

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

Date of decision: 18th February, 2014.

+ **RFA 353/2012**

SUCHA SINGH SODHI (DECEASED)

THROUGH LRS

.....Appellant

Through: Mr. Bheem Sain Jain, Adv.

Versus

BALDEV RAJ WALIA & ANR

..... Respondents

Through: Mr. S.K. Bhaduri & Ms. Kiran
Dharam, Advs. for R-1.

Mr. B.B. Gupta & Mr. Udyan
Srivastava, Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The appeal impugns the judgment and decree dated 8th May, 2012 of dismissal of CS No.135/2008, instituted on 25th February, 1999, by Sh. Sucha Singh Sodhi, predecessor-in-interest of the four appellants, for specific performance of an Agreement of Sale of immovable property, consequent to rejection (under Order VII Rule 11 of Civil Procedure Code (CPC), 1908 and on a preliminary issue framed in that regard) of the plaint as barred by Order II Rule 2 of the CPC.

2. The appeal was accompanied with an application for condonation of 68 days delay in re-filing the same. Notice only of the said application was

issued to the two respondents. The respondent No.1 was proceeded against *ex-parte* in the appeal. However, on 26th November, 2013 the counsels for each of the two respondents appeared and after hearing them, the delay in re-filing the appeal was condoned and the appeal admitted for hearing and considering the nature of the controversy, arguments were finally heard in the appeal and the judgment reserved.

3. The predecessor-in-interest of the appellants, on 25th February, 1999 as aforesaid, instituted the suit from which this appeal arises, only against the respondent/defendant No.1 Sh. Baldev Raj Walia, pleading:

(i) that the respondent/defendant No.1 vide Agreement to Sell dated 27th February, 1996 had agreed to sell the building consisting of basement and half portion of the first floor constructed on Plot No.1, admeasuring 169 sq. yds. situated in Gali No.9, Sanwal Nagar P.O. Raipur Khurd, New Delhi to the predecessor-in-interest of the appellants for a consideration of Rs.11,50,000/- out of which a sum of Rs.2,00,000/- was paid at the time of Agreement to Sell and the balance Rs.9,50,000/- was payable within 120 days;

(ii) that the respondent/defendant No.1 on 29th February, 1996 i.e. within two days of the Agreement to Sell took a further sum of

Rs.2,00,000/- in cash from the predecessor-in-interest of the appellants/plaintiffs, leaving a balance sum of Rs.7,50,000/- to be paid at the time of execution and registration of title deed and also delivered possession of the property agreed to be sold to the predecessor-in-interest of the appellants/plaintiffs;

(iii) that the predecessor-in-interest of the appellants/plaintiffs after so taking over possession, carried out extensive repairs, additions and alterations in the basement as well as in the half portion of the first floor at a cost of Rs.4,00,000/-;

(iv) that though the predecessor-in-interest of the appellants/plaintiffs was always ready and willing to perform his duty and in this regard approached the respondent/defendant No.1 several times but the respondent/defendant No.1 avoided the same;

(v) that on 10th May, 1996, the respondent/defendant No.1 requested for payment of a further sum of Rs.50,000/- out of sale consideration but the predecessor-in-interest of the appellants/plaintiffs was reluctant since the respondent/defendant No.1 had been avoiding completion of transaction; however the respondent/defendant No.1 handed over all the original

papers/documents relating to the property and also agreed to complete the transaction at the earliest and in consideration whereof, the predecessor-in-interest of the appellants/plaintiffs paid a further sum of Rs.36,000/- in cash on 10th May, 1996;

(vi) that however the respondent/defendant No.1 issued letters dated 22nd June, 1996 and 24th June, 1996 stating that the period of 120 days agreed for completion of the transaction was over and as the balance sale consideration had not been paid, the Agreement dated 27th February, 1996 automatically stood cancelled and the advance paid of Rs.2,00,000/- forfeited;

(vii) that the time of 120 days stipulated in the Agreement to Sell was not the essence of the contract;

(viii) that apprehending alienation of the property and threat to his possession over the property, the predecessor-in-interest of the appellants/plaintiffs on 5th October, 1996 filed a suit in the Court of the Civil Judge, Delhi against the respondent/defendant No.1 for permanent injunction but the said suit was withdrawn on 27th November, 1998 with liberty to file proper suit before a proper forum;

(ix) that the predecessor-in-interest of the appellants/plaintiffs had

always been ready and willing to perform his part of the Agreement;

