

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.11.2016

CORAM:

THE HONOURABLE MR. **JUSTICE M.M.SUNDRESH**

C.R.P.PD.No.1872 of 2016 & C.M.P.No.9778 of 2016
and
A.Nos.2729 & 3666 of 2016 in C.S.No.323 of 2016
and
A.No.3500 of 2016 in C.S.No.914 of 2015

Uniworld Logistics Private Limited,
Rep. By its Managing Director,
No.225, 4th Block, 5th Main, Koramengela,
Bangalore-560 034 and its business operations
at Plot Nos.A-11 & A-12, SIPCOT Industrial Park,
Irungattukottai, Sriperumbudur, Kancheepuram District. .. Petitioner

Vs.

Indev Logistics Private Ltd.,
Rep. by its Chief Financial Officer,
Mr.Vishwanatham Gandla and has its
Registered Office at No.81, Thambu Chetty Street,
Chennai-600 001. .. Respondent

Civil Revision Petition is filed under Article 227 of the Constitution of India against the impugned order dated 15.02.2016 allowing I.A.No.2001 of 2015 in O.S.No.101 of 2015 on the file of the District Munsif cum Judicial Magistrate Court, Sriperumbudur.

For Petitioner : Mr.Vijay Narayan, S.C., for
M/s Rathina Asohan

For Respondent : Mr.T.V.Ramanujam, S.C., for

Mr.K.S.Arumugam.

COMMON ORDER

C.R.P.No.1872 of 2016 has been filed against the order passed in I.A.No.2001 of 2015 in O.S.No.101 of 2015 pending on the file of District Munsif cum Judicial Magistrate Court, Sriperumbudur, by which, leave was granted to sue for the relief of recovery of arrears of storage/warehouse charges and damages, wrongful occupation and other incidental reliefs by way of a separate suit.

2. A.No. 3500 of 2016 in C.S.No.914 of 2015 has been filed seeking extension of time till 15.09.2016 to the applicant to vacate and hand over the suit property to the first respondent.

3. A.No.2729 of 2016 in C.S.No.323 of 2016 has been filed seeking direction to the first respondent/defendant to furnish security to the suit claim of Rs.8,42,88,761/-.

4. A.No. 3666 of 2016 in C.S.No.323 of 2016 has been filed seeking to reject the plaint in C.S.No.323 of 2016.

5. O.S.No.101 of 2015 has been filed on the file of District Munsif cum Judicial Magistrate Court, Sriperumbudur, for permanent injunction and mandatory injunction. There was a Leave and Licence Agreement between the parties. It was followed by another warehouse agreement dated 01.12.2010. In the suit, it has also been averred that the respondent reserved its right to file their claim against the petitioner for recovery of arrears and for damages arising out of its illegal use and occupation.

6. C.S.No.914 of 2015 has been filed by the petitioner/defendant in O.S.No.101 of 2015 seeking a prayer for declaration on the ground that the relationship between *inter se* parties is only lessor and lessee. Consequently, a challenge has been made to the Warehouse Agreement dated 01.12.2010 seeking to declare it as null and void and not acted upon. Pending the suit, the respondent has handed over the possession. Therefore, the relief sought for in the application filed in A.No.3500 of 2016 in C.S.No.914 of 2015 seeking extension of time to vacate and hand over the suit property has become infructuous.

7. The respondent/plaintiff in O.S.No.101 of 2015 has filed another suit in C.S.No.323 of 2016 seeking the following reliefs:

“(1) Directing the defendant to pay the plaintiff, a sum of Rs,8,42,88,761/- (Rupees eight crores forty two lakhs eighty eight thousand seven hundred and sixty one only) towards arrears in storage charges/warehouse chrges together with interest at the rate of 18% per annum on Rs.6,86,15,509/- from the date of the plaint to the date of realisation.

(2)Directing the defendant to pay the plaintiff future damages at the rate to be fixed by this Hon'ble Court from the date of the decree till the date on which the defendant removes their belongings and leaves the property forming subject matter of the Warehouse Agreement dated 01.12.2010.

(3) Directing the defendant to pay the costs of the suit; and

(4) pass such other suitable relief or reliefs as the Court may deem fit and proper in the circumstances of the case.”

