. Though the counsel for the appellant/plaintiff at the time of arguments has purported to make out a case of cause of action for the relief of mandatory injunction and the cause of action for the relief of recovery of money to be different, with the cause of action for the relief of recovery of money arising only upon the denial of the relief of mandatory injunction but if the said argument were to be accepted then the provision of Order II Rule 2 would not apply to cases where the appellant/plaintiff is entitled to claim alternative reliefs and which is directly contrary to the language of Order II Rule 2 of the CPC.

16. The cause of action for the relief of recovery of the sale price claimed to have been paid also accrued to the appellant/plaintiff on the same day when the cause of action for the relief of mandatory injunction accrued. Significantly the relief of mandatory injunction also has been denied to the appellant/plaintiff not on any other ground but on the ground of the appellant/plaintiff having failed to prove the transaction of sale of the trucks on representations alleged by the respondents/defendants no.1&2 to the appellant/plaintiff. The appellant/plaintiff in the garb of claiming the

alternative relief cannot have a second chance to prove his case, which he has failed to prove in the first round. The Supreme Court recently in *Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd.* (2013) 1 SCC 625 has reiterated that Order II Rule 2 engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason.

17. The suit from which this appeal arises, for this reason is also found to be in abuse of the process of the Court. The appellant/plaintiff, to be entitled to the relief of permanent and mandatory injunctions claimed in the earlier suit, was required to prove sale/transfer of the trucks by the respondent/defendant no.1 on the representation of the respondent/defendant no.2 that NOC would be issued to the appellant/plaintiff. The appellant/plaintiff failed to prove the same. It matters not whether the failure was on account of leading no evidence or on account of though leading evidence but being not believed. The effect is the same. The appellant/plaintiff to be entitled to the relief of recovery of money, is required to prove the same facts and for which he cannot be permitted a second chance as claimed.

18. There is thus no error in the impugned judgment and decree.
19. The appeal thus fails and is dismissed.
20. However notice having not been issued to the respondents/defendants,
no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 19, 2013
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