4. The respondent/defendant No.1 contested the suit by filing a written statement, on the grounds:

(a) that the suit was barred by Order II Rule 2 of the CPC owing to the predecessor-in-interest of the appellants/plaintiffs having earlier filed a suit for injunction and which suit was dismissed as withdrawn; that the cause of action, if any for the relief of specific performance had already been waived by the predecessor-in-interest of the appellants/plaintiffs by not claiming the said relief of specific performance in the earlier suit;

(b) that the respondent/defendant No.1 had prior to the institution of the suit sold the property to Sh. Sanjay Ahuja on 16th August, 1996 and delivered possession thereof to the said Sh. Sanjay Ahuja and the suit against the respondent/defendant No.1 was thus infructuous;

(c) denying that there was any Agreement to Sell dated 27th February, 1996 and pleading that the predecessor-in-interest of the appellants/plaintiffs had on 27th February, 1996 given a friendly loan of Rs.2,00,000/- to the respondent/defendant No.1 and in consideration thereof, obtained a letter dated 27th February, 1996 from

the respondent/defendant No.1 and with the understanding that on return of the loan, the said letter will be destroyed;

(d) that the said letter dated 27th February, 1996 signed by the respondent/defendant No.1 only did not constitute an Agreement in law;

(e) that the predecessor-in-interest of the appellants/plaintiffs however subsequently turned dishonest and refused to receive refund from the respondent/defendant No.1 of the loan of Rs.2,00,000/-;

(f) that on an earlier occasion, the respondent/defendant No.1 and his other partner has mortgaged part of the ground floor in favour of the predecessor-in-interest of the appellants/plaintiffs and during that time some documents in respect of the property were also given to the predecessor-in-interest of the appellants/plaintiffs;

(g) that the predecessor-in-interest of the appellants/plaintiffs even otherwise was in breach of the terms of the letter dated 27th February, 1996;

(h) denying receipt of further amounts of Rs.2,00,000/- and Rs.36,000/- in cash;

(i) denying delivery of possession of the property to the predecessor-in-interest of the appellants/plaintiffs or that any works had been carried out therein;

(j) that even if the letter dated 27th February, 1996 was to be treated to be an Agreement to Sell, the predecessor-in-interest of the appellants/plaintiffs having failed to pay the entire sale consideration within the period of 120 days, as mentioned therein, was not entitled to sue for specific performance;

(k) denying that any documents of title of the property were handed over on 10th May, 1996;

(l) denying that the predecessor-in-interest of the appellants/plaintiffs was ever in a position to pay the balance amount, as per the letter dated 27th February, 1996;

(m) that the respondent/defendant No.1 had sent the letters dated 22nd June, 1996 and 24th June, 1996 to prevent the predecessor-in-interest of the appellants/plaintiffs from misusing the letter dated 27th February, 1996;

(n) that had there been any Agreement to Sell between the parties, the predecessor-in-interest of the appellants/plaintiffs should have

immediately on receipt of the letters dated 22nd June, 1996 and 24th June, 1996, offered the balance sale consideration;

(o) denying that any liberty was given to the predecessor-in-interest of the appellants/plaintiffs while withdrawing the earlier suit for injunction to file the suit for specific performance;

(p) denying that predecessor-in-interest of the appellants/plaintiffs had been ready and willing.

5. Sh. Sucha Singh Sodhi predecessor-in-interest of the appellants/plaintiffs died soon after the institution of the suit and the appellants were substituted in his place vide order dated 11th November, 2003. Upon the respondent/defendant No.1 filing the written statement aforesaid with the plea of having sold the property, he was vide order dated 18th March, 2004 directed to furnish full particulars of the purchaser. The appellants/plaintiffs thereafter filed an application for impleadment of the said purchaser as defendant No.2 and which application was allowed on 22nd March, 2007. Though notice to the respondent/defendant No.2 Sh. Sanjay Ahuja was sent also of the application under Order I Rule 10 CPC for his impleadment and in which he had been proceeded against *ex-parte* but pursuant to his impleadment and upon issuing of fresh notice of the suit to

him, he appeared and filed his written statement on 10th October, 2008, on the same lines as the written statement of the respondent/defendant No.1 and additionally pleading that though the predecessor-in-interest of the appellants/plaintiffs was informed of the sale of the property in favour of the respondent/defendant No.2 in the written statement dated 20th November, 1996 filed by the respondent/defendant No.1 in the earlier suit for injunction but still did not implead the respondent/defendant No.2 in the suit for specific performance and also did not take any action for impugning the transfer by the respondent/defendant No.1 of the property to the respondent/defendant No.2 and the suit against the respondent/defendant No.2 was thus barred by time.

6. The appellants/plaintiffs filed replication to the written statement of the respondent/defendant No.2 but need is not felt to advert thereto.

