

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

% **Date of Decision: 22nd July, 2016.**

+ **RFA No.795/2015**

NUTAN TYAGI **Appellant**

Through: Mr. Pawan Sharma, Adv.

Versus

NIRMALA DABAS **Respondent**

Through: Mr. Gaurav Bhardwaj and Ms.
Garima Bhardwaj, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 16th September, 2015 of the Court of District and Sessions Judge (North) Rohini Courts, Delhi of dismissal, on a preliminary issue as barred by Order II Rule 2 CPC, of CS(OS) No.69/2014 filed by the appellant/plaintiff for (a) specific performance of an agreement of sale of immovable property; (b) injunction restraining the respondent/defendant from dispossessing the appellant/plaintiff from the said property; and, (c) injunction restraining the respondent/defendant from creating third party interest in the said property.

2. The appeal came up before this Court first on 27th November, 2015 when notice thereof was issued. Thereafter on 29th April, 2016, the following order was passed.

- “1. The appeal impugns the judgment and decree of dismissal of a suit for specific performance of an agreement to sell of immovable property as barred by Order II Rule 2 of the Code of Civil Procedure, 1908.*
- 2. Notice of the appeal was issued and the Trial Court record requisitioned.*
- 3. Though the notice is reported to have been served but none appears for the respondent.*
- 4. Though the learned Additional District Judge in dismissing the suit has relied upon my judgment in **Lakhbir Singh Vs. Arun Kumar Khanna** 209 (2014) DLT 708 but as far as I recollect, Supreme Court in **Inbasagaran Vs S. Natarajan (Dead) Through LRs** (2015) 11 SCC 12 has taken a view contrary to that taken by me in **Lakhbir Singh** supra against which it appears no appeal was preferred.*
- 5. The counsel for the appellant seeks time to examine.*
- 6. Even otherwise, it is deemed expedient to give another opportunity to the respondent to appear.*
- 7. List on 19th May, 2016.”*

3. The counsels were heard on 19th May, 2016 and judgment reserved.

4. The trial court record has been requisitioned and has also been perused.

5. The appellant/ plaintiff on 18th March, 2014 instituted the suit from which this appeal arises pleading (i) that the husband of the respondent/defendant was the owner of property No.C-21, Top Floor, measuring 200 sq yds, Adarsh Nagar, Village Bharola, Netaji Road, Delhi – 33 and had agreed to sell the same to the appellant/plaintiff for a total sale consideration of Rs.13,50,000/- and received *bayana* amount of Rs.1,50,000/- from the plaintiff and executed a *bayana* agreement dated 16th May, 2007; (ii) that as per the said *bayana* agreement the balance consideration of Rs.12,00,000/- was to be paid in installments of Rs.15,000/- each per month w.e.f. 1st January, 2008 to January, 2012 and thereafter the sale deed had to be executed; (iii) the husband of the respondent/defendant had also handed over peaceful and vacant possession of the said property to the appellant/plaintiff and the appellant/plaintiff has since then been in possession thereof; (iv) that the appellant/plaintiff has paid Rs.15,000/- per month w.e.f. 1st January, 2008 had has paid total amount of Rs.8,75,000/- on different dates upto December, 2011 against receipt; (v) as per *bayana* agreement dated 16th May, 2007, the appellant/plaintiff is liable to pay interest at 2% on the delayed payment; (vi) that the husband of the respondent/defendant expired and which fact came to the knowledge of the

appellant/plaintiff in February, 2012; (vii) though the appellant/plaintiff approached the respondent/defendant to execute the sale deed after receiving the balance sale consideration but the respondent/defendant refused; (viii) the respondent/defendant sent legal notice dated 2nd March, 2013 to the appellant/plaintiff averring the appellant/plaintiff to be a tenant in the property and terminating the tenancy of the appellant/plaintiff; (ix) that the respondent/defendant on 30th August, 2013 attempted to dispossess the appellant/plaintiff from the property.

Accordingly, the suit for reliefs aforesaid was filed.

