

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 435 OF 2016

Shri Ramdas Yashwant Suryanvanshi
And Anr

...Applicants

Versus

M/s. Viva Highways Private Limited
And Ors

...Respondents

....

Mr. Milind M. Sathaye, Advocate for the Applicants.

Mr.R.S. Apte, Senior Advocate a/w. A.A. Garge, Advocate for
Respondents No.1 to 5.

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CORAM : R. G. KETKAR, J.

DATE : 17th FEBRUARY, 2017

P.C.

1. Heard Mr.Milind Sathaye, learned Counsel for the applicants and Mr.R.S. Apte, learned Senior Counsel for respondents No.1 to 5, at length.

2. By this application under Section 115 of C.P.C. the applicants, hereinafter referred to as 'defendants No.5 & 6' have challenged the judgment and order dated 15.6.2016 passed by the learned 4th Jt. Civil Judge, Senior Division, Nashik below Exhibit-75 in Special Civil Suit No.8/2012. By that order, the learned trial Judge rejected the application made by defendants No.5 & 6 under Order VII Rule 11(d) of C.P.C. for rejecting the

plaint on the ground that it is barred under Order II Rule 2 of C.P.C.

3. The subject matter of the dispute between the parties is Gat No.180, 181/2, 183, 187 in all admeasuring 81 H 58 R situate at village Matori, Taluka and District Nashik (for short, 'suit property'). Respondents No.1 to 5, hereinafter referred to as the plaintiffs and the defendants No.5 & 6, entered into Memorandum of Understanding (for short, 'MOU') styled as 'Samjutpatra' dated 11.2.2010. It appears that Regular Civil Suit No.404/2007 (for short, 'first suit') was instituted by Shri Vitthal Hari Charaskar and 10 others against defendants No.5 & 6 and others restraining defendants therein from creating third party interest by entering into agreement of sale / sale deed without prior permission of the residents of village Matori.

4. Clause-4 of the MOU recorded that in respect of the suit property, disputes are pending which does not permit execution of the agreement of sale, earnest receipt (visar pawati) and, therefore, the parties to the MOU signed said document and the terms and conditions set out therein are binding on the parties. It *inter alia* provided that if the disputes are decided in

favour of defendants No.5 & 6 upto High Court, after expiry of the appeal period, the plaintiffs will issue public notice and if no objections are received during the notice period or if the objections are received, the same will be taken care of by the plaintiffs at their expenses and thereafter upon payment of entire consideration to defendants No.5 & 6, within 15 days they will execute the sale deed. Defendants No.5 & 6 upon receipt of entire consideration within 15 days will execute the sale deed in favour of the plaintiffs or their nominations and also will hand over actual physical possession on execution of the sale deed. Clause-17 thereof laid down that the period of MOU is nine months. If by that time, the sale deed is not executed, by mutual consent of the parties, the period of nine months will be extended failing which the MOU and the transaction shall be treated as cancelled.

5. It is the case of the plaintiffs that the period of nine months was to expire on 11.11.2010. As the parties have mutually agreed to extend the period of nine months, on 8.11.2010 a meeting was convened at the residence of the plaintiff's Director Ashok Motilal Kataria and the defendant orally agreed to extend the period by six months. In order to

record what transpired orally in the meeting of 8.11.2010, the plaintiff addressed a letter dated 9.11.2010 to the defendants. By letter dated 15.11.2010 the defendants informed the plaintiffs that in terms of clause-17 of the MOU, the transaction was to be completed within nine months from 11.2.2010 and as the transaction is not completed within a period of nine months, MOU stands cancelled. The defendants also communicated to the plaintiffs that they are not interested in extending the period stipulated in the MOU. The plaintiffs, therefore, instituted R.C.S. No.578/2010 in the Court of Civil Judge, Senior Division, Nashik on 26.11.2010 for perpetual injunction restraining the defendants from creating third party interest by entering into any agreement and transferring the suit property.