8. Pending the aforesaid suit, A.No.2729 of 2016 has been filed seeking a direction to the first respondent to furnish security for the suit claim. The petitioner has also filed an application in A.No.3666 of 2016 contending that the subsequent suit is hit by Order II Rule 2 of Code of Civil Procedure.

9. As all these issues in the applications filed and the civil revision

petition are one and the same and between the same parties and connected to each other, they are taken up and disposed of by way of a common order.

10. For the sake of brevity, parties as arrayed in the civil revision petition are taken up as such for the other cases.

11. Heard Mr.Vijay Narayan, learned Senior Counsel for M/s Rathina Asohan, learned counsel for the petitioner and Mr.T.V.Ramanujam, learned Senior Counsel for Mr.K.S.Arumugam, learned counsel for the respondent.

12. In the earlier suit filed in O.S.No.101 of 2015, the respondent/plaintiff filed an application in I.A.No.2001 of 2015 in O.S.No.101 of 2015 seeking leave to file the subsequent one, in which, leave was granted by the trial Court by an order dated 15.04.2016. Thereafter, challenging the same, a revision in C.R.P.No.188 of 2016 was filed by the petitioner/defendant. This Court, by an order dated 28.01.2016, set aside the order of the trial Court and remanded the application for fresh consideration. The following paragraphs would be apposite:

“3. During pendency of the suit, the

plaintiff/respondent has filed an application in

I.A.No.2001 of 2015 under Order II Rule 2(3) C.P.C., to grant leave to the plaintiff to sue the defendant for the relief of recovery of arrears of storage/warehouse charges and damages for wrongful occupation and other reliefs arising out of the warehouse agreement dated 01.12.2010 in a separate suit. The trial Court allowed the application, against which, the present revision has been preferred by the defendant.

4. Learned counsel appearing for the revision petitioner submits that the defendant was not given an opportunity to file a counter in the application and contesting the same on merits. The present application was filed on 24.11.2015 and on that date itself, it was allowed. Therefore, he prays for allowing the revision.

5. Learned Senior counsel appearing for the respondent/plaintiff submits that it is true, an opportunity must be given to the defendant to putforth his case. He also prayed for early disposal of the application.

6. Considering the submissions made on both sides and perusing the typed set of papers, I am of the view, an opportunity must be given to the defendant/revision petitioner to file a counter in I.A.No.2001 of 2015. Therefore, the docket order passed in I.A.No.2001 of 2015 is liable to be set aside, it is hereby set aside and the matter is remanded back to the trial Court.

The Presiding Officer, District Munsif-cum-Judicial Magistrate's Court, Sriperumbudur, is directed to give

an opportunity to the revision petitioner/defendant to file a counter in I.A.No.2001 of 2015 and dispose of the same within a period of two months from the date of receipt of a copy of this order. The revision petitioner/defendant is directed to file a counter within a period of two weeks from today.”

13. After affording opportunity to the parties, the trial Court once again allowed I.A.No.2001 of 2015 in O.S.No.101 of 2015 by an order dated 15.04.2016 holding that the cause of action in both the suits are different. The cause of action for the earlier suit arose when the petitioner interfered with the respondent's availing of facilities to usage and attempted to prevent ingress and egress. The cause of action for the subsequent suit was due to the non payment of arrears of storage warehouse charges and apart from a claim for damages. Challenging the above said order, C.R.P.(PD) No.1872 of 2016 has been filed.

14. The learned Senior Counsel appearing for the petitioner submits that the trial Court, after holding that the cause of action for both the suits are different, nevertheless granted leave. There is a pleading in the earlier

suit about the non payment qua the petitioner. Therefore, the Civil Revision Petition has to be allowed and consequently, the application filed in A.No. 3666 of 2016 in C.S.No.323 of 2015 also has to be allowed. Insofar as the application No.2729 of 2016 is concerned, the question of liability would come at the time of deciding the suit and therefore, the said application has to be dismissed.

15. The learned Senior Counsel appearing for the respondent submits that Order II Rule 2 of C.P.C., can be invoked by way of filing an application at any stage. The leave has been sought for only by way of abundant caution as the cause of action for recovery of possession and recovery of arrears of storage/warehouse charges are different. In support of his contention, he has made reliance on the following decisions.

