

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.12.2014

PRONOUNCED ON : 12.03.2015

CORAM

THE HONOURABLE MR.JUSTICE R. MAHADEVAN

A.S.No.1099 of 2009

Saraswathi

...Appellant/Defendant

Versus

P.S. Swarnalatha
represented by her Power Agent
R. Mohan

...Respondent/Plaintiff

Prayer: This appeal is filed under Order XLI Rule 1 r/w Section 96 C.P.C. against the judgment and decree dated 24.9.2009 and made in O.S.No.387 of 2005 on the file of the learned Additional District Judge, Fast Track Court No.1, Coimbatore.

For Appellant : Mr.G. Ramadass

For Respondents : Mr.S. Parthasarathy,
Senior Counsel
for Mr.P.S. Kothandaraman

J U D G M E N T

This regular appeal is directed against the judgment and decree dated 24.9.2009 and made in O.S.No.387 of 2005 on the file of the learned Additional District Judge, Fast Track Court No.1, Coimbatore.

2. Having been dissatisfied with the decreeing of the suit, the defendant has knocked the door of this court by way of this appeal.

3. For easy reference and also for the sake of convenience, the appellant may hereinafter be referred to as the defendant and the respondent be referred to as the plaintiff wherever the context so require.

Background facts:

4. The plaintiff had entered into an agreement of sale with the defendant on 21.6.2002 in respect of the suit property, under a registered sale agreement, for a sale consideration of Rs.7,00,000/-, out of which a sum of Rs.4,50,000/- was paid as advance on the same day and on receipt of the balance of sale consideration, the sale deed shall be executed on or before 20.6.2005.

5. On the date of agreement, as the defendant had asked a further sum of Rs.50000/- to settle some urgent liabilities, the said amount was paid by the plaintiff, for which the defendant had executed a promissory note separately.

6. The defendant had also executed a possession receipt in respect of the suit property referring the above transactions. She had handed over all the title deeds in original including the patta pass book to the plaintiff and accordingly, the plaintiff has been in possession and enjoyment of the suit property right from 21.6.2002 till date.

7. Since the husband of the plaintiff is a salaried person, it was difficult for the plaintiff to mobilise the funds and therefore, they sought for time for the execution of the sale deed. As the plaintiff has been in possession and enjoyment, she has been harvesting the coconut yield from 21.6.2002 onwards.

8. On 27.10.2003, when the plaintiff herself had engaged in the supervision work along with her farm servants, the defendant had accompanied with one Jayabal Gounder and Dharmaraj @ Raju and entered into the suit property and they wanted to harvest the coconuts in the suit property, but such attempt was thwarted and therefore, the plaintiff had filed a suit in O.S.No.480 of 2003 on the file of the District Munsif Court, Pollachi and obtained an order of interim injunction in I.A.No.1591 of 2003. Since the relief was prayed till 20.6.2005 and such time was over, again the plaintiff filed the present suit.

9. On 2.3.2004, the plaintiff had executed a power of Attorney authorising her sister-in-law to take steps for specific performance of the agreement, dated 21.6.2002. Thereafter, the power agent had dug a well and a building was erected with tiled roof at a cost of Rs.2.00 lakhs, which necessitated the power agent to stay in the land for irrigation, cultivation and maintenance and therefore, she had requested the defendant to execute the sale deed. As there was no response, she issued a notice, dated 13.5.2005 calling for the defendant to execute the sale deed after

receiving the balance of sale consideration. Hence, the present suit.

10. It is admitted in the written statement filed by the defendant that the sale agreement executed in favour of the plaintiff is true and the consideration fixed is also true. The receipt of Rs.50000/- on the evening of the agreement date and the execution of possession receipt are denied.

11. When admittedly the balance of sale consideration is due to her from the plaintiff, there is no necessity for the defendant to execute any promissory note and borrow any amount from the plaintiff and the promissory note is a rank forgery one and the so-called possession receipt is also a fabricated one.

12. The defendant had no intention to part with the property before the completion of the sale and she also did not give possession to the plaintiff at any point of time.

13. The cursory reading of the sale agreement would clearly show that the possession is to be given only at the time of the execution of the sale deed. When there is such expression in the sale agreement, the question of issuing a separate muchalika for handing over the possession of the suit property, does not arise. If what the plaintiff says is true, then it would have been incorporated in the sale agreement itself.