7. On the pleadings of the parties, the following issues were framed in the suit on 23rd October, 2009:

*“1. Whether the plaintiff is entitled to specific performance of the agreement to sell dated 27.02.1996 in respect of the suit property constituted in plot bearing no.1, Gali No.9, Sanwal Nagar, P.O. Raipur Khurd, New Delhi, measuring 169 sq. yds?
OPP*

2. Whether the plaintiff is estopped from filing the present suit? OPD

3. *Whether the suit is liable to be rejected u/O 7 Rule 11 CPC? OPD*
4. *Whether the suit is bared u/O 2 Rule 2 CPC? OPD*
5. *Whether the suit is barred by limitation? OPD*
6. *Whether no cause of action accrued to the plaintiff for filing the present suit? OPD*
7. *Relief.”*

8. The respondent/defendant No.2 along with his written statement had also filed an application under Order VII Rule 11 of the CPC for rejection of the plaint as barred by Order XXIII Rule 1 and Order II Rule 2 of the CPC. Notwithstanding the framing of the issues, the said application was directed to be heard.

9. The learned Additional District Judge (ADJ), by the impugned order has decided Issue No.4 supra and allowed the application under Order VII Rule 11 of the CPC and held the suit filed by the predecessor-in-interest of the appellants/plaintiffs to be barred by Order II Rule 2 of the CPC, finding/observing/holding:

(A) that admittedly the predecessor-in-interest of the appellants/plaintiffs has earlier filed a suit for permanent injunction on 11th October, 1996, based upon the same facts;

(B) that the predecessor-in-interest of the appellants/plaintiffs on 27th November, 1998 made a statement before the learned Civil Judge, Delhi before whom the said suit for injunction was pending, that he wanted to withdraw the said suit and the said suit was disposed of with the following order:

“It is submitted by the counsel for plaintiff that he wants to withdraw the suit from this court to be filed before the appropriate forum. Counsel for defendant has no objection for withdrawal of the suit by the plaintiff, however asking for cost incurred.

Statements of both the parties have been recorded separately. Parties shall be bound by their statements as undertakings in the court.

I have perused the records of the file and statements of both the parties. The plaintiff is allowed to withdraw the suit subject to cost of Rs.500/- to be paid to the defendant. Cost paid in the court.

After completion, file be consigned to the record room.”

(C) that from a perusal of the aforesaid order, it was apparent that no opportunity was granted to the appellants/plaintiffs to file a separate suit for specific performance based upon the same cause of action;

(D) that this Court in **Ashok Aggarwal Vs. Bhagwan Das Arora** AIR 2001 Delhi 107 has held that when in the plaint in the earlier suit

for injunction also, it is averred that the defendant was not performing the Agreement to Sell and was trying to sell the property to some other party and when there is no change in circumstances between the first and the second suit for specific performance, the second suit is barred by Order II Rule 2 of the CPC and the said judgment applied squarely to the facts of the present case, since while dismissing the suit for injunction earlier filed, the appellants/plaintiffs were not granted any leave to sue for the relief of specific performance;

(E) that the earlier suit for injunction was based upon the same bundle of facts and cause of action;

(F) that the appellants/plaintiffs had not sought any amendment of the plaint to make any averment against the respondent/defendant No.2 and there were thus no allegation/relief sought against the respondent/defendant No.2 and the suit did not disclose any cause of action against the respondent/defendant No.2 and the plaint qua the respondent/defendant No.2 was liable to be rejected on this ground also.

10. The counsel for the appellants/plaintiffs has:

(I) invited attention to the Agreement to Sell dated 27th February,

1996 in hand and the typed version whereof is as under:

“I BALDEV RAJ WALIA S/o Shri Munshi Ram Walia, R/o D-36, Pandav Nagar, New Delhi is joint owner property bearing No.9 measuring 169 sq. yards situated at Sanwal Nagar P.O. Raipur Khurd, New Delhi. S.S. Sodhi S/o K.S. Sodhi R/o 2/31 Kalkaji Extension, New Delhi. I agreed to sold my share to Mr. S.S. Sodhi S/o K.S. Sodhi R/o 2/31, Kalkaji Extension, New Delhi for Rs.11,50,000/- (Eleven Lakh Fifty Thousand only), received cheque Rs.2,00,000/- (Rs. Two Lakh only) as advance payment. The balance Rs.9,50,000/- (Rs. Nine Lakh Fifty Thousand) will be made within 120 days. Advance of Rs. 2 lakh (Rs. Two Lakh) made vide Cheque No.368119 drawn on United Bank of India, Lajpat Nagar.