6. The respondent/defendant contested the suit by filing a written statement *inter alia* on the ground that the suit was hit by Order II Rule 2 of the CPC as the appellant/plaintiff previously filed a suit for permanent injunction but did not include the claim for specific performance in that suit and also did not seek leave of the Court to file a separate suit for specific performance. Considering that the suit has been dismissed on a preliminary issue on this plea of the respondent/defendant, need to refer to the other defences of the respondent/defendant is not felt.

7. The appellant/plaintiff in his replication, with respect to the plea of Order II Rule 2 CPC pleaded that the earlier suit filed on 23rd September, 2013 had already been withdrawn on 21st February, 2014 with liberty to file a fresh and hence the question of bar of Order II Rule 2 CPC did not arise.

8. The learned Additional District Judge, vide order dated 25th November, 2014, on the pleadings of the parties framed the following issues.

- “1. Whether the suit of the plaintiff is barred by provisions of Order II Rule 2 CPC? OPD.*
- 2. Whether the bayana agreement and receipts produced by the plaintiff are forged and fabricated? OPD.*
- 3. Whether the plaintiff is entitled to the decree of specific performance as prayed? OPP.*
- 4. Whether the plaintiff is entitled to permanent injunction as prayed? OPP.*
- 5. Relief.”*

and ordered the issue No.1 be treated as a preliminary issue.

9. The learned Additional District Judge, vide impugned judgment/order dated 16th September, 2015, has decided the issue aforesaid in favour of the respondent/defendant and hence “rejected” the plaint, finding / observing / holding –

- (a) the appellant/plaintiff had filed a suit for injunction on 24th September, 2013 before senior Civil Judge pleading the agreement to sell and that the defendant had refused to perform the same and had on the contrary attempted to dispossess the appellant/plaintiff from the property and claiming permanent injunction restraining the respondent/defendant from forcibly dispossessing the plaintiff/defendant from the property;
- (b) the said suit was withdrawn on 21st February, 2014 with liberty to file fresh one;
- (c) the appellant/plaintiff in the plaint in the earlier suit for permanent injunction had pleaded that the cause of action therefor had accrued when the husband of the respondent/defendant had entered into the agreement to sell and from time to time when part payments were made;
- (d) that in the plaint in the subject suit for specific performance also it was pleaded that the cause of action therefor had accrued on 22nd March, 2013 when the respondent/defendant in response to the legal notice had refused to execute the sale deed;

(e) relief of specific performance was very much available to the appellant/plaintiff on the date the injunction suit was filed but the appellant/plaintiff did not seek the said relief; and,

(f) that the liberty granted to the appellant/plaintiff to file a fresh suit, while withdrawing the earlier suit for injunction, would be only for a fresh injunction suit and not for a suit for specific performance.

10. The question for adjudication, as would be apparent from the above, is two fold. Firstly, whether owing to the appellant/plaintiff having omitted to sue for the relief of specific performance while filing the earlier suit, the appellant/plaintiff was precluded from afterwards suing for the relief of specific performance; and, secondly, whether the liberty granted “to file fresh suit” at the time when the earlier suit was withdrawn is confined to a fresh suit for the same relief which was claimed in the earlier suit or entitles the appellant/plaintiff to in the fresh suit also add the relief of specific performance of agreement to sell.

11. The learned District Judge having based the impugned judgment/order solely on *Lakhibir Singh* supra, I will first deal therewith. In that case, after

the seller had notified the purchaser of the purchaser being in breach of the agreement to sell for not paying the sale consideration, the purchaser had instituted a suit for permanent injunction to restrain the seller from creating third party rights in the property agreed to be sold and after obtaining an interim order therein and during the pendency of the said suit instituted the suit for specific performance and thereafter withdrew the earlier suit for injunction. Relying on the dicta of the Supreme Court in *M/s Virgo Industries (Eng) P. Ltd. Vs. M/S Venturetech Solutions P. Ltd.* (2013) 1 SCC 625 *inter alia* holding a suit for specific performance filed during the pendency of an earlier suit for injunction for restraining the seller from creating third party rights in the property to be barred by time and finding fault with the reasoning of the High Court that Order II Rule 2 CPC is applicable only when the first suit is disposed of, the suit was held to be barred by Order II Rule 2 CPC.