14. If the contention of the plaintiff is true, then she would not have withdrawn the suit in O.S.No.480 of 2003 on the file of the District Munsif, Pollachi, as not pressed. Thereafter, the plaintiff has come forward with the present suit through her power agent.

15. Armed with the order of injunction obtained in I.A.No.1591 of 2003 in O.S.No.480 of 2003, the plaintiff occupied the suit property with the help of the police.

16. In the written statement filed in O.S.No.480 of 2003, the defendant had stated that she is always ready and willing to execute the sale deed as per the recitals of the sale agreement. Even after the receipt of the notice issued by the counsel for the plaintiff, dated 13.5.2005, the defendant approached the plaintiff and expressed her willingness to execute the sale deed, provided she has to pay the balance sale consideration.

17. The plaintiff had also filed the suit in O.S.No.327 of 2005 on the file of the District Munsif Court, Pollachi, based on the alleged promissory note demanding a sum of Rs.68000/- from the

defendant. Without disclosing the said suit, the plaintiff has come forward with the present suit.

18. On the aforesaid submissions, the defendant sought for the dismissal of the suit.

19. Based on the pleadings of the plaintiff as well as the defendant, the trial court has formulated the following seven issues:-

a. Whether the suit sale agreement, dated 21.6.2002 is true, valid and enforceable by law?

b. Whether the possession of the suit property is handed over to plaintiff and she is in enjoyment of the suit property since 21.6.2002?

c. Whether the Power Agent of the plaintiff improved the land by digging borewell and constructed a tiled floor to the value of Rs.2,00,000/-?

d. Whether the plaintiff is entitled to direct the defendant to execute the sale deed, encumbrance certificate in reference to agreement, dated 21.6.2002 to the power agent of the plaintiff?

e. Whether the plaintiff is ready and willing to execute the sale deed by paying the balance amount?

f. Whether the plaintiff is entitled for permanent injunction as prayed for?

g. To what other relief?

20. In order to substantiate their respective cases both the plaintiff and the defendants were directed to face the trial.

21. On the side of plaintiff, her power agents were examined as P.Ws.1 and 2. During the course of their examination, ExsA1 to A11 were marked. On the other hand, on the side of the defendant, the defendant has examined herself as D.W.1 and during the course of her examination, only one document was marked as Ex. B.1.

22. On evaluating the evidences both oral and documentary, the learned trial Judge had proceeded to decree the suit.

23. Challenging the correctness of the judgment and decree of the trial court dated 24.9.2009, the defendant stands before this court with this appeal.

24. Heard Mr.G. Ramadass, learned counsel appearing for the appellant and Mr.S. Parthasarathy, learned Senior Counsel appearing on behalf of Mr.P.S. Kothandaraman, learned counsel, who is on record for the respondent.

25. The arguments of the learned counsel appearing for the appellant are as under:-

a. Though the claim for specific performance was available to the plaintiff/respondent even on the date of filing of the suit for bare injunction in O.S.No.480 of 2003, the plaintiff did not seek the relief of specific performance, which would amount to waiver of the said claim and therefore, the present suit for the specific performance is barred under Order 2 Rule 2 C.P.C.

b. The plaintiff has not categorically stated in her plaint that she is ready and willing to perform her part of contract and therefore, the suit shall be dismissed in limine on that ground alone.

c. Even in the pre-suit notice issued by the plaintiff claimed only for recovery of money, which was given under the promissory note, which would also clearly show that the plaintiff was never ready and willing to perform her part of contract and therefore, the suit is not maintainable.

d. The alleged promissory note as well as the possession letter was not executed by the defendant and that the signatures found in those documents are not that of the defendant and without considering these aspects, the trial Court decreed the suit, which is incorrect.

e. It is settled law that a person, who has defaulted in performing his part, has no right to seek specific performance and therefore, when the plaintiff has failed to perform her part of contract, she has no right to seek for the relief of specific performance.