Dated 27/2/96

Sd/-

27/2/96”

(II) argued that the suit for specific performance instituted on 25th February, 1999 was within three years of the Agreement to Sell;

(III) invited attention to the statements of Sh. Sucha Singh Sodhi predecessor-in-interest of the appellants and of the counsel for the respondent/defendant No.1 recorded on 27th November, 1998 in the injunction suit and which are as under:

“Statement of Sh. Sucha Singh, Plaintiff in the presence of Counsel Sh. K.S. Kataria.

On S.A.

I want to withdraw the suit for Injunction as I want to file the appropriate proceedings before the competent forum. As the suit is lacking for jurisdiction in this court. I am allowed to withdraw the suit with liberty to file it with the appropriate forum.

RO & AC

CJ Delhi.

Statement of Counsel Sh. D.K. Gupta for the defendant without oath:-

I have heard the statement of the plaintiff in the presence of his counsel. I have no objection for withdrawal subject to cost incurred by the defendant for contesting the suit for a long period.

RO & AC

CJ Delhi.”

(I may mention that the counsel for the respondent/defendant No.1 has also acknowledged receipt of Rs.500/- as costs on the sheet on which his statement aforesaid was recorded)

(IV) invited attention to the plaint dated 11th October, 1996 in the suit for injunction and contended that the cause of action for the relief claimed in the suit from which this appeal arises for the relief of specific performance was different from the cause of action for the relief claimed in the earlier suit for injunction;

(V) relied on judgment dated 2nd July, 2008 of this Court in I.A. No.2950/2005 in CS(OS) No.1132/2004 titled **Sh. Suresh Kakkar Vs. Sh. Mahender Nath Kakkar** to contend that the plea of Order II Rule 2 of the CPC cannot be decided at the stage of Order VII Rule 11 of the CPC.

11. Per contra, the counsel for the respondent/defendant No.2 has contended:

(a) that the predecessor-in-interest of the appellants/plaintiffs in the plaint dated 11th October, 1996 in the earlier suit for injunction admitted receipt of notices dated 22nd June, 1996 and 24th June, 1996 from the respondent/defendant No.1 to the effect that time of 120 days for completion of the sale had expired and on the failure of the predecessor-in-interest of the appellants/plaintiffs to pay the balance sale consideration, the advance paid of Rs.2,00,000/- had been forfeited and wherefrom it is evident that the cause of action for the relief of specific performance had accrued to the predecessor-in-interest of the appellants/plaintiffs;

(b) that the predecessor-in-interest of the appellants/plaintiffs was in the written statement filed by the respondent/defendant No.1 to the

earlier suit for injunction informed of the respondent/defendant No.2 being in possession of the property from 16th August, 1996 and execution on 16th August, 1996 in favour of the respondent/defendant No.2 of the Agreement to Sell, General Power of Attorney, Affidavit etc. with respect to the property but still did not implead the respondent/defendant No.2 as defendant in the suit for specific performance and the suit insofar as against the respondent/defendant No.2, instituted on the date of his impleadment i.e. 22nd March, 2007 was barred by time;

(c) reliance is placed on ***Azhar Sultana Vs. B. Rajamani*** (2009) 17 SCC 27 to contend that from the respondent/defendant No.1 being in possession of the property, the appellants/plaintiffs are deemed to have notice under Section 3 of the Transfer of Property Act, 1882 of creation of rights in the property in his favour and the appellants/plaintiffs inspite thereof did not implead him as defendant in the suit for specific performance and are not entitled to the relief of specific performance on this ground alone.

12. The respondent/defendant No.2 having not pleaded execution of any sale/transfer deed of the property by the respondent/defendant No.1 in his

favour, it was enquired from the counsel for the respondent/defendant No.2 during the hearing, whether not in view of the judgment of the Supreme Court in ***Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana*** (2012) 1 SCC 656, the respondent/defendant No.2 was not even required to be joined as a party to the conveyance of the property in favour of the appellants/plaintiffs, in the event of the appellants/plaintiffs ultimately succeeding in the suit and if so, how the question of limitation raised, was relevant. In response thereto, the counsel for the respondent/defendant No.2 has after the close of hearing filed copy of a judgment of a learned Single Judge of this Court in ***Hardip Kaur Vs. Kailash*** 193 (2012) DLT 168 where after considering the said dicta of the Supreme Court, it was held that though a purchaser of immovable property vide Agreement to Sell, Power of Attorney etc. may not be a classical owner as would be an owner under registered Sale Deed but still he would have better rights/entitlement to possession than the person who is in actual physical possession.

13. The counsel for the respondent/defendant No.2 after close of hearing has also filed copy of a judgment of a learned Single Judge of Gauhati High Court in ***Smt. Usha Rani Banik Vs. Haridas Das*** AIR 2005 Gauhati 1 laying down that where the earlier title suit seeking confirmation of

possession and for permanent injunction is based on the same cause of action as mentioned in the subsequent suit for specific performance, the subsequent suit is hit by the provisions of Order II Rule 2 CPC.

