

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

LETTER PATENT APPEAL NO. 146 OF 2010

LAXMI NARESH CHANDNANI AND ANR
 VERSUS
 UDDHAV L BHATHIJA LUNIDARAM AND ANR

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Advocate for Appellants : Mr. R F Totala

Advocate for Respondent No.1: Mr. A. G. Talhar h/for Mr. Pramod Gaikwad

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**CORAM : S. V. GANGAPURWALA &
 V. K. JADHAV, JJ.**

DATE : 24th July, 2015

PER COURT :

1. The present respondents had filed a suit for specific performance of contract bearing Special Civil Suit No.40/2008. The present petitioners have filed an application Exh.39 in the said suit under Order 7 Rule 11 of the Code of Civil Procedure on the ground that the suit is barred by Order 2 Rule 2 of the Code of Civil Procedure. The Court rejected the said application. Against the said order the petitioners filed Writ Petition No. 2373 of 2009. Learned Single Judge of this Court, vide order dated 25th March, 2010, disposed of the said writ petition. However, while disposing of the said writ petition, has held that the bar of Order 2 Rule 2 is a triable issue and had kept the said point open to be agitated by the parties at the trial. At the interlocutory stage it was not entertained. As such, by the order of learned Single Judge, the issue with regard to bar of Order 2 Rule 2 is kept open which is to be decided by the trial court after recording evidence of the parties.

2. According to Mr. Totala, the learned counsel for the appellants,

the present respondents had initially filed Suit for simplicitor injunction bearing Regular Civil Suit No. 184 of 2007. Learned counsel submits that cause of action for filing RCS No.184/2007 and the subsequent suit for specific performance of contract bearing Special Civil suit No.40/2008 is one and the same. The cause of action spell out in both the suits is the same i.e. of 19.02.2007. According to the learned counsel, the said suit would not have been entertained by the Court in view of the bar engrafted under Order 2 Rule 2 of the Code. Earlier suit has been withdrawn by the respondents without seeking liberty to file fresh suit on the same cause of action.

3. The learned counsel for the appellant relies on -

- 1) Judgment of the Apex Court in the case of State Bank of India Vs. Gracure Pharmaceuticals Ltd. reported in 2014 AIR (SC) 731,
- 2) Judgment of this Court in the case of Gajanan R. Salvi Vs. Satish Shankar Gupte and others reported in AIR 2004 BOMBAY, 455,
- 3) Judgment of learned Single Judge of Delhi High Court in the case of S. Jaswant Singh (deceased by L.Rs.) Vs. Darshan Singh (deceased by L. Rs.) and ors. Reported in AIR 1992 DELHI 80,
- 4) Judgment of Delhi High Court in the case of Kamal Kishore Saboo Vs. Nawabzada Humayun Kamal Hasan Khan reported in AIR 2001 DELHI 220
- 5) Judgment of Gauhati High Court in the case of Smt.Usha Rani Banik Vs. Haridas Das and others reported in AIR 2005 GAUHati 1.

4. Mr. Talhar, learned counsel for the respondent No.1 submits that when RCS No.184/2007 was filed, the respondent in the said plaint had categorically stated that he is reserving his right to file suit for specific performance. According to the learned counsel, the suit is withdrawn. The Court at Rahata where the suit for injunction was filed did not have pecuniary jurisdiction to entertain the suit for specific performance.

5. We have considered the submissions canvassed by the learned counsel for the receptive parties and also gone through the judgments relied on by the learned counsel.

6. Order 2 Rule 2 of the Code of Civil Procedure is a rule of procedure. The ratio laid down in the judgments relied on by the learned counsel for the petitioners are the settled propositions of law. The relief that could have been claimed in the previous suit and if not claimed, the plaintiff is not entitled to claim the said relief in the subsequent suit. The cause of action has to be construed by reading the whole plaint. The cause of action is bundle of fact and not a solitary sentence in the plaint.

7. The plaintiff, in the subsequent suit bearing No. Special Civil Suit No.40/2008, has averred as under:

“9. The Plaintiff states that inspite of the telephone calls and the phone calls the Defendants have not came forward to execute the Sell-deed therefore a notice was issued to the defendant at their address at Maleshiya. As the defendant No.1 and 2 are residing at Malesia at that time. Thereafter the

plaintiff has issued a notice as per the telephone talk on 22nd October, 2007 to have a meeting for balance consideration and execution of Sale Deed inspite of that the defendant have not come forward to execute sale deed and to perform their part of contract through the plaintiff is always ready and willing to perform.”

8. In the said plaint, it has been averred that there was a telephonic talk between the plaintiff and respondents 1 and 2 on 22nd October, 2007, i.e. much later than filing of the previous suit. How far, the said aspect would be proved by the plaintiff is a different matter altogether. However, the same will also require to be considered as to whether after filing of the previous suit, there was some further talk between the parties which led to filing of the subsequent suit. All those aspects will be a matter of evidence. The said cause of action 22nd October, 2007 could not have been a part of the earlier suit as the same is much later than filing of earlier suit. What had transpired on 22nd October, 2007 between the parties would be a matter of evidence. Precisely, learned Single Judge of this court, by order dated 25th March, 2010 has observed as under:

“4. I have perused the order passed by the trial Court. That, so far as issue in respect of bar for entertaining subsequent suit is concerned, in my opinion, it is a triable issue and has to be framed by the trial court on the basis of pleadings, those may be raised by the parties. The issue so framed in respect of bar either under Order II Rule 2 or in respect of non compliance of provisions of Order XXIII Rule 1 of the Code of Civil Procedure are concerned, same has to be dealt with by the trial Court after recording evidence of the parties. At this interlocutory stage, the trial Judge

was right in refusing to entertain the application. The points agitated by defendants are specifically kept open for being agitated at the time of trial of the suit and decision rendered on interlocutory application by the trial Court will not be an impediment in considering such objections. In this view of the matter, no interference is called for in exercise of extraordinary jurisdiction under Article 227 of the Constitution of India.”

9. The learned Single Judge, while passing the said order, has observed that the issue so framed in respect of bar either under Order II Rule 2 or in respect of non compliance of provisions of Order XXIII Rule 1 of the Code of Civil Procedure are concerned, same has to be dealt with by the trial Court after recording evidence of the parties. Door of the present appellants are not shut by the order of the learned Single Judge. On the contrary, it is kept open.

10. There is another facet of matter. The learned Single Judge of this Court, while passing the impugned order has exercised its power under Article 227 of the Constitution. In fact the present appellant was required to file civil revision application against the impugned order of the trial Court and against the order in civil revision application, Letter Patent Appeal is not tenable. However, the present appellant preferred to file writ petition. The Court exercised its jurisdiction under Article 227 and by making observation and keeping the point of Order 2 Rule 2 CPC open to be decided after the parties adducing evidence at trial, has disposed of the petition. Considering the said aspect also, the present Letter Patent Appeal cannot be entertained .

11. Considering the above, the Letter Patent Appeal is dismissed. No costs.

12. At this stage, learned counsel for the appellant seeks extension of interim orders passed in the Letter Patent Appeal for a period of six weeks. Mr. Talhar learned counsel opposes the same. Considering the fact that interim order was operating, the same is continued for a period of four weeks from today. Needless to state that on lapse of four weeks, the said interim order shall come to an end.

(V. K. JADHAV, J.)

(S. V. GANGAPURWALA, J.)

JPC