26. In support of his contentions, the learned counsel for the defendant/appellant has relied on the following decisions:-

a. Razia Begum vs. Sahebzadi Anwar Begum and others (AIR 1958 SC 886).

b. Man Kaur (Dead) by L.Rs. vs. Hartar Singh Sangha ((2010) 10 SCC 512).

c. Inder Mohan Singh vs. Sube Singh (MANU/DE/2798/2014).

d. Smt. Sandhya Rani Sarkar vs. Smt. Sudha Ranit Debi and others ((1978) 2 SCC 116).

e. Govindarasami Naidu vs. Shanmuga Nattar and another (2007 (2) CTC 553).

27. Countering the submissions of the learned counsel for the appellant, the learned Senior counsel appearing for the respondent has advanced his submissions as under:-

a. When the defendant has admitted that the execution of the sale agreement and the receipt of advance towards sale consideration, she is bound to execute the sale deed and on several requests made by the plaintiff, since the defendant did not heed to the request of the plaintiff, after issuing notice to the defendant, the plaintiff has filed the present suit for specific performance and therefore, the court below decreed the suit for specific performance.

b. The contention of the learned counsel for the appellant/defendant that since the first suit had been filed for bare injunction, the subsequent suit is barred from seeking the relief of specific performance under Order 2 Rule 2 of C.P.C. cannot be accepted, since the cause of action arose for seeking the relief of specific performance only after the filing of the suit for bare injunction and therefore, the theory of waiver does not arise. If the plaintiff had initially filed the suit seeking the relief of specific performance and permanent injunction and later in the subsequent suit, if she sought for the only relief of bare or permanent injunction, then it could be understood or presumed that the relief of specific performance has been waived.

c. The learned Senior Counsel has vehemently contended that from bare reading of the complaints in the two suits, it would be apparently clear that the cause of action in the two suits filed by the plaintiff was not similar, but different and distinct and the same would not attract the provisions of Order 2, Rule 2 of C.P.C.

d. Further, the learned Senior Counsel has contended that the provisions of Order 2, Rule 2, C.P.C., do not apply where the two

suits are filed on different cause of action and therefore, the present suit would not hit by the provisions of Order 2, Rule 2 C.P.C.

28. In support of his contention, the learned Senior counsel has relied on the following decisions:-

a. C.L. Jain vs. Gopi Chand (AIR 1990 Delhi 280).

b. P. Lakshmi Ammal vs. S. Lakshmi Ammal and others (AIR 1991 Madras 137).

c. Triloki Vishwakarma alias Triloki Mistri vs. Zaitun Nisa (AIR 1992 Patna 40).

d. Alka Gupta vs. Narender Kumar Gupta ((2010)10 SCC 141).

e. Rathnavathi & Another vs. Kavita Ganashamdas (2014 (6) CTC 333).

f. Inbasegaran and another vs. S. Natarajan (Dead) through L.Rs. (2014 (6) CTC 445).

29. Now the first and foremost question arises for the consideration of this Court, whether the present suit would hit by the provisions of Order 2 Rule 2 C.P.C. or not and only then, it could be decided, whether the plaintiff is entitled for the relief of specific performance.

30. To decide whether the present suit would hit by the provisions of Order 2 Rule 2 C.P.C., it will be useful to refer to the following decisions for better understanding.

31. In Alka Gupta vs. Narender Kumar Gupta (2010) 10 SCC 141, While speaking on behalf of the Division Bench of the Apex Court, Hon'ble Mr. Justice R.V.Raveendran has observed as under:-

I. A suit cannot be dismissed as barred by Order 2 Rule 2 of the Code in the absence of a plea by the defendant to that effect and in the absence of an issue thereon.

12. We may extract Order 2 Rules 1 and 2 of the Code for ready reference:-

"1. Frame of suit: Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

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 in respect of the portion so omitted or relinquished.

(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."

The object of Order 2 Rule 2 of the Code is two-fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.

13. This Court in *Gurbux Singh v. Bhoora Lal* [AIR 1964 SC 1810] held :

"In order that a plea of a bar under O. 2, R. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one

relief the plaintiff without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar."

14. Unless the defendant pleads the bar under Order 2 Rule 2 of the Code and an issue is framed focusing the parties on that bar to the suit, obviously the court can not examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. In this case, the respondent did not contend that the suit was barred by Order 2 Rule 2 of the Code. No issue was framed as to whether the suit was barred by Order 2 Rule 2 of the Code. But the High Court (both the trial bench and appellate bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order 2 Rule 2 of the Code. Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order 2 Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Order 2 Rule 2 of the Code, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable.