12. In *Inbasagaran* supra though the seller had been allotted the property agreed to be sold by the Tamil Nadu Housing Board, the Housing Board had not executed the sale deed in favour of the seller for the reason of the seller having not raised construction. In these circumstances, the seller had agreed to sell the land to the purchaser and agreed to execute sale deed in favour of

the purchaser after the sale deed in his own favour had been executed by the Housing Board and which in turn was dependent upon the purchaser raising construction on the land. The purchaser filed a suit for permanent injunction to restrain the seller from taking forcible possession of the building constructed by him and during the pendency of the said suit filed a second suit for relief of specific performance. Though the Trial Court decreed the suit for specific performance but the High Court in appeal held the suit for specific performance to be barred by Order II Rule 2 CPC reasoning that the purchaser had not filed the suit for specific performance on the basis of the fact that the Housing Board had since the filing of the earlier suit for injunction executed the sale deed in favour of the seller and the cause of action pleaded in both, the earlier suit for injunction as well as in the subsequent suit for specific performance was the same and since the purchaser had omitted to seek the relief for specific performance in the earlier suit for permanent injunction, it amounted to relinquishment of his right of specific performance. Setting aside the said reasoning, Supreme Court held -

- (i) that the cause of action for the earlier suit for injunction and the cause of action for the subsequent suit for specific performance

and the relief sought for in the two suits were quite distinct and not the same;

- (ii) if the causes of action in the two suits are different and distinct and the evidence to support the relief in the two suits is also different, then the provisions of Order II Rule 2 CPC will not apply;
- (iii) a perusal of Order II Rule 2 CPC clearly reveals that the same applies to cases where the plaintiff omits to sue a portion of the cause of action on which the suit is based, either by relinquishing the cause of action or by omitting the part of it;
- (iv) Order II Rule 2 CPC has no application to cases where the plaintiff bases his suit on separate and distinct cause of action and chooses to relinquish one or the other of them; it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he may have relinquished;
- (v) only if the two suits and the reliefs claimed therein are based on the same cause of action then only the subsequent suit will be barred by Order II Rule 2 CPC; however when the precise cause of action upon which the previous suit for injunction was filed

because of imminent threat from the side of the seller of dispossession from the suit property, then subsequent suit for specific performance on the strength and on the basis of the sale agreement cannot be held to be same cause of action;

(vi) from the pleadings in the two suits, particularly the cause of action as alleged by the purchaser, it was clear that they were not same and identical;

(vii) besides, there was nothing in the suit for injunction filed by the purchaser to show that the purchaser intentionally relinquished any part of his claim for the reason that the suit was for only injunction because of the threat from the side of the seller to dispossess the purchaser from the property; it was only after the seller disclosed the execution of the sale deed in his favour by the Housing Board and denied execution of sale deed in favour of the purchaser that the cause of action for filing the suit for specific performance arose;

(viii) the judgment in *Virgo Industries (Eng) P. Ltd* supra was not applicable as in that case the plea of the purchaser in the plaint in

the suit for injunction was that the seller was attempting to frustrate the agreement by transferring the property to third party; and,

(ix) on the contrary in the subject case the suit for injunction was filed only qua the threat of dispossession and the purchaser did not allege that the seller was threatening to alienate or transfer the property to frustrate the agreement.

13. Both the judgments i.e. *Virgo Industries (Eng) P. Ltd* supra and *Inbasagaran* supra are of benches of two Hon'ble Judges of the Supreme Court.

14. What I understand of the two judgments i.e. *Virgo Industries (Eng) P. Ltd.* supra and *Inbasagaran* supra is that if in the plaint in the earlier suit for injunction, it is not the plea that the seller is indulging in the acts which are sought to be enjoined for frustrating the agreement to sell, a subsequent suit for the relief of specific performance would not be barred by Order II Rule 2 CPC; otherwise it would be.