14. As far as the contention raised by the counsel for the respondent/defendant No.2 of the suit insofar as against the respondent/defendant No.2 being barred by time is concerned, neither has the learned ADJ given any finding thereon nor is the respondent/defendant No.2 found to have taken the same as a ground in his application under Order VII Rule 11 of the CPC for rejection of the plaint, which was sought only on the grounds of the plaint being barred by Order XXIII Rule 1 and Order II Rule 2 of the CPC and not disclosing any cause of action against respondent/defendant no.2. In this appeal, no enquiry for the first time on the aspect can be entertained and the ambit of this appeal is limited to gauging the correctness of the conclusion arrived at by the learned ADJ of the suit for specific performance being barred under Order II Rule II CPC owing to the earlier suit for injunction filed by the appellants/plaintiffs and on the ground of the plaint not disclosing any cause of action against the respondent/defendant No.2 for the reason of the appellants/plaintiffs in spite of impleading the respondent/defendant No.2, not amending the plaint to

incorporate any pleas or reliefs therein qua/against the respondent/defendant No.2.

15. I may at the outset deal with the contention of the counsel for the appellants/plaintiffs of the plea of Order II Rule 2 CPC being not entertainable at the stage of Order VII Rule 11 of the CPC and which contention is founded on the judgment of a learned Single Judge of this Court in **Sh. Suresh Kakkar** supra. However **Sh. Suresh Kakkar** in turn relies on **Gurbux Singh Vs. Bhooralal** AIR 1964 SC 1810 and **Bengal Waterproof Ltd. Vs. Bombay Waterproof Manufacturing Company** (1997) 1 SCC 99.

16. Though the Supreme Court in **Gurbux Singh** supra undoubtedly held that a plea under Order II Rule 2 CPC cannot be made out except on proof of the plaint in the previous suit, the filing of which is said to create the bar and that such plea of Order II Rule 2 CPC is a technical bar it has to be established satisfactorily and cannot be presumed merely on the basis of inferential reasoning and can be established only if the defendant files in evidence the pleadings in the previous suit and proves to the Court the identity of the cause of action in the two suits but it came to be so held in the face of the Suit Court in that case rejecting the plaint as barred by Order II

Rule 2 CPC without the plaint or other pleadings in the earlier suit being before the Court. The learned ADJ in the first appeal set aside the said order holding that without the pleadings in the earlier suit, it could not be known what the precise allegations of the plaintiff in his previous suit were. The second appeal by the defendant to the High Court met with no success. The Supreme Court in its judgment observed that the original of the plaint in the earlier suit was not before the Supreme Court also and so it was not possible to verify whether the English translation placed before the Supreme Court was accurate or not.

17. Similarly, in ***Bengal Waterproof Ltd.*** supra also, the pleadings in the first suit had not been filed and it was owing thereto that it was held in the absence of pleadings in the first suit, the plea of Order II Rule 2 of the CPC raised by the defendant was completely barred at the threshold as the bar of Order II Rule 2 CPC could not be culled out from the plaint in the second case and without the pleadings in the earlier suit being brought on record.

18. In ***Sh. Suresh Kakkar*** supra, though the plaint in the earlier suit was before the Court but the earlier suit had been filed only by one of the two plaintiffs in the second suit and all the defendants in the second suit were also not the defendants in the earlier suit and it was in this factual situation

that following the two judgments aforesaid of the Supreme Court, it was held that the bar of Order II Rule 2 of the CPC could not be adjudicated under Order VII Rule 11 of the CPC.

19. Per contra, the appellants/plaintiffs in the plaint in the suit from which this appeal arises not only admitted to institution of the earlier suit for injunction but also filed before the Court the certified copies of the statements aforesaid made on 27th November, 1998 in the earlier suit and the order of the same date therein. Though the appellants/plaintiffs had not filed the pleadings in the earlier suit for injunction, but the respondent/defendant No.1 filed before the Court, the certified copies of the pleadings in the earlier suit. Thus, at the time when the learned ADJ dealt with and decided the application under Order VII Rule 11 of the CPC, he had before him, the certified copies of the pleadings in the earlier suit as well as the order of withdrawal thereof and which were admitted documents and about which there was no controversy.