II. The cause of action for the second suit being completely different from the cause of action for the first suit, the bar under order 2 Rule 2 of the Code was not attracted.

"15. The first suit was for recovery of balance price under an agreement of sale. The agreement dated 29.6.2004 was not an agreement relating to dissolution of the firm constituted under deed of partnership dated 5.4.2000, or settlement of the accounts of the said partnership. The agreement of sale made it clear that it related to sale of the

undivided half share in the second floor at Rohini, 50% (property bearing No.8, Pocket & Block C-9, Sector-8, Rohini, Delhi-110085) and 50% share of the business that was being run in that premises, that is premises at Rohini. The second suit was for rendition of accounts in pursuance of the dissolution of the firm of Takshila Institute constituted under deed of partnership dated 5.4.2000, carrying on business at Bhera Enclave, Paschim Vihar, Delhi-110087 and for payment of the amounts due on dissolution of the said firm.

16. The pleadings in the two suits make it clear that both parties proceeded on the basis that the partnership between appellant and respondent under deed dated 5.4.2000 was only in regard to the business run under the name and style of 'Takshila Institute' at Bhera Enclave, Paschim Vihar, Delhi-110087. The appellant proceeded on the basis that the property at Rohini and the business carried therein under the name of Takshila Institute, was not a part of the partnership business under deed dated 5.4.2000. Even the respondent in his written statement in the first suit asserted that the partnership dated 5.4.2000 between appellant and respondent did not extend to Takshila Institute at Rohini or other places. In fact appellant clearly contended that respondent was carrying on business under the same name of Takshila Institute at Janakpuri, Ashok Vihar and Kalu Sarai in Delhi and also at Dehradun and Palampur, but they were not partnership businesses. The respondent in his written statement asserted that he alone was carrying on business at those places under the name of Takshila Institute. Therefore, the court could not, before trial, assume that the sale of appellant's share in the immovable property at Rohini and the goodwill and assets of the business carried on at Rohini under the name of Takshila Institute should be taken as relinquishment or retirement or settlement of share in regard to the partnership business of Paschim Vihar Takshila Institute.

17. The cause of action for the first suit was non-payment of price under the agreement of sale dated 29.6.2004, whereas the cause of action for the

second suit was non-settling of accounts of a dissolved partnership constituted under deed dated 5.4.2000. The two causes of action are distinct and different. Order 2 Rule 2 of the Code would come into play only when both suits are based on the same cause of action and the plaintiff had failed to seek all the reliefs based on or arising from the cause of action in the first suit without leave of the court. Merely because the agreement of sale related to an immovable property at Rohini and the business run therein under the name of 'Takshila Institute' and the second suit referred to a partnership in regard to business run at Pachhim Vihar, New Delhi, also under the same name of Takshila Institute, it cannot be assumed that the two suits relate to the same cause of action.

18. Further, while considering whether a second suit by a party is barred by Order 2 Rule 2 of the Code, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of plaintiff are not relevant for deciding whether the second suit is barred by Order 2 Rule 2 of the Code."

31A. Rathnavathi and another vs. Kavita Ganashamdas (2014 (6) CTC 333).

a. The facts of the case in Rathnavathi and another vs. Kavita Ganashamdas (2014 (6) CTC 333), are as under:-

b. Plaintiff entered into a Contract of Sale with Defendant and in pursuance of execution of Sale Agreement, Plaintiff was inducted into possession of Suit property. Defendant attempted to interfere with Plaintiff's possession, therefore, Plaintiff has filed Suit for Permanent Injunction. Subsequently, Plaintiff called upon the Defendant to execute the Sale Deed as per terms of Contract of Sale and when Defendant refused to perform his part of obligation, Plaintiff has filed suit for Specific Performance. Defendant during subsistence of Sale Agreement has illegally sold the property to third party. Suit filed by the Plaintiff was decreed by Courts below. Hence, Appeal to Supreme Court.