15. I have looked at the plaint in the suit for permanent injunction earlier filed by the appellant/plaintiff in the said light. The appellant/plaintiff therein is found to have pleaded as under:

“6. *That unfortunately the husband of the defendant expired which fact came into the knowledge of the plaintiff in February, 2012 and after the demise of her husband, the defendant and her other legal heirs became dishonest and now they want to grab the suit property.*

7. *That the plaintiff approached the defendant and requested to execute the sale deed after receiving the balance amount but she flatly refused to execute the sale deed in respect of the suit property.*

8. *That to achieve her wrong tactic, the defendant has sent a legal notice dated 22.3.2013 to the plaintiff and in which she alleged that the plaintiff is a tenant in respect of the suit property and allegedly terminated his tenancy. The plaintiff has replied the said notice on dated 23.4.2013 and further amended reply dated 10.5.2013 thereby mentioning the correct facts.*

.....

10. *That the defendant has become dishonest and he wants to evict the plaintiff from the suit property and to chief his illegal design he is adopting the different tactics.*

11. *That thereafter the defendant approached to plaintiff on 1.8.2013 and told to vacate the premises in question the plaintiff told the defendant that he has already made the big share of the entire payment of the said property and requested not to disturb his possession over the suit property on this the defendant threatened the plaintiff that she will come again along with her associates and forcibly dispossess the plaintiff from the suit property.*

12. *That the plaintiff was/is always ready and willing to perform the part of her contract and is ready to pay the balance payment along with 2% interest as per the terms and conditions mentioned in the aforesaid agreement to sell to the defendant and due to the demise of the husband of the defendant, the agreement cannot be performed.*
13. *That the defendant along with her associates again came to the plaintiff at the suit property on 30.8.2013, and started throwing the goods lying in the suit property and tried to dispossess the plaintiff from the said property the plaintiff made hue and cry and due to the intervention of the respectable persons of the area, the defendant could not succeed in his illegal motive and design and left the place by threatening the plaintiff that he will come again with more force and will definitely dispossess the plaintiff from the property in question.*
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16. *That the cause of action arose for filing the present suit in favour of the plaintiff and against the defendant on 16.5.2007 when the husband of the defendant entered into a bayana agreement with the plaintiff and received Rs.1,50,000/- as Bayana Agreement, the cause of action further arose time to time as and when the plaintiff paid the amount of Rs.15,000/- each upto January, 2012. The casue of action further arose on 30.8.2013 when the defendant and her associates further tried to dispossess the plaintiff from the suit property and the cause of action is still continuing.”*

The appellant/plaintiff in the said suit sought not only the injunction against the dispossession but also injunction against the

respondent/defendant from selling, transferring or creating third party interest in the property.

16. The aforesaid averments of the appellant/plaintiff in the plaint in the earlier suit for permanent injunction do indeed show that it was the case of the appellant/plaintiff therein that the respondent/defendant was threatening to dispossess the appellant/plaintiff or to transfer the property to a third party in order to frustrate the agreement to sell. In the facts of the present case, the ratio of the dicta of Supreme Court in *Virgo Industries (Eng) P. Ltd* supra and not the dicta of Supreme Court in *Inbasakaran* supra would be applicable and following the same the suit indeed would be barred by Order II Rule 2 of the CPC.

17. The counsel for the appellant/plaintiff however drew attention to *Rathnavathi Vs. Kavita Ganashamdas* (2015) 5 SCC 223 pronounced on the same date as *Inbasakaran* supra by a different Bench of two judges of the Supreme Court. That was also a case of the purchaser first instituting a suit for permanent injunction restraining the seller from interfering with the purchaser's possession of the property agreed to be sold and subsequently instituting a suit for specific performance of the agreement to sell. Both the