20. I am of the view that the judgment of this Court in **Sh. Suresh Kakkar** in turn relying on the Supreme Court judgments in **Gurbux Singh** and in **Bengal Waterproof Limited** supra holding that the plea of Order II Rule 2 CPC cannot be decided at the stage of Order VII Rule 11 CPC, in the

context of cases where the Court at the time of considering the plea under Order VII Rule 11 CPC did not have on its record the pleadings in the earlier suit on the basis whereof the plea of Order II Rule 2 CPC was invoked, cannot apply to a factual situation as in the present case where not only are the pleadings and the order in the earlier suit on record and there is no controversy about the same but there is also a statement in the plaint in the suit from which this appeal arises about the institution of the earlier suit and withdrawal thereof. Though the appellants/plaintiffs pleaded that the said withdrawal was with the permission of the Court but it has to be determined from the order of the Court from which the earlier suit was withdrawn, whether such permission was granted or not.

21. This Court in ***Sanjay Kaushish Vs. D.C. Kaushish*** 48 (1992) DLT 414 in para 16 has held that from a bare reading of the plaint and the ‘admitted documents’ and the facts coming out in the statement recorded under Order X of the CPC, the Court could come to the conclusion that the plaint does not disclose a cause of action or the suit is barred by limitation or otherwise not maintainable; the Court can decide the said point even without recording evidence. The said judgment was upheld by the Division Bench of this Court in judgment dated 12th January, 1999 in FAO(OS) No.221/1991

titled ***Uday Kaushik Vs. Sanjay Kaushik***. Another Division Bench of this Court in ***Asha Sharma Vs. Sanimiya Vanijiya P. Ltd.*** MANU/DE/2029/2012 has held that though admissions made in documents can be explained but admissions in pleadings stand on a different footing and attract the principle of estoppel. Thus it is not as if an opportunity has to be given to the appellants/plaintiffs to explain their pleadings or statement in the earlier suit.

22. I fail to see as to what purpose will be served by putting the parties to trial in such a case. As aforesaid, the pleadings in the earlier suit and the order therein are admitted and as per the dicta aforesaid of this Court in ***Asha Sharma*** supra, the appellants/plaintiffs have no right to explain the same. The Court has to thus decide the plea of Order II Rule 2 CPC on a reading of the said pleadings and the statements made and the order in the earlier suit and for which purpose no evidence is required. Though undoubtedly, Order VII Rule 11(d) CPC allows rejection of the plaint, where the suit from the statement in the plaint appears to be barred by any law and which would include Order II Rule 2 CPC but I fail to see as to what prevents the Court from, at the stage of Order VII Rule 11 of the CPC, seeing any documents admitted by the plaintiff also, particularly the

pleadings in the earlier suit. The counsel for the appellants/plaintiffs also has not raised any plea that the appellants/plaintiffs need to explain the pleadings or the order in the earlier suit and for which purpose evidence may be required.

23. The Supreme Court in ***T. Arivandandam Vs. T.V. Satyapal*** (1977) 4 SCC 467 and in ***Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success I*** (2004) 9 SCC 512 and yet again in ***ITC Limited Vs. Debts Recovery Appellate Tribunal*** (1998) 2 SCC 70 has held that proceedings, of which there is no possibility of success and/or which are deadwood and are doomed should be shot down at the earliest stage and ought not to be permitted to clog the resources of the Court and at the cost of other deserving matters requiring the attention of the Courts and should not be allowed to be used as a device to harass. Applying the said principle also, there is no bar to the consideration of the plea of Order II Rule 2 CPC, in the facts of the present case, at the stage of Order VII Rule 11 CPC.

24. As far as the judgment in ***Gurbux Singh*** is concerned, it may also be mentioned that the Supreme Court in ***Saradamani Kandappan Vs. Mrs. S. Rajalakshmi*** (2011) 12 SCC 18 has held that the well settled principle, that laws which are reasonable and valid when made can, with the passage of

time and consequential change in circumstances become arbitrary and unreasonable, applies to decisions of Courts also. The Courts, in 1960s when the judgment in **Gurbux Singh** was pronounced, were not overburdened and inundated with cases as the situation is today, leading to long delays in disposal of cases. The present situation demands that cases should not be put to unnecessary trial, when the outcome thereof in view of the admitted documents on record, will remain unaffected by the oral evidence recorded. The Supreme Court in **State of Maharashtra Vs. Dr. Praful B. Desai** AIR 2003 SC 2053 held that the language of a statute, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

25. The appellants/plaintiffs, in the plaint in the suit from which this appeal arises, have clearly admitted:

- (i) that the time of 120 days agreed in the document dated 27th February, 1996 for completion of the sale had expired prior to the institution of the earlier suit for injunction;
- (ii) that the respondent/defendant No.1 had vide notices dated 22nd June, 1996 and 24th June, 1996 i.e. prior to the institution of the earlier suit for injunction, informed the appellants/plaintiffs that owing to the

appellants/plaintiffs having failed to pay the balance sale consideration within 120 days, the Agreement for Sale automatically stood cancelled and the advance amount paid of Rs.2,00,000/- stood forfeited.