31b. In this case, while speaking on behalf of the Division Bench of the Hon'ble Apex Court, the Hon'ble Mr. Justice Abhay Manohar Sapre has observed as under:-

"26. Coming first to the legal question as to whether bar contained in Order II Rule 2 of CPC is attracted so as to non suit the plaintiff from filing the suit for specific performance of the agreement, in our considered opinion, the bar is not attracted.

27. At the outset, we consider it apposite to take note of law laid down by the Constitution bench of this Court in *Gurbux Singh v. Bhooralal*, AIR 1964 SC 1810, wherein this Court while explaining the true scope of Order II Rule 2 of CPC laid down the parameters as to how and in what circumstances, a plea should be invoked against the plaintiff. Justice Ayyangar speaking for the Bench held as under:

"In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar...."

(Emphasis supplied)

28. This Court has consistently followed the aforesaid enunciation of law in later years and reference to only one of such recent decisions in *Virgo Industries (Eng.) P. Ltd. Vs Venturetech Solutions P. Ltd.*, (2013) 1 SCC 625, would suffice,

wherein this Court reiterated the principle of law in following words:-

"The cardinal requirement for application of the provisions contained in Order II Rules 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression, i.e. cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in the Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee JT 2012 (6) SC 149. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury's Laws of England, (4th Edition). The following reference from the above work would, therefore, be apt for being extracted herein below:- " 'Cause of Action' has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the Plaintiff to succeed, and every fact which a Defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action on the part of the Defendant which gives the Plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

29. In the instant case when we apply the aforementioned principle, we find that bar contained in Order II Rule 2 is not attracted because of the distinction in the cause of action for filing the two suits. So far as the suit for permanent injunction is concerned, it was based on a threat given to the plaintiff by the defendants to dispossess her from the suit house on 2.1.2000 and 9.1.2000. This would be clear from reading Para 17 of the plaint. So far as cause of action to file suit for specific performance of agreement is concerned, the same was based on non performance of agreement dated 15.2.1989 by defendant no. 2 in plaintiff's favour despite

giving legal notice dated 6.3.2000 to defendant no. 2 to perform her part.

30. In our considered opinion, both the suits were, therefore, founded on different causes of action and hence could be filed simultaneously. Indeed even the ingredients to file the suit for permanent injunction are different than that of the suit for specific performance of agreement.

31. In case of former, plaintiff is required to make out the existence of prima facie case, balance of convenience and irreparable loss likely to be suffered by the plaintiff on facts with reference to the suit property as provided in Section 38 of the Specific Relief Act, 1963 (in short "the Act") read with Order 39 Rule 1 & 2 of CPC. Whereas, in case of the later, plaintiff is required to plead and prove her continuous readiness and willingness to perform her part of agreement and to further prove that defendant failed to perform her part of the agreement as contained in Section 16 of The Act.

32. One of the basic requirements for successfully invoking the plea of Order II Rule 2 of CPC is that the defendant of the second suit must be able to show that the second suit was also in respect of the same cause of action as that on which the previous suit was based.

33. As mentioned supra, since in the case on hand, this basic requirement in relation to cause of action is not made out, the defendants (appellants herein) are not entitled to raise a plea of bar contained in Order II Rule 2 of CPC to successfully non suit the plaintiff from prosecuting her suit for specific performance of the agreement against the defendants.

34. Indeed when the cause of action to claim the respective reliefs were different so also the ingredients for claiming the reliefs, we fail to appreciate as to how a plea of Order II Rule 2 could be allowed to be raised by the defendants and how it was sustainable on such facts.

35. We cannot accept the submission of learned senior counsel for the appellants when she contended that since both the suits were based on identical pleadings and when cause of action to sue for relief of specific performance of agreement was available to the plaintiff prior to filing of the first suit, the second suit was hit by bar contained in Order II Rule 2 of CPC.

36. The submission has a fallacy for two basic reasons. Firstly, as held above, cause of action in two suits being different, a suit for specific performance could not have been instituted on the basis of cause of action of the first suit.

Secondly, merely because pleadings of both suits were similar to some extent did not give any right to the defendants to raise the plea of bar contained in Order II Rule 2 of CPC. It is the cause of action which is material to determine the applicability of bar under Order II Rule 2 and not merely the pleadings. For these reasons, it was not necessary for plaintiff to obtain any leave from the court as provided in Order II Rule 2 of CPC for filing the second suit.