1. Edara Venkayya V. Edara Venkata Rao (C.R.P.No.87 & 386 to 388 of 1937 dated 19.08.1938) (48 Law Weekly 517);
2. Canning Mitra Phoenix Ltd., Vs. Popular Construction ((1994) 1 Mah. L J., 812)
3. Bodduru Nagaraju V. Gudla Narasimha Murthy (2005) 2 ALT 465);
4. Ponnammal V. Ramamirda Aiyar ((1915) 1 MLJ 127);
and
5. A.Subramanian V. Muthukrishna Reddiar (AIR 2005

Mad. 43).

16. The object of Order II Rule 2 of Code of Civil Procedure is to prevent the petitioner being vexed with same action twice. This is with respect to the same cause of action. Secondly, it is meant to prevent the respondent from clubbing the claims and remedies on the same cause of action. Therefore, the intention is to prevent a party from making different claims at different points of time based upon the very same cause of action. Thus, there is no bar in filing different suits between the same parties when cause of action is different from the one with other. When the cause of action as mentioned in the first suit becomes an initiation to the second one, the rigour of Order II Rule 2 of C.P.C., would come into play. While dealing with the bar under Order II Rule 2 of C.P.C., the onus is on the petitioner to plead specifically and prove. For the aforesaid purpose, the petitioner will have to produce both the complaints and satisfy the Court. When the cause of action is different, obviously there is no need for a leave. For deciding a bar under Order II Rule 2 of C.P.C., the complaints must be read as a whole to identify the cause of action.

17. An application seeking leave under Order II Rule 2 of C.P.C., can be filed after the institution of the suit. There is no condition precedent qua the leave to the jurisdiction of the Court to entertain a particular action. Thus, a mere omission to ask for a particular relief under Order **II** Rule 2 of C.P.C., would not make the first suit one without jurisdiction. Therefore, an application filed during the pendency of the first suit seeking leave is certainly maintainable. Such an application can be filed at any time prior to the date of the decree in the first suit as held in **CANNING MITRA PHOENIX LTD., V. M/S POPULAR CONSTRUCTIONS AND OTHER ((1994) 1 Mah. L J., 812).**

18. Cause of action has been well defined by the Courts from time to time. It constitutes a bundle of facts. These facts are material facts relatable to the relief of being proved successfully by the respondent. Therefore, every other fact would not constitute a cause of action. The Privy Council in **MOHAMMED KHALIL KHAN V. MAHBUB ALI MIAN ((1948) 61 Law Weekly 686)**, summarised the principle in the following manner.

"The principles laid down in the cases thus far discussed may be thus summarised:

(1) The correct test in cases falling under Order II Rule 2, is 'whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation for the former suit'. (Moonshee Buzloor Ruheem v. Shumsoonnissa Begum);

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

(3) If the evidence to support the two claims is different, then the causes of action are also different. (Brunsden v. Humphrey

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical. (Brunsden v. Humphrey)

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers 'to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour'. (Chand Kour v. Partab Singh[27]) This observation was made by Lord Watson in a case under [Section 43](#) of the Act of 1882 (corresponding to Order II Rule 2), where plaintiff made various claims in the same suit."

19. This decision of the Privy Council has been quoted with approval in the Apex Court's decision in **S.NAZEER AHMED ((2007) 11**

Supreme Court Cases 75) and INFRASTRUCTURE LEASING AND FINANCIAL SERVICES LTD., V. BPL LTD., ((2015) 3 Supreme Court Cases 363). A Constitution Bench of the Apex Court in GURUBUS SINGH V. BHOORALAL (AIR 1964 Supreme Court 1810) held as follows:

"Held: (i) A plea under Order II Rule 2 of the Code based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. It is for this reason that a plea of a bar under Order II Rule 2 of the Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the court the identity of the cause of action in the two suits. In other words a plea under Order II Rule 2 of the Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. Without placing before the court the plaint in which those facts were alleged, the defendant cannot invite the court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. On the facts of this [pic]case it has to be held that the plea of a bar under Order II Rule 2 of the Code should not have been entertained at all by the trial court because the pleadings in Civil Suit No. 28 of 1950 were not filed by the appellant in support of this plea.

(ii) In order that a plea of a bar under Order II Rule 2(3) of the Code should succeed the defendant who raises the plea must make out (i) that the second suit was in respect of the same cause of action as that on which the previous

suit was based; (ii) that in respect of that cause of action the plaintiff was entitled to more than one relief; (iii) 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."