The appellants/plaintiffs being fully aware that owing to the aforesaid, the subsequent suit for specific performance may be held to be barred by Order II Rule 2 CPC, had pleaded that the earlier suit for injunction was withdrawn on 27th November, 1998 with liberty to file proper suit before proper forum. The appellants/plaintiffs thus pleaded the subsequent suit for specific performance to be maintainable owing to the earlier suit having been withdrawn with liberty to file the subsequent suit. Significantly, the plaint is quiet, whether the Court had granted such liberty to the appellants/plaintiffs or not.

26. As far as the legal position emanating from filing a suit for injunction only after the cause of action for a suit for specific performance had accrued, I had during the hearing invited attention of the counsels to the judgment of the Division Bench of this Court in ***Kamal Kishore Saboo Vs. Nawabzada Humayun Kamal Hasan Khan*** AIR 2001 Delhi 220 laying down that where

from the averments in the plaint in the first suit, it is clear that the cause of action for seeking the relief of specific performance had ripened as according to the plaintiff the defendant had failed to perform his part of the contract and still the plaintiff chose to file the suit claiming relief of permanent injunction only when on the basis of the bundle of facts he could also claim the relief of specific performance as well, the second suit for the relief of specific performance is clearly not maintainable in view of Order II Rule 2(3) of the CPC. The judgment of the Supreme Court in **Gurbux Singh** though was considered by the Division Bench, was held to be not applicable. Unfortunately, neither the counsel for the respondent/defendant No.1 nor the counsel for the respondent/defendant No.2 referred to the said judgment of the Division Bench of this Court in **Kamal Kishore Saboo** supra, which applies on all fours to the present case.

27. I will be failing in my duty if I do not mention that I had in **Rohit Kumar Vs. A.S. Chugh** 155 (2008) DLT 424, against which no appeal is found to have been preferred, raised doubts about the correctness of the view in **Kamal Kishore Saboo** supra for the reasons mentioned therein.

28. However, the matter has been put beyond any pale of controversy in **Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd.** (2013) 1

SCC 625, to which again neither of the counsels for the respondents/defendants referred. The Supreme Court was concerned with a case, where first a suit for permanent injunction restraining the defendant from alienating, encumbering or dealing with the property was filed pleading that the time agreed of six months for completion of sale had till the institution of the said suit not expired and the plaintiff was thus not claiming the relief of specific performance and seeking liberty to sue for the relief of specific performance at a later point of time, if necessary and thereafter, after the expiry of six months, a suit for specific performance was filed pleading that in the earlier suit for injunction, the relief of specific performance had not been claimed as the time agreed for performance had not elapsed till the institution of the earlier suit for injunction. The defendant therein sought rejection of plaint in the second suit for specific performance as barred by Order II Rule 2 CPC. Finding, that at the time of filing the earlier suit for injunction, the time agreed for performance had not elapsed and thus the cause of action for the relief of specific performance had not accrued and holding that provisions of Order II Rule 2(3) CPC would render a subsequent suit not maintainable only if the earlier suit had been decreed and the said provision will not apply if the first suit remains pending, the

prayer for rejection of the plaint on the said ground was rejected by the High Court. However, the Supreme Court while allowing the appeal against the said judgment held:

- (a) that Order II Rule 2(2) & (3) CPC engraft 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 the plaintiff may not have been claimed for good reason;
- (b) a later suit for such relief is contemplated only with the leave of the Court which leave naturally will be granted after due satisfaction and for good and sufficient reason;
- (c) that the cardinal requirement for application of the provisions contained in Order II Rule 2(2) & (3) CPC therefore is that the cause of action in the later suit must be the same as in the first suit;
- (d) that though the plaintiff in the earlier suit had claimed leave to sue for the relief of specific performance at a later stage but no such leave was granted by the Court; in the absence of the said leave, it will have to be determined, whether the cause of action for the first suit for injunction and the second suit for specific performance was one and

the same;

(e) a reading of the plaint in the first suit for permanent injunction showed clear averments to the effect that the defendant had vide letter refused to perform the agreement and returned advance amount received; the plaintiff had also pleaded that the defendant was attempting to frustrate the Agreement between the parties; the said pleadings left no room for doubt that on the date of institution of the first suit for permanent injunction, it was the case of the plaintiff that the defendant had no intention to honour the Agreement to Sell; in the said situation, it was open for the plaintiff to incorporate the relief of specific performance along with the relief of permanent injunction and the foundation for the relief of permanent injunction claimed in the earlier suits furnished a complete cause of action to the plaintiff to also sue for the relief of specific performance; yet the said relief of specific performance was omitted and no leave in this regard was obtained or granted by the Court;