37. Since the plea of Order II Rule 2, if upheld, results in depriving the plaintiff to file the second suit, it is necessary for the court to carefully examine the entire factual matrix of both the suits, the cause of action on which the suits are founded, reliefs claimed in both the suits and lastly the legal provisions applicable for grant of reliefs in both the suits.

38. In the light of foregoing discussion, we have no hesitation in upholding the finding of the High Court on this issue. We, therefore, hold that second suit (OS No. 2334 of 2000) filed by the plaintiff for specific performance of agreement was not barred by virtue of bar contained in Order II Rule 2 CPC.

32. In the case on hand, a perusal of the written statement shows that the defendant has not pleaded anything about the bar under Order 2 Rule 2 of the Code and no issue was framed focussing the parties on that bar to the suit. The said fact

is not in dispute.

33. Under these circumstances, the Apex Court in the decision cited supra has held that the dismissal of the suit by the High Court under Order 2 Rule 2 of the Code, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable.

34. Further, it is settled law that if the cause of action for the second suit being completely different from the cause of action for the first suit, then the bar under Order 2 Rule 2 of the Code cannot be attracted.

35. At this juncture, it is pertinent to see the cause of action for both the suits to ascertain whether the cause of action of the first suit is different from the cause of the action of the second suit.

36. The cause of action in the suit in O.S.No.480 of 2003:-

"When the plaintiff entered into an 'agreement of sale' of the suit property with the defendant on 21.6.2002 paying a sum of Rs.4,50,000/- out of the sale consideration of Rs.7,00,000/-; on the same day when the defendant demanded a further sum of Rs.50000/- alleging she had a certain other liability for immediate settlement and received Rs.50000/- after executing an on demand promissory note; when the defendant put the plaintiff in possession of the suit property on the same day after executing also a 'Possession Receipt' besides surrendering the original title deeds of the suit property; when the defendants 1 to 3 suddenly made a forcible entry into the suit property on 27.10.2003 threatening the plaintiff to evict from the suit property alleging that they would harvest the coconut yields; when the defendants made such threats of forcible dispossession of the suit property which was timely checked by the plaintiff only with the help of her farm servants; when the apprehended injury is threatened everyday by the defendants 1 to 3; on all these days and till the date of the filing of this suit in Odayakulam Village, Pollachi Taluk, Coimbatore District within the Jurisdiction of this Hon'ble Court."

37. The cause of action in the suit in O.S.No.387 of 2005:-

"When the plaintiff entered into an 'agreement of sale' of the suit property with the defendant on 21.6.2002 paying a

sum of Rs.4,50,000/- out of the sale consideration of Rs.7,00,000/- ; on the same day when the defendant demanded a further sum of Rs.50,000/- alleging that she had certain other liabilities for immediate settlement and received Rs.50000/- separately after executing an on demand promissory note; when the defendant put the plaintiff in possession of the suit property on the same day after executing also a 'Possession Receipt' referring the transactions besides surrendering the original title deeds of the suit property; when the defendant accompanied by one Jayabal Gounder and Dharmaraj (a) Raju suddenly made a forcible entry into the suit property on 27.10.2003 threatening to eject the plaintiff from the suit property alleging that they would harvest the coconut yields; when such threats of forcible dispossession was timely checked by the plaintiff with the help of her farm servants present; when the apprehended injury was threatened everyday by the defendant with Jayabal Gounder and Dharmaraj (a) Raju; when the plaintiff filed suit against them before the Hon'ble District Munsif Court in O.S.No.480 of 2003; When the court was pleaded to order ad-interim injunction against the defendant and her allies in I.A.No.1591 of 2003 ; When Swarnalatha executed power of attorney authorising her sister-in-law on 2.3.2004; when the Power Agent dug a well and put up a tiled roof building in the suit property; when the Power Agent made repeated requests to the defendant to execute the sale deed; when the power agent issued lawyer's notice, dated 13.5.2005 which the defendant received on 20.5.2005 but kept quite on all these days and till the date of filing of the suit in Odayakulam village, Pollachi Taluk, Coimabtoe District within the Jurisdiction of this Hon'ble Court."