suits were consolidated for trial. The trial Court dismissed both the suits *inter alia* holding the suit for specific performance to be barred by Order II Rule 2 CPC. The High Court allowed both the appeals. Supreme Court upheld the judgments of the High Court. With respect to the plea of Order II Rule 2 CPC it was held – (i) that for Order II Rule 2 CPC to apply the cause of action in later suit has to be the same as in the first suit; (ii) that the suit for permanent injunction was based on a threat of dispossession; (iii) the cause of action for the subsequent suit for specific performance was non-performance of the agreement to sell; (iv) both the suits were thus founded on the different causes of action and hence could be filed simultaneously; (v) that the ingredients to file the suit for permanent injunction are different than that of the suit for specific performance; (vi) that even if both the suits are based on identical pleadings and even if the cause of action to sue for relief for specific performance of agreement to sell was available prior to filing of the first suit, the second suit would not be barred by Order II Rule 2 CPC because the cause of action in the two suits is different; (vii) a suit for specific performance could not have been instituted on the basis of cause of action of the first suit; (viii) merely because pleadings of both suits are similar to some extent does not give rise to the Order II Rule 2 of CPC; (ix)

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; (x) 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 were founded and the reliefs claimed in both the suits and lastly the legal provisions applicable for grant of relief in both the suits.

18. I have again examined the plaint in the suit for specific performance from which this appeal arises and the plaint in the earlier suit for injunction filed by the appellant/plaintiff, with the care and caution which Supreme Court has advised.

19. As per the own case of the appellant/plaintiff, (i) the date fixed in the *bayana* agreement of which specific performance was sought, was end of January, 2012; (ii) the appellant/plaintiff had approached the respondent/defendant for performing her part of the agreement to sell but the respondent/defendant had refused; (iii) the appellant/plaintiff had also got issued a legal notice to the respondent/defendant to perform her part of the agreement and in response thereto also the respondent/defendant had refused

to perform her part of the agreement; (iv) that the respondent/defendant had become dishonest and was wanting to evict the appellant/plaintiff from the suit property of which possession had been given in pursuance to the agreement to sell and to sell the suit property to defeat the agreement of sale thereof in plaintiff's favour.

20. It is not the case of the appellant/plaintiff that after the institution of the earlier suit for injunction she had approached the respondent/defendant to perform her part of the agreement or that the respondent/defendant had refused or that anything else had happened after the institution of the suit for injunction which may have furnished a cause of action for the suit for specific performance.

21. Rather it is the express case of the appellant/plaintiff that she was filing the suit for specific performance after withdrawing the earlier suit for permanent injunction with liberty to file a fresh suit.

22. In this view of the matter, there is nothing in the dicta of ***Rathnavathi*** supra also which dissuades me from following ***M/s Virgo Industries (Eng) P. Ltd.*** supra which has not been disagreed with therein also. I therefore answer the first of the aforesaid questions in favour of the

respondent/defendant and against the appellant/plaintiff and hold that in terms of *M/s Virgo Industries (Eng) P. Ltd.* supra and *Lakhbir Singh* supra the suit from which this appeal arises was barred by Order II Rule 2 of CPC.

23. Though I had in order dated 29th April, 2016 reproduced above observed that no appeal appeared to have been filed against *Lakhbir Singh* supra but my subsequent research discloses *Lakhbir Singh Vs. Arun Khanna* MANU/DE/2131/2015 whereby the Division Bench of this Court, after noticing *Inbasagaran* supra and *Rathnavathi* supra, for similar reasons as have been given by me above, dismissed the appeal, holding *Virgo Industries (Eng) P. Ltd.* supra to be applicable to facts of that case.

24. Notice may also be taken of yet another judgment of a bench of two Judges in *Coffee Board Vs. Ramesh Exports Pvt. Ltd.* (2014) 6 SCC 424 where in the context of successive suits for recovery of money, the second suit for recovery of money was held to be barred by Order II Rule 2 CPC reasoning that (i) one ought not to be vexed twice for the same cause; (ii) 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 and claims except without leave of the Court; (iii) the bar of Order II Rule 2 CPC comes into operation where the cause of action on which previous suit was filed forms the foundation of the

subsequent suit and when the plaintiff could have claimed the relief sought in subsequent suit, in earlier suit; (iv) both plaints must be read as a whole to identify the cause of action which is necessary to maintain a claim or necessary for plaintiff to prove if traversed; (v) if relief claimed in subsequent suit could have been pleaded in earlier suit, the subsequent suit would be barred.

