

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.656 of 2013

Date of decision: 23.03.2017

Pankaj Kumar

..Appellant

Versus

Hem Raj

..Respondent

CORAM: HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present: Mr. V.B. Aggarwal, Advocate
for the appellant.

Mr. Sanjiv Gupta, Advocate
for the respondent.

Daya Chaudhary, J.

Appellant-Pankaj Kumar was plaintiff before the trial Court and filed suit for possession by way of specific performance.

As per case of the plaintiff, one Rajesh Kumar being Power of Attorney of defendant-Hem Raj, executed an agreement to sell in his favour on 02.01.2008 for sale of suit land for consideration of ₹620/- per square yard. Defendant received ₹30,000/- as earnest money and balance sale consideration was to be paid at the time of execution, attestation and registration of the sale deed before the Sub Registrar, Kaithal. It was also agreed that the plaintiff was entitled to get the sale deed executed in his favour or in favour of any person of his choice. In case, the defendant failed to execute the sale deed, then the plaintiff was entitled to get the agreement to sell specifically enforced through the Court of law or to recover double of the amount of the earnest money. It was also a term and condition of the agreement to sell that in case, the plaintiff fails to get the sale deed executed

then the earnest money would be forfeited and agreement to sell stand cancelled. In the suit, it was specifically mentioned that the plaintiff had always been ready and willing to perform his part of the contract but later on the defendant became dishonest and tried to alienate the suit land to any other person except the plaintiff. Plaintiff also filed a civil suit for permanent injunction on 05.02.2008 but it was withdrawn on 04.03.2008 with the liberty to file fresh suit for specific performance. It was also mentioned in the suit that plaintiff remained present in the office of Sub Registrar along with balance sale consideration from morning to evening but the defendant did not turn up and thereafter, the plaintiff got his presence marked. The defendant failed to perform his part of the agreement to sell and accordingly, the suit was filed.

Written statement to the suit was filed by Rajesh Kumar, General Power of Attorney of defendant-Hem Raj wherein certain objections were raised like, the suit was not maintainable, the plaintiff had not approached the Court with clean hands and suppressed the true and material facts from the Court and so on.

Ultimately, the suit filed by the appellant-plaintiff was allowed vide judgment dated 13.09.2010 and it was decreed in his favour. The defendant was directed to execute the sale deed in favour of the plaintiff within a period of one month on receipt of balance sale consideration minus cost of the suit, failing which, he was held entitled to seek assistance of the Court. The plaintiff was also directed to deposit the balance sale consideration minus costs within a period of one month and thereafter, to execute the sale deed, failing which, the suit was deemed to be dismissed.

Aggrieved by said judgment and decree dated 13.09.2010 passed by the trial Court, respondent-defendant-Hem Raj filed appeal before the District Judge, Kaithal and the same was allowed vide judgment and decree dated 17.11.2012.

The appellant-plaintiff-Pankaj Kumar has filed the present regular second appeal being aggrieved by the judgment and decree dated 17.11.2012 passed by the Lower Appellate Court.

Learned counsel for the appellant submits that a well reasoned judgment and decree passed by the trial Court has been reversed by observing that the suit was barred under Order 2 Rule 2 CPC and the agreement to sell Ex.P-2 was executed under fraud by believing the version of the respondent-defendant to be correct. Learned counsel further submits that the appellant-plaintiff filed suit for permanent injunction on 05.02.2008 and the same was dismissed as withdrawn on 04.03.2008. Thereafter, the suit was filed after two months. The finding recorded by the Lower Appellate Court that the suit of the plaintiff was hit by Order 2 Rule 2 CPC, was totally illegal and against the provisions of law. The cause of action for filing suit for specific performance had arisen after contract date i.e., 06.02.2008 and the suit was filed on 16.04.2008. Learned counsel also submits that the suit for specific performance was maintainable even without getting liberty to file the second suit because the cause of action for specific performance arose either on 06.02.2008 or thereafter. Learned counsel also submits that on the date of filing of the suit for permanent injunction, the appellant was not held entitled to make a prayer for specific performance of the agreement and therefore, the suit could not be barred by

principle set out under Order 2 Rule 2 CPC. Earlier suit filed by the appellant-plaintiff was dismissed as premature and not on merits. Learned counsel also submits that the finding recorded by the Lower Appellate Court is contrary to facts and law. At the end, learned counsel for the appellant submits that the judgment passed by the Lower Appellate Court is liable to be set-aside as the judgment passed by the trial Court was not only well reasoned but were based on proper appreciation of evidence. Learned counsel for the appellant has also relied upon judgment rendered by Hon'ble the Apex Court in *M/s. Virgo Industries (Eng.) P. Ltd. vs. M/s. Venturetech Solutions P. Ltd., 2012 (4) RCR (Civil) 372* as well as judgment rendered by this Court in *Parsani Devi and another vs. Angrej Singh and another, 2010(2) RCR (Civil) 1* in support of his contentions.