38. A perusal and comparison of the cause of action in both the suits divulge that the cause of action in both the suits are not similar, but different and it is clear that when there was the threat of forcible dispossession, the suit for bare injunction was filed by the plaintiff and thereafter, when the Power Agent of the plaintiff had made repeated requests to the defendant to execute the sale deed, which went unheeded, the Power Agent had issued a lawyer's notice, dated 13.5.2005, which was received by the defendant on 20.5.2005 and thereafter as there was no response from the defendant, the power agent on behalf of the plaintiff had filed the suit for specific performance and therefore, it is clear that both the suits having different cause of action and if the dictum laid down in the decision cited supra, the contention of the learned counsel for the defendant that the suit is hit by the provisions of Order 2 Rule 2 of C.P.C., cannot be accepted and in the light of the principles laid down in the said decisions, this Court is of the considered view that the suit is not hit by the provisions of Order 2 Rule 2 of

C.P.C.

39. Moreover, the observation made by the Division Bench of this Court in *Kalash Properties Pvt. Ltd., represented by its Chairman and Managing Director G. Kaliasundaram vs. Lilly Pushpam and three others* (MANU/TN/2341/2009), is a befitting answer to the question whether the suit filed by the plaintiff/respondent was hit and barred under Order 2 Rule 2 of C.P.C., which reads as under:-

"31. In so far as the question whether the suit filed by the plaintiff/appellant was hit and barred under Order 2 Rule 2 C.P.C. is concerned, the contention put forth by the appellant's side cannot stand in the scrutiny of law. What is all contended by the appellant's side is that the cause of action which was available for the plaintiff to file C.S.No.1063 of 1995 for permanent injunction was a threat made by the 1st defendant to dispossess him of the property. But the cause of action for the second suit was the evasion on the part of the defendants from completing the transaction for sale and thus, both the causes of action were distinct and different. Under such circumstances, Order II Rule 2 C.P.C., cannot be invoked to bar the present suit for specific performance."

39a. The above dictum laid down in the decision cited supra, is squarely applicable to the case on hand.

40. Further, if the facts discussed above with regard to the plea, framing of issues and the cause of action are analysed in the light of the principles laid down in the above said decisions, this Court is of firm view that the suit is not hit by the bar under Order 2 Rule 2 of C.P.C., and therefore, whatever the contentions of the learned counsel for the appellant/defendant with regard to the bar under Order 2 Rule 2 of C.P.C., cannot be countenanced.

41. Now the question arises for consideration is whether the plaintiff is entitled for the relief of specific performance:-

42. It is not in dispute that the plaintiff had entered into an agreement of sale with the defendant on 21.6.2002 in respect of the suit property, under a registered sale agreement, for a sale consideration of Rs.7,00,000/-, out of which a sum of Rs.4,50,000/- was paid as advance on the same day and on receipt of the balance sale consideration, the sale deed shall be executed on or before 20.6.2005.

43. In the meanwhile, on 27.10.2003, when the plaintiff herself had engaged in the supervision work along with her farm servants, the defendant had accompanied with one Jayabal Gounder

and Dharmaraj @ Raju and entered into the suit property and they wanted to harvest the coconuts in the suit property, but such attempt was thwarted and therefore, the plaintiff had filed a suit in O.S.No.480 of 2003 on the file of the District Munsif Court, Pollachi and obtained an order of interim injunction in I.A.No.1591 of 2003.

44. Thereafter, the power agent of the plaintiff requested the defendant to execute the sale deed by receiving the balance of sale consideration, however, as there was no response from the defendant, there is no other go for the plaintiff to issue lawyer's notice dated 13.5.2005 calling upon the defendant to receive the balance of sale consideration of Rs.2,50,000/- and to execute the sale deed on or before 20.6.2005 and asked the defendant to inform the convenient date for registration within 10 days from the date of receipt of the said notice.

45. Under these circumstances, it cannot be said that the plaintiff is not ready and willing to perform her part of contract.

46. However, the learned counsel for the defendant has contended that to prove the readiness and willingness, the plaintiff herself should have entered into the witness box and give evidence that she has all along been ready and willing to perform her part of contract and subject herself to cross examination on that issue and a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the plaintiff.

47. In support of his contention, the learned counsel has relied on the decision in Kaur (Dead) by Lrs vs. Hartar Singh Sangha ((2010) 10 SCC 512), wherein it is held as under:-

"To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot obviously examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the

state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned.