It is not necessary to multiply authorities except to notice that the decisions in [Sidramappa v. Rajashetty](#), [Deva Ram v. Ishwar Chand](#) and [State of Maharashtra v. National Construction Co.](#) have reiterated and re-emphasised this principle."

20. In COFFEE BOARD V. RAMESH EXPORTS PVT. LTD., ((2014) 3

CTC 728) the Apex Court has held in the following manner.

"10. The above rules are offshoots of the ancient principle that there should be an end to litigation traced in the Full Bench decision of the Court in *Lachmi vs. Bhulli*[ILR 1927 (8) Lah.384] and approved by this Court in many of its decisions. The principle which emerges from the above is that no one ought to be vexed twice for the same cause. In light of the above, from a plain reading of Order 2 Rule 2, it emerges that if different reliefs and claims arise out of the same cause of action then the plaintiff must place all his claims before the Court in one suit and cannot omit one of the reliefs or claims except without the leave of the Court. Order 2 Rule 2 bars a plaintiff from omitting one part of claim and raising the same in a subsequent suit. (See: [Deva Ram & Anr. vs. Ishwar Chand & Anr.](#)[1995 (6) SCC 733]). Furthermore, this Court in [Alka Gupta v. Narender Kumar Gupta](#)[2010 (3) MWN (Civil) 852 (SC) : 2010 (10) SCC 141], stated that:

“The object of Order 2 Rule 2 of the Code is twofold. 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.”

11. The bar of Order 2 Rule 2 comes into operation where the cause of action on which the previous suit was filed, forms the foundation of the subsequent suit; and when the plaintiff could have claimed the relief sought in the subsequent suit, in the earlier suit; and both the suits are between the same parties. Furthermore, the bar under Order 2 Rule 2 must be specifically pleaded by the defendant in the suit and the Trial Court should specifically frame a specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different. This was held by this Court in [Alka Gupta v. Narender Kumar Gupta](#) (supra) which referred to decision of this Court in [Gurbux Singh vs. Bhooralal](#) [AIR 1964 SC 1810], wherein it was held that:

“6. 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.”

12. The Courts in order to determine whether a suit is barred by Order 2 Rule 2 must examine the cause of action pleaded by the plaintiff in his plaints filed in the relevant suits (See: [S. Nazeer Ahmed v. State Bank of Mysore & Ors.](#)[2007 (11) SCC 75]. Considering the technicality of the plea of Order 2 Rule 2, both the plaints must be read as a whole to identify the cause of action, which is necessary to establish a claim or necessary for the plaintiff to prove if traversed. Therefore, after identifying the cause of action if it is found that the cause of action pleaded in both the suits is identical and the relief claimed in the subsequent suit could have been pleaded in the earlier suit, then the subsequent suit is barred by Order 2 Rule 2.”

21. The cause of action in a suit for recovery of possession would be

different from that of recovery of arrears. The material facts/cause of action for a suit for possession would depend on the status of parties, conduct during the validity of the agreement followed by a refusal on the part of the petitioner to hand over possession, whereas in a suit for recovery of arrears, the issue is only with respect to the alleged non payment. In **SHANKARLAL LAXMINARAYAN RATHI V. GANGABISEN (AIR1972 BOM 326 (FB))**, Full Bench of High Court of Bombay, while dealing with the similar issue, has held as follows:

“16. The fundamental postulate for the application of Order 2, Rule 2, therefore, is that there must be one and only one cause of action in fact before its several provisions can apply. Of course, the Explanation creates by fiction one and the same cause of action in the case of successive claims arising under the same obligation. Obviously these successive claims, although arising under the same obligation, will normally give rise to different cause of action but the explanation says that they are to be deemed to constitute but one cause of action. The illustration itself to Order 2, Rule 2, also makes this clear. The rents for the three years 1905, 1906 and 1907 which are due and unpaid would obviously and normally be regarded as different cause of action having arisen at the end of each of those respective years, but because of the Explanation they being successive claims arising under the same obligation, they would be regarded as one and the same cause of action.