6. The plaintiffs also issued public notice on 23.11.2010 cautioning the public at large from entering into transactions with defendants No.5 & 6 and others. In paragraph-14, the plaintiffs contended that they are entitled to execution of the sale deed on the basis of the concluded contract. However, the MOU being a contingent contract and the event that was to happen as mentioned in that MOU did not take place, the plaintiffs are unable to perform their part of contract. The

plaintiffs are ready and willing to perform their part of the contract as per the MOU and, therefore, they are reserving their right to sue for specific performance of the contract under Order II Rule 21 of C.P.C. On 4.12.2010 the plaintiffs filed application Exhibit-15 under Order II Rule 2 of C.P.C. On 18.12.2010, the application at Exhibit-5 filed by the plaintiffs in first suit was rejected.

7. On 30.4.2011, R.C.S. No.404/2007 filed by Vitthal Charaskar and others against defendants No.5 and 6 and others was dismissed by the trial Court. It is common ground between the parties that no appeal was preferred against that decision and the said decision has attained finality. On 23.12.2011, the plaintiffs instituted Special Civil Suit No.8/2012 (for short, 'second suit') for specific performance of the contract. On 29.11.2012, the defendants filed written statement resisting the suit. One of the objections raised by the defendants was that the suit is hit by Order II Rule 2 of C.P.C. Defendants No.5 & 6 contended that the plaintiffs had instituted R.C.S. No.578/2010. In that suit, the plaintiffs specifically contended that they reserved their right to sue for specific performance under Order II Rule 2 of C.P.C. Though, they have filed application under

Order II Rule 2 of C.P.C. on 4.12.2010, no leave was granted by the trial Court.

8. On 28.7.2015, the plaintiffs filed purshis at Exhibit-33 in the first suit for withdrawal of the suit on the ground that they have instituted other proceedings against the defendants. On the same day, the learned trial Judge disposed of the suit subject to the plaintiffs paying costs of Rs.5100/- to the defendants.

9. Defendants No.5 and 6 filed application Exhibit-75 under Order VII Rule 11 of C.P.C. for rejecting the plaint on the ground that the second suit is hit by the provisions of Order II Rule 2 of C.P.C. By the impugned order, the learned trial Judge has rejected the application Exhibit-75 by holding that the second suit is not hit by Order II Rule 2 of C.P.C. It is against this order, defendants No.5 & 6 have instituted present application.

10. In support of this application, Mr. Sathaye invited my attention to clauses-4, 16, 17 of MOU dated 11.2.2010. In particular, he submitted that clause-17 clearly laid down that MOU will be valid for nine months. In case the sale deed cannot

be executed during this period, both parties mutually will extend the time for completing the transaction failing which the MOU and the transaction shall stand cancelled. He submitted that by letter dated 15.11.2010, the defendants did not extend time limit stipulated in MOU of 11.2.2010 and cancelled the transaction. In fact the plaintiffs were also aware of the cancellation of the MOU and, therefore, issued Public Notice on 23.11.2010. The plaintiffs instituted first suit on 26.11.2010. Mr. Sathaye invited my attention to paragraphs-9 to 14 of the first suit. He submitted that though the plaintiffs filed application on 4.12.2010 at Exhibit-15 in the first suit under Order II Rule 2, they did not invite any order. In fact after the defendants filed written statement raising objection in that regard as also filing application Exhibit-75, the plaintiffs filed purshis at Exhibit-33 in the first suit for withdrawal of the suit and the suit was disposed of on 28.7.2015 without obtaining leave under Order II Rule 2. He, therefore, submitted that as the second suit is instituted without obtaining leave under Order II Rule 2 of C.P.C. and is based on the same cause of action, the second suit is not maintainable and is hit by Order II Rule 2 of C.P.C. The learned trial Judge was not justified in rejecting the application.

He has also taken me through the averments made in the second suit to contend that the second suit is based on the same cause of action as that of the first suit.