48. In the case on hand, the first power agent, who has been examined as P.W.1, is none other than the sister-in-law of the plaintiff and the second power agent, who has been examined as P.W.2, is none other than the husband of the plaintiff and they had personal knowledge about all the transactions between the plaintiff and the defendant. P.W.2 being the husband of the plaintiff, is more appropriate person to give evidence on behalf of the plaintiff and therefore, the above said decision is not applicable to the case on hand.

49. The learned counsel for the defendant had also relied on the following decision in support of his contention that the failure to prove the readiness and willingness of the plaintiff to perform her part of contract and there is any inordinate delay in performing her part of contract, it would disentitle the plaintiff to seek the relief of specific performance.

50. In Smt. Sandhya Rani Sarkar vs. Smt. Sudha Rani debit and others ((1978) 2 SCC 116), it is held thus:-

".....It is undoubtedly true that the High Court has recorded a finding (p. 32) that time was not the essence of the contract nor was it made essence of the contract by a specific notice, but it is equally true that the plaintiff seeks relief for specific performance of contract and it is incumbent upon the plaintiff to affirmatively establish that all throughout he or she, as the case may be, was willing to perform his or her part of the contract, and that the failure on the part of the plaintiff to perform the contract or willingness to perform her part of the contract may in an appropriate case disentitle her to relief, one such situation being where there is inordinate delay on the part of the plaintiff to, perform his or her-part of the contract and that is how the High Court has approached the matter in this case. One, aspect of the case which deserves notice is that by the terms of the contract the vendor had to put the purchase in possession of the property when conveyance is executed and balance of consideration is paid and, that was to be done by the end of April 1956. Even though the plaintiff purchaser had failed to perform any portion of her part of the contract by the end of April 1956, the vendor put the plaintiff in actual possession of the first and second floors of the premises to be sold on 28th April 1956 and the plaintiff is in possession of the same till today that is after a lapse of more than 20 years. On the other hand, she deposited after

struggle and procrastination the balance of consideration on 6th February 1968 that is nearly 12 years after the date of agreement. The plaintiff thus enjoyed actual possession of the property from April 1956 to February 1968 when she parted with consideration without paying a farthing for the use and occupation of the premises which, on a reasonable construction of the contract, she was not entitled at all, till she parted with the full consideration and took the conveyance. This has undoubtedly weighed with the High Court in coming to the conclusion that the plaintiff is disentitled to a relief of specific performance of contract."

51. In the case on hand, as discussed above, the plaintiff had requested the defendant to execute the sale deed by receiving the balance of sale consideration and as there was no response, the plaintiff was compelled to issue a lawyer's notice, dated 13.5.2005 calling upon the defendant to receive the balance of sale consideration of Rs.2,50,000/- and to execute the sale deed on or before 20.6.2005 as recited in the sale agreement, dated 21.6.2002 and asked the defendant to inform the convenient date for registration within 10 days from the date of receipt of the said notice and therefore, this Court is of the considered view that neither the plaintiff had failed to prove her readiness and willingness to perform her part of contract nor there is delay or inordinate delay in proving her part of contract and therefore, the above said decision is not applicable to the case on hand.

52. Further, after the receipt of the notice, dated 13.5.2005, the defendant herself had approached the plaintiff and expressed her readiness and willingness to execute the sale after receiving the balance of sale consideration. Under these circumstances, this court of view that since both the parties have expressed their readiness and willingness to perform their part of contract, there will not be any impediment in executing the sale deed and therefore, both the parties are directed to perform their respective part of contract within a period of two months from the date of receipt of a copy of this order.

For the foregoing reasons, the regular appeal fails and the same is dismissed confirming the judgment and decree of the trial court. However, there will be no order as to costs.

Sd/-

Deputy Registrar(J)

//True Copy//

Sub Assistant Registrar

rnb

To

The Additional District Judge,
Fast Track Court No.1, Coimbatore.

1 CC to Mr.P.S. Kothandaraman, Advocate SR.No.

1 CC to G.Vivekanand, Advocate SR.No. 14014

A.S.No.1099 of 2009

UG (CO)
PSI (26.03.2015)



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