17.Order 2, Rule 2, does not require that when a transaction gives rise to several causes of action they should all be combined in one suit, or that the plaintiff must, if necessary, lay his claim alternatively in the same suit for these different causes of action. All that O. 2, R. 2, provides is that where there is one and the same cause of action, the plaintiff cannot split up his cause of action and sue for one part in one suit and for another part in another suit. As the Privy Council put it in *Naba Kumar v. Radhashyam*, "the rule in question is intended to deal with the vice of splitting a cause of action".

Thus, the applicability of O. 2, R. 2, depends upon there being established one and the same cause of action in the two suits. The defendant who raises the plea must establish that the second suit was in respect of the same cause of action as the previous suit. Therefore, in the present suit, all we have to determine in order to settle the disputes referred is whether the cause of action for the subsequent suit for possession was the same as the cause of action for mesne profits or damages in the first suit (Civil Suit No. 36 - B of 1955).

18.What is a cause of action is now settled beyond any doubt. The classic definition of that expression is that of Lord Justice Brett in *Cook v. Gill*, (1873) 8 CP 107.

" 'Cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, - every fact which the defendant would have a right to traverse."

Lord Justice Fry put it in the negative by saying. "Everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action." This definition is the basis of all subsequent decisions containing an interpretation of the expression "cause of action." It was accepted in [Deep Narain Singh v. Dietert](#), ILR 31 Cal 274 at p. 282 and by the Privy Council in [Mohammad Khalil Khan v. Mohbub Ali Mian](#) at p. 86, para 61 point No. 2. This has been referred to in several cases as the media upon which the plaintiff asks the Court to arrive at the conclusion in his favour :see the Privy Council case *Chand Kour v. Partap Singh* (1889) ILR 16 Cal 98 at p. 102 (PC) and in *Hiromal v. Faridkhan*, AIR 1915 Sind 35 at p. 36, a case upon which Mr. Deo strongly relied and in *Sheokumar Singh v. Bechan Singh* AIR 1940 Pat 76, by Rowland, J. at p. 79.

19. These cases also make it clear that the cause of action in a suit has no reference to the defence taken in the suit, nor is it related to the evidence by which that cause of action is established.

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21. Rule 4 uses the expression "cause of action" in the opening part, and the word 'claims' in clauses (a), (b) and (c) which form the exceptions, and this difference in the two expressions appears to have been made only the purpose of avoiding confusion and for the sake of clarity of language. It is not possible to hold that an exception refers to a different subject from the general rule to which it is an exception. It cannot be that the exceptions refer to claims

while the general rule to which they are exceptions refers to cause of action. Necessarily, it seems to us that we must construe "claims" in clauses (a), (b) and (c) of Rule 4 to be equivalent to "cause of action" in that rule. The different words are used only in order to avoid repetition and for convenience of expression, specially having regard to the language of clause (c).

22. Now, it is clear upon a plain reading of Order 2, Rule 4, that it regards the cause of action or claim for mesne profits or for damages as different from the cause of action for the recovery of immovable property. If it was the same, then there was no need to state the exceptions in clauses (a), (b) and (c), because Order 2, Rules 1 and 2, make ample provision for the same cause of action. It seems to us therefore that there is the amplest indication in O. 2, R. 4 that the cause of action for a suit for recovery of immovable property is not the same as the cause of action for damages for breach of any contract under which the property or any part thereof is held."

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24. We cannot read O. 2, R. 4 as entirely divorced from Order 2, Rule 2. No doubt Order 2, Rule 3 is an exception to Order 2, Rule 2 but it does not therefore follow that it has nothing to do with Order 2, Rule 2. On the other hand, it seems to us that Order 2, Rule 4, forms an important qualification to both Order 2, Rule 2, and Order 2, Rule 3. Order 2, Rule 2 (1) as we have already said, lays down the general principles that a suit must include the whole claim which the plaintiff is entitled to make in respect of a cause