25. Now coming to the second question, the appellant/plaintiff on 21st February, 2014 made the following statement before the Court in which the earlier suit for specific performance was pending.

“Statement of plaintiff Sh. Nutan Tyagi s/o Sh. Shiv Nandan Tyagi r/o C-21, Top Floor Adarsh Nagar, Village Bharola, Netaji Road, Delhi-33 ON S.A.

I am the plaintiff. The present suit may be dismissed as withdrawn with liberty to file afresh.”

And the following order was passed by the Court –

“21.02.14.

Present: Plaintiff Nutan Tyagi with Counsel Sh. Manoj Kumar.

Defendant in person with counsel Sh. Sunil Chaudhary.

Counsel for the plaintiff submits that the plaintiff wishes to withdraw the present suit with liberty to file afresh.

Statement of the plaintiff recorded separately to this effect.

In view of the same, the present suit filed by the plaintiff is hereby dismissed as withdrawn with liberty to file fresh suit.

File be consigned to record room.”

26. The learned District Judge in the impugned judgment / order, without giving any reason, has held that the liberty granted would entitle the appellant/plaintiff only to file a fresh suit for injunction as was claimed in the suit which was being withdrawn and not a suit for specific performance. The correctness thereof is under challenge.

27. Order XXIII of the CPC titled “Withdrawal and adjustment of suits”, in sub-Rules (3) and (4) of Rule (1) thereof (in exercise of power whereunder the earlier suit was permitted to be withdrawn with liberty aforesaid) provides as under:

“(3) Where the Court is satisfied,-

- (a) that a suit must fail by reason of some formal defect, or*
- (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a **fresh suit in***

respect of the subject-matter of such suit or such part of the claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule(1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.”

(emphasis added)

28. Though the Court, in which the earlier suit filed by the appellant/ plaintiff for injunction was pending has not given any reason or expressed any satisfaction that that suit was liable to fail for the reason of some formal defect or there were any sufficient grounds for allowing the appellant/plaintiff to institute a fresh suit, as ought to have been done but the fact remains that the respondent/defendant present through counsel on that date did not object thereto and the order permitting the earlier suit for injunction to be withdrawn with liberty to file a fresh suit has attained finality. Again, though the appellant/plaintiff did not withdraw the earlier

suit for injunction stating that he intended to file a suit for specific performance of the agreement to sell but the liberty granted to the appellant/plaintiff “to file a fresh suit” has to be judged in the light of Order XXIII Rule 1(3)(b) supra of CPC and which liberty is to institute a fresh suit “in respect of the subject matter of such suit” with the words “such suit” meaning the suit, which was being permitted to be withdrawn. Thus, the liberty granted to the appellant/plaintiff was to institute a fresh suit in respect of the subject matter of the suit for injunction earlier filed. What has to be seen is, whether the appellant/plaintiff can, exercising such liberty, only file a suit for injunction or could add a relief of specific performance of agreement to sell thereto.

29. I find a Division Bench of the High Court of Allahabad, as far back as in *Behari Lal Pal Vs. Srimati Baran Mai Dasi* ILR (1895) XVII Allahabad 53 to have held that the relief for recovery of rent which could have been included in the prior suit, also for recovery of rent, and which was permitted to be withdrawn with liberty to file a fresh suit, could be added to the fresh suit. Reliance was placed on yet earlier judgment in *Venkata Shetti Vs. Ranga Nayak* ILR 10 Mad. 160 holding that where a suit is withdrawn with permission to bring a fresh suit, the effect of such

permission is to leave matters in the position they would have stood if no such suit had been instituted. I find the said view to have been consistently followed in i) *J. Subba Row Vs. J. Rama Row* AIR 1917 Mad. 948; ii) *Ghulam Muhammad Khan Vs. Nur Khan* AIR 1917 Lahore 414; iii) *Becharam Choudhuri Vs. Purna Chandra Chatterji* AIR 1925 Calcutta 845 (FB); iv) *Bhimangouda Vs. Sangappa Irappa Patil* AIR 1960 Karnataka 178; v) *Sukumar Banerjee Vs. Dilip Kumar Sarkar* AIR 1982 Calcutta 17; vi) *Parmanand (Dead) through L.Rs. Vs. Prescribed Authority (Munsif City), Meerut* MANU/UP/0403/2001; and, vii) *Times Publishing House Ltd. Vs. The Registrar of Newspapers of India* MANU/KA/1457/2010 (DB).