(f) there was no merit in the plea of the plaintiff that since the period of six months agreed for completion of sale had not expired on the date of institution of the first suit, the cause of action for the relief

of specific performance had not accrued;

(g) that a suit claiming a relief to which the plaintiff may be entitled at a subsequent point of time, though may be treated as premature, yet cannot *per se* be dismissed to be presented on a future date;

(h) there is no provision in the Specific Relief Act, 1963 requiring a plaintiff claiming the relief of specific performance to wait for expiry of due date for performance of Agreement in a situation where the defendant may have made his intention clear by his overt acts;

(i) Order II Rule 2 CPC seeks to avoid multiplicity of litigations on the same cause of action and if that is the true object of the law, the same would not stand fully sub-served by holding that the provision of Order II Rule 2 CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit; rather, Order II Rule 2 CPC will apply to both the aforesaid situations;

accordingly, the plaint in the subsequent suit for specific performance was rejected.

29. The aforesaid recent dicta of the Supreme Court sets at rest the doubt

expressed by me in **Rohit Kumar** supra about the correctness of the decision in **Kamal Kishore Saboo** supra. After the said dicta of the Supreme Court, there could be no manner of doubt that the subsequent suit for specific performance from which this appeal arises was indeed barred by Order II Rule 2 of the CPC, in view of the earlier suit for permanent injunction filed by the appellants/plaintiffs. Though in **Virgo Industries (Eng.) P. Ltd.** supra, **Gurbux Singh** supra was also considered but the Supreme Court still (of course without any discussion in this regard) rejected the plea on the plea of Order II Rule 2 of the CPC and did not hold that the plea of Order II Rule 2 CPC can be adjudicated only after trial.

30. That brings me to the question whether the appellants/plaintiffs had withdrawn the earlier suit for injunction with leave to subsequently sue for specific performance. A reading of the statement made by the appellants/plaintiffs and as reproduced hereinabove shows that the appellants/plaintiffs had expressed desire to withdraw the suit with liberty to file appropriate proceedings before the competent forum but the Court in its order dated 27th November, 1998 merely permitted the plaintiff to withdraw the suit and did not grant any liberty as sought by the appellants/plaintiffs. Though the Supreme Court in **Gurinderpal Vs. Jagmittar Singh** (2004) 11

SCC 219 on which the counsel for the appellants/plaintiffs failed to place reliance, in near same situation held that a conjoint reading of the order of the Court and the statement of the plaintiffs suggests that the suit was dismissed as withdrawn because the plaintiff wanted to file a fresh suit, obviously wherein the plaintiff would seek a decree for specific performance and not of mere injunction as was prayed for in the suit which was sought to be withdrawn and the Trial Court and the Appellate Courts were not right in holding that no leave had been granted to the appellant/plaintiff but in the light of the recent subsequent judgment in ***Virgo Industries (Eng.) P. Ltd.*** supra, where though the earlier suit for injunction in which leave was sought was still pending, the Supreme Court nevertheless held the subsequent suit for specific performance to be barred. I am not inclined to hold that the appellants/plaintiffs, at the time of withdrawing the earlier suit, were granted leave.

31. It has thus but to be held that the suit for specific performance was indeed barred by Order II Rule 2 CPC and the learned Addl. District Judge has rightly rejected the plaint on this ground.

32. As far as the other ground, of the plaint not disclosing any cause of action against the respondent/defendant no.2, on which the plaint has been

rejected, is concerned, I am unable to concur with the learned Addl. District Judge. The impleadment of the respondent/defendant no.2, who was not a party to the agreement of which specific performance was claimed, was under Section 19(b) of the Specific Relief Act which permits specific performance of an agreement to be claimed against a non-party thereto also. The Supreme Court recently in ***Thomson Press (India) Ltd. Vs. Nanak Builders and Investors (P) Ltd.*** (2013) 5 SCC 397 has reiterated that the need for impleading a subsequent purchaser in a suit for specific performance is to, in the event of the suit succeeding, direct the subsequent purchaser/transferee to join in the conveyance so as to pass a title which resides in him to the purchaser. In this view of the matter, in my opinion, the plaint is not required to disclose any cause of action against the subsequent purchaser and the plaint could not have been rejected on this ground.

33. However, having upheld the ground of rejection under Order II Rule 2 CPC, the appeal is dismissed. However the counsels for the respondents having not cited the relevant case-law, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 18, 2014.

‘bs’