11. On the other hand, Mr. Apte supported the impugned order. He relied upon Order II Rule 2(1) of C.P.C. He submitted that Order II Rule 2(1) lays down that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. Order II Rule 2(2) lays down that 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. He has invited my attention to the averments made in the first suit as also in the first suit. Having regard to clause-4 of the MOU, so long as R.C.S. No.404/2007 was not decided, the plaintiffs could not have sought the relief of specific performance. He submitted that basically the first suit and the second suit are not founded on the same cause of action. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

12. I have considered the rival submissions advanced by

learned Counsel appearing for the parties. I have also perused the material on record. I have already dealt with clauses-4 and 17 of MOU dated 11.2.2010. It is no doubt true that the time stipulated in the MOU is nine months and as per the contention of the defendants, the period of nine months expired on 11.11.2010. At the same time, clause-4 of the MOU recorded that in respect of the suit property, disputes are pending which does not permit execution of the agreement of sale, earnest receipt (visar pawati) and, therefore, the parties to the MOU signed said document and the terms and conditions set out therein are binding on the parties. It is not in dispute that on 15.11.2010, the defendants terminated the MOU dated 11.2.2010. It is also not in dispute that on 23.11.2010, the plaintiffs issued Public Notice. On 26.11.2010, the plaintiffs instituted suit for perpetual injunction restraining the defendants from creating third party interest by entering into any transaction in respect of the suit property. In paragraph-9, the plaintiffs have referred to the period expiry of nine months on 11.11.2010 and also meeting of 8.11.2010 and their sending communication dated 9.11.2010 to the defendants and the defendants' response dated 15.11.2010. In paragraph-12, the plaintiffs specifically averred that it was

agreed between the parties that so long as R.C.S. No.404/2007 and other proceedings are not decided, the transaction cannot be completed and said condition is binding on the parties. In paragraph-13, the plaintiffs have expressed their apprehension that the defendants are likely to create third party interest. In paragraph-14, the plaintiffs reiterated that they have right to obtain sale deed on the basis of concluded contract. However as the event that was contemplated in MOU had not taken place, the plaintiffs cannot pray for specific performance of the contract. The plaintiffs are ready and willing to perform their part of the contract and, therefore, they reserved liberty to sue for specific performance under Order II Rule 2 of C.P.C. and accordingly they will file application in that regard.

13. It is not in dispute that R.C.S. No.404/2007 was dismissed on 30.4.2011. Thus when the first suit was instituted by the plaintiffs they could not have prayed for specific performance of contract in view of clause-4 of MOU dated 11.2.2010. It is only after that suit was disposed of, the plaintiffs could have prayed for specific performance of the contract. Accordingly the plaintiffs have instituted second suit on 23.12.2011 praying for specific performance of the contract. It

is not disputed that the suit is within limitation. Perusal of the averments in the second suit and in particular paragraphs-21 and 22 clearly shows that the second suit is based upon cause of action, namely, disposal of the suit in R.C.S. No.404/2007 and the said cause of action was not available to the plaintiffs when they instituted the first suit.

14. While rejecting the application, the learned trial Judge has referred to the decision of ***Rathnavathi and another v. Kavita Ganashamdas, (2015) 5 SCC 223***. In that case, the plaintiffs filed two suits, one for specific performance of the agreement and other for grant of permanent injunction in respect to the suit house. The learned trial Judge dismissed the suits. In appeal, High Court reversed the decree of the trial Court and decreed both the suits. Against that order, defendants No.1 and 3 approached Apex Court. The controversy related to a dwelling house bearing No.351, Block No.11, Matadahalli Extension, now known as R.T. Nagar, Bangalore. Defendant No.2 had purchased the said house from Bangalore Development Authority (B.D.A.) in a scheme on 15.2.1989. Defendant No.2 entered into an agreement with the plaintiff for

sale of the suit house for a total consideration of Rs.3,50,000/- . In terms of clause-2 of the agreement, the plaintiff paid sum of Rs.50,000/- as advance towards the sale consideration. On 7.1.2000, the plaintiff filed O.S.No.223/2000 initially against 3 defendants for permanent injunction restraining the defendants jointly and severally from interfering in the plaintiff's possession over the suit house. While contesting the suit by defendants No.1 and 2, it was alleged that defendant No.2 had cancelled the agreement dated 15.2.1989 on 25.10.1995 by sending legal notice to the plaintiff and then sold the suit house to defendant No.1 on 9.2.1998. On 31.3.2000, the plaintiff filed O.S. No.230/2000 in the Court of City Civil Judge, Bangaluru for specific performance of the agreement dated 15.2.1989 in relation to the said house.