30. Though I was reluctant to accept the aforesaid view in today's day where litigation is often instituted to harass, oppress and to delay relief to opposite party and not always for resolution of *bona fide* disputes and more so in the facts of the present case, where it appears that the claim for specific performance is being pursued to delay the ejection of the appellant/plaintiff as a tenant from the subject premises and taking advantage of the death of the husband of the respondent/defendant and also for the reason of a new view taken by the Supreme Court in M/s *Virgo*

Industries (Eng.) Pvt. Ltd. supra and which has not been dissented from in any of the subsequent judgments and rather finds support from *Coffee Board* supra but find myself bound by the judgment of the Division Bench of this Court in *Shri N.D. Tiwari Vs. Sh. Rohit Shekhar* MANU/DE/3072/2010 holding that the term “subject matter” in Order XXIII Rule 1(3)(b) of CPC is of wider amplitude than the term “cause of action” and to have followed *Ghulam Muhammad Khan* supra, holding that the effect of permission under Order XXIII Rule 1(3)(b) CPC is to leave matters in the position in which they would have stood, if no such suit had been instituted.

31. According to *M/s Virgo Industries (Eng.) Pvt. Ltd.* supra the bar to Order II Rule 2 CPC is attracted on the date of institution of the suit omitting to claim a relief which could and ought to have been claimed therein and is not dependent upon the decision of the suit. Therefrom it appears that the said bar once attracted could not have been taken away by subsequent grant of permission to withdraw that suit with liberty to file fresh one, specially when no specific permission was taken to, in the new suit, claim the relief of specific performance. However, as aforesaid, I am bound by the judgment of the Division Bench of this Court in *Shri N.D. Tiwari* supra. As per the said judgment, the effect of grant of permission to institute a fresh suit is as

if the earlier suit had not been filed and as a consequence whereof the bar of Order II Rule 2 CPC which was attracted on filing thereof would also disappear.

32. The appeal thus, has to be allowed.

33. I however find that the suit from which this appeal arises was being taken up along with a suit for ejectment of the appellant/plaintiff from the premises filed by the respondent/defendant. The agreement to sell of which the appellant/plaintiff claims specific performance is not a registered one. The appellant/plaintiff cannot thus be said to be in possession of the premises in part performance of the agreement to sell and benefit of Section 53A of the Transfer of Property Act, 1881 would thus not be available. This question has been dealt by me in *Jagdambey Builders Pvt. Ltd. Vs. J.S. Vohra* MANU/DE/0310/2016.

34. Thus, while allowing the appeal, it is clarified (i) that the pendency of the suit for specific performance will not come in the way of the suit for ejectment filed by the respondent/defendant against the appellant/plaintiff and/or in execution of the decree therein; and, (ii) it will be open to the respondent/defendant to apply to the Trial Court for an order that the

provisions of Section 52 of the Transfer of Property Act, 1881 and the principle of *lis pendens* would not be attracted by the pendency of the suit for specific performance, as has been held in ***Vinod Seth Vs. Devinder Bajaj*** (2010) 8 SCC 1.

35. The appeal so succeeds. The impugned order/judgment and decree are set aside. Axiomatically the suit is required to proceed to trial on other issues. The plaintiffs to appear before the District Judge (North) Rohini Courts, Delhi on 7th September, 2016. The Trial Court record requisitioned be sent back forthwith.

No costs.

Decree sheet be drawn.

RAJIV SAHAI ENDLAW, J.

JULY 22, 2016

‘M/bs’