of action, and if he does not, then he is visited with the penalty in Order 2, Rule 2 (2). Similarly, Order 2, Rule 2 (3) provides that reliefs arising out of the same cause of action shall be sued for in one and the same suit and again attaches a penalty if the plaintiff omits to do so. Thus Order 2, Rule 2, deals with one and the same cause of action. Order 2, Rule 3, on the other hand, deals with several causes of action and makes the contrary provision. It permits the plaintiff to unite several causes of action in one suit under certain circumstances. Where Order 2, Rule 2, deals with the same cause of action and prohibits its splitting, O. 2, R. 3 provides for the joinder of several causes of action. Therefore, inter alia they deal with two different aspects of the same subject viz. joinder of causes of action. Now, no doubt an exception to Order 2, Rules 2 and 3 is created by Order 2, Rule 4. Its opening part says that no cause of action shall be joined with a suit for the recovery of immovable property. to that extent this provision is an exception to Rule 2 (1) and Rule 2 (3) which respectively enjoin that a plaintiff must include his whole claim in respect of a cause of action and claim all the reliefs he is entitled to in respect of the same cause of action. It is also an exception to Order 2, Rule 3 (1) which permits several causes of action to be joined by the plaintiff against the same defendant or the same defendants jointly. Clauses (a), (b) and (c) of Order 2, Rule 4 create further exceptions to the general principle laid down in the opening part of Order 2, Rule 4; Order 2, Rule 4, therefore deals with a specific subject, namely, claims which could be joined in a suit for the recovery of immovable property, and to the

extent that special provision is so made on a special topic, its provision qualify the general provision of both Order 2, Rule 2 and Order 2, Rule 3. In fact, Order 2, Rule 3 is expressly made subject to the O. 2, R. 4 by the sue of the words "save as otherwise provided". Thus, though Order 2, Rule 4, is in part an exception to the general principle laid down in Order 2, Rule 3, it is also an exception to O. 2, Rr. 2 (1) and 2 (3). We cannot regard it as only an exception to Order 2, Rule 3, and completely divorced from Order 2, Rule 2.

25. Order 2, Rule 2 must therefore be read along with Order 2, Rule 4. We have already shown how in Order 2, Rule 4 claims for mesne profits and claims for damages are contrasted and contra distinguished from the cause of action for the recovery of immovable property, and in so far as they are contra distinguished, it is clear that the law regards the two as different claims or causes of action. We have already shown that there is no difference between the words "cause of action" and "claims".

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27.WE are quite unable to accept this argument. We have already referred to the provisions of Order 2, Rule 4, and we have shown that it clearly mentions 'a suit for recovery of immovable property' contrapuntally with "claims for mesne profits" or "claim for damages". That necessarily implies that they are separate and distinct causes of action. Thus, what are enacted in the Code of 1859 is in the present Code assumed by the law itself. It was not considered necessary to say so explicitly. The whole basis of assumption of Order 2, Rule 4, is that they are two

separate and distinct causes of action. If it were necessary to go as far as that, we would say that the law has read that fiction of Section 10 of the Code of 1859 into Order 2, Rule 4. At any rate, a historical argument like this cannot prevail against the plain reading of the words of Order 2, Rule 4. We think that it is clear beyond any doubt that claims for damages and claim for mesne profits are regarded as distinct and separate causes of action from the cause of action for recovery of immovable property, and Order 2, Rule 4, says that they may be joined together, whereas otherwise they could not be joined together because of the general principle contained in the opening words of O. 2, R. 4.

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32.The mere fact that the plaintiff chose to adopt the same measure of damages as he might have got under the contract will make no difference, because even in a title suit the plaintiff can always assess his own damages and in this case he chose to assess them at the same rate as agreed upon between the parties. That does not mean that the suit was on the basis of that agreement.

33. Even assuming however that it was a suit arising upon the same contract as the claim for damages, we do not think that the two causes of action would be the same. The claim in the first suit was for damages and it was therefore a recurring cause of action arising from month to month unlike the second suit where it arose once and for all on 20-1-1955. No doubt, the commencement of both the causes of action under the contract would be on the same

date and would depend upon the determination of the lease and that has enabled counsel on behalf of the lessees to show some similarity in the causes of action. But the basic nature of the claim for damages and/or mesner profits and the claim for possession as a landlord is different.