15. Before the Apex Court it was contended that the suit was not maintainable as the bar contained under Order II Rule 2 of C.P.C. do not permit the plaintiff to file suit for specific performance of the agreement against the defendants. It was alleged that the relief of claim of specific performance of the agreement was available to the plaintiff when she filed earlier suit for permanent injunction against the defendants. Though

the plaintiff failed to claim relief in the earlier suit, consequently, the subsequent suit filed for claim of specific performance is hit by the rigour contained in Order II Rule 2 of C.P.C. and as such is barred and is liable to be dismissed as not maintainable.

16. In paragraph-23, Apex Court referred to the decision of Constitution Bench of Apex Court in **Gurbux Singh v. Bhooralal, AIR 1964 SC 1810**. In paragraph-6, it was observed thus :

“6. In order that a plea of a bar under Order 2 Rule 2(3) of the Code of Civil Procedure 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)

17. Apex Court referred to the decision of **Virgo**

Industries (Engg.) (P) Ltd v. Venturetech Solutions (P) Ltd.,

(2013) 1 SCC 625. In paragraph-11 of that report, it was observed thus :

“11. 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 . 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."

18. In paragraph-25.1, Apex Court referred to the suit for injunction as also cause of action for filing suit for specific performance of the agreement. In paragraph-25.2 it was observed that both the suits were founded on different causes of action and hence could be filed simultaneously. The ingredients to file suit for permanent injunction are different than that of the suit for specific performance of the agreement. In paragraph-25.3, it was observed that in case of former *prima facie* 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 read with Order XXXIX Rules 1 and 2. Whereas in the case of latter, the plaintiff is required to plead and prove her continuous readiness and willingness to perform her part of the agreement and to further prove that the defendant failed to perform her part of the agreement as contained in Section 16 of the Specific Relief Act. In paragraph-26 it was observed that one

of the basic requirements for successfully invoking the plea of Order II Rule 2 of C.P.C. 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. In paragraph-28, Apex Court dealt with the submissions advanced on behalf of the appellants that 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 C.P.C. Apex Court observed in paragraph-29 as under :

“29. 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 Code of Civil Procedure. 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 Code of Civil Procedure for filing the second suit.”

19. Applying the tests laid down by Apex Court in the above decision to the facts of the present case and perusal of the plaint in the first suit and second suit clearly show that in the first suit the plaintiff specifically referred pendency of R.C.S. No.404/2007 and as such could not have claimed relief of specific performance till the disposal of that suit as stipulated in clause-4 of the MOU dated 11.2.2010. In paragraph-9, the plaintiffs specifically referred to expiry of nine months on 11.11.2010. As also meeting convened at the residence of one of the Directors of the plaintiff on 8.11.2010 and letter dated 9.11.2010 addressed to the defendants as also response of the defendants dated 15.11.2010. In paragraph-12, the plaintiffs reiterated that the terms and conditions which are contained in MOU are binding on the parties. In paragraph-13, the plaintiffs have referred to the information received by them about the defendants entering into transaction with third parties.

20. As far as the second suit is concerned, in paragraph-21 the plaintiffs reiterated that so long as R.C.S. No.404/2007 is pending, sale deed cannot be executed and the same shall be

executed after disposal of that suit. It was also specifically averred that on the date of filing of the first suit on 26.11.2010, the plaintiffs could not have prayed for relief of specific performance. In paragraph-22, the plaintiffs averred that R.C.S. No.404/2007 was decided on 30.4.2011 and no appeal is preferred against that. The plaintiffs therefore averred that as the defendants have refused performance on 15.11.2010, they are now entitled to pray for relief of specific performance. In paragraph-23, the plaintiffs have averred that they are all along ready and willing to perform their part of the contract. Thus, the ratio in the case of **Rathnavathi** (supra) applies on all fours to the facts of the present case.

21. In view thereof, it cannot be said that the second suit is based on the same cause of action. Merely because the pleadings of both the suits are similar to some extent cannot give rise to the defendants to raise plea which was contained under Order II Rule 2 of C.P.C. Hence, no case is made out for interfering with the impugned order. Civil Revision Application fails and the same is dismissed.

(R. G. KETKAR, J.)