34.To take this very case, on 20-1-1955 the lease was determined. The plaintiff could on the morning of that very day have filed a suit for possession under the contract, but he could not at the commencement of that day have filed any suit for damages because no damages had accrued. It was only after either the first day or the first month, as the case may be, had elapsed under the wrongful occupation by the defendant - lessees that the claim for damages would accrue. Thus, the claim for damages depended upon proof of some other facts in addition to the mere determination of the lease on a particular day. The plaintiff would have to allege that the defendants wrongfully continued in occupation after 20-1-1955 and only then would he be entitled to claim the relief of damages. That shows that the cause of action for possession and the cause of action for claiming damages were not the same. The terms of the document itself indicate this. The right to damages would rest upon the provisions of Clause 7 and but for that clause the right to the additional Rs. 20/- per day as penalty would not arise in favour of the plaintiff, although the right to take possession would still arise. It was a completely different stipulation which was the foundation of the claim for damages in the first suit and a different stipulation in the

contract on which the claim for possession could be founded. This is clear from the penultimate part of clause 1 of the document which says :

"In case the party No. 2 fails to pay the rent for three months, then the Party No. 1 may get party No. 2 ejected; in spite of any law".

The distinction is well brought out (and we say so with great respect) in a passage in *Loknath v. Dwarika*, AIR 1931 Pat 233, col. 2 :-

"Now claims for mesne profits and ejectment are distinct reliefs and may or may not arise out of the same cause of action. The right to eject the defendant arises the moment the possession of the defendant becomes unlawful. The right to mesne profits arises at different times when the profits accrue to the defendant. The date of the cause of action for ejectment is one fixed date, whereas the dates of cause of action for mesne profits are several. Order 2, Rule 4, to my mind distinctly recognizes that the cause of action for mesne profits, for unless they were two distinct and separate entities there was no necessity for providing in the aforesaid rule for their uniting together in one single claim against the defendant".

22. The aforesaid decision took into consideration, the Full Bench decision of this Court in **PONNAMMAL V. RAMAMIRDA AIYAR (AIR 1915 Mad. 127 (FB))**. Thus, considering the above said declaration of law in such

a case even the leave may not be necessary.

23. Applying the principles aforesaid, this Court is of the view that there is no error in the order passed by the trial Court in I.A.No.2001 of 2015 in O.S.No.101 of 2015. Admittedly, the cause of action governing both the cases are different. A mere averment in the earlier suit would not be sufficient. The trial Court has come to the conclusion after thorough analysis of the pleadings contained in both the suits. The petitioner has not filed an application, but the order was passed on an application filed by the respondent seeking leave. The issue in the first suit is as to whether the respondent is entitled for a decree for permanent injunction and mandatory injunction. This relief has been sought for based upon the warehouse agreement dated 01.12.2012. The relief sought for in the subsequent suit is with respect to the claim of arrears of payment and damages. Even in the first suit, the respondent has stated that it reserves its right to file a suit against the petitioner for recovery of arrears and damages. Further, the cause of action in the first suit was on the refusal of the petitioner to vacate and hand over the schedule mentioned properties. For the aforesaid purpose alone, it has been averred that the amount due has not been paid by the petitioner. In any case, leave has been obtained. The question as to whether the cause of action in both the suits are different and the

respondent is entitled for the leave or not, being contradictory to each other, is irrelevant. If cause of action in both the suits are different, the subsequent suit is maintainable. If both are same, even then leave can be granted. Though this Court finds the cause of action in both the suits are different, there is no error in the order passed by the trial court. Therefore, in my opinion, the trial Court has passed the order based on proper appreciation of the facts of the case. The petitioner has also filed an application for rejecting the plaint in the subsequent suit filed. As this order is passed with respect to the civil revision petition as well as the application filed under Order VII Rule 11 of C.P.C., the contention of the learned Senior Counsel for the petitioner that if cause of action in both the suits are same, the leave ought not to have been granted is nothing but technical and thus, deserves to be rejected.

24. Insofar as Application No.2729 of 2016 in C.S.No.323 of 2016 is concerned, admittedly, the applicant is not a secured creditor. There is no material to hold that the respondent would not be in a position to honour the decree, if granted. The question of damages along with the quantum is a matter for trial. Accordingly, the Civil Revision Petition No.1872 of 2016 stands dismissed. Consequently, C.M.P.No.9778 of 2016, A.Nos.2729 and 3666 of 2016 in C.S.No.323 of 2016 and A.No.3500 of 2016 in C.S.No.914

of 2015 are also dismissed. No costs.

24.11.2016

raa

M.M.SUNDRESH, J

C.R.P.PD.No.1872 of 2016 & CMP.No.
9778 of 2016 and A.Nos.2729 & 3666
of 2016 in C.S.No.323 of 2016 and
A.No.3500 of 2016 in C.S.No.914 of 2015

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24.11.2016