Learned counsel for the respondent submits that the judgment passed by the Lower Appellate Court is well reasoned and the same has been passed by giving specific finding. Learned counsel further submits that the earlier suit for permanent injunction was filed by the appellant-plaintiff on 05.02.2008 only on the ground that the respondent-defendant was contemplating to alienate the property in dispute to some other person. The intention was not to honour the agreement with the appellant-plaintiff whereas the appellant-plaintiff could not incorporate the relief of specific performance along with relief of permanent injunction when the suit was filed. Learned counsel also submits that from the conduct of the appellant-plaintiff, it was clear that he was not interested in execution of the sale deed. The stand of the defendant was that a fraud was played upon him as his signatures on the papers were available and the same were used by

preparing agreement to sell. The stand of the plaintiff was falsified on the ground that there is endorsement regarding receipt of ₹30,000/- as earnest money in the handwriting of the defendant himself and the paper whereupon agreement to sell (Ex.P-2) was scribed was purchased from the stamp vendor on the day of agreement itself i.e., 02.01.2008. It shows that the papers bearing signatures of the defendant were already available with Narender Kumar Jain, brother-in-law of the plaintiff and those papers were used for fabricating the agreement. It was observed by the Lower Appellate Court that by attracting provisions of Order 2 Rule 2 CPC, the plaintiff could not file a separate suit on the same cause of action and accordingly, the judgment and decree passed by the trial Court was set aside. Learned counsel for the respondent has also relied upon judgment rendered by Hon'ble the Apex Court in *I.S. Sikandar (D) By Lrs. vs. K. Subramani and others, 2014(1) RCR (Civil) 236* in support of his contentions.

Heard arguments of learned counsel for the parties and have also perused the judgment and decree passed by the trial Court as well as the Lower Appellate Court.

The facts relating to filing of a suit by the plaintiff, withdrawal of said suit and thereafter, filing of suit for specific performance are not disputed. It is also not disputed that the suit filed by the appellant-plaintiff was decreed by the trial Court and thereafter, the appeal filed by the respondent-defendant before the Lower Appellate Court was allowed and the judgment and decree passed by the trial Court was set-aside. Initially, the appellant-plaintiff filed a suit for permanent injunction on 05.02.2008, which was dismissed as withdrawn on 04.03.2008 with permission to file a

fresh suit. Thereafter, second suit for specific performance was filed on 16.04.2008, which was decreed in favour of the appellant-plaintiff vide judgment and decree dated 13.09.2010. However, the same was reversed by the Lower Appellate Court on the ground that the suit was hit by Order 2 Rule 2 CPC.

From the pleadings of the parties, following issues were framed by the trial Court.

1. Whether the defendant through his mukhtiare-aam entered into valid agreement to sell 10 marlas of plot mentioned in Para No.1 of the plaint for which formal agreement to sell dated 2.1.2008 was executed in favour of the plaintiff and the plaintiff is entitled to specific performance of the same on payment of balance sale consideration as prayed for?OPP
2. Alternatively, if specific performance cannot be ordered then whether the plaintiff is entitled to recover back Rs.60,000/- i.e. double of the amount of earnest money with interest as prayed for?OPP
3. Whether the plaintiff with Narender Kumar Jain in collusion with each other has prepared false agreement to sell as alleged in P.O. No.1 of the written statement?OPD
4. Whether the plaintiff has no locus standi to file the present suit?OPD
5. Whether the plaintiff has no cause of action to file the suit against the defendant?OPD

6. Whether the suit of the plaintiff is not maintainable?OPD
7. Whether the suit is liable to be dismissed under Order 2 Rule 2 Code of Civil Procedure?OPD
8. Whether the suit is not properly valued for the purpose of court fee and jurisdiction?OPD
9. Relief.

Order 2 Rule 2 CPC, which is relevant for resolving the controversy in hand, is reproduced as under: -

2. Suit to include the whole claim.-

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

Order 2 Rule 2 CPC requires every suit to include the whole of the claim, to which, the plaintiff is entitled in respect of any particular cause of action. In case, the plaintiff has an option to relinquish any part of his claim, if he chooses to do so. Order 2 Rule 2 CPC contemplates a situation

where a plaintiff omits to sue or intentionally relinquishes any portion of the claim for which, he is entitled to make. If the plaintiff acts as such, Order 2 Rule 2 CPC makes it clear that he shall not afterwards sue for the part or portion of the claim that has been omitted or relinquished. It is submitted that Order 2 Rule 2(2) CPC does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the Court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the Court has been contemplated by Order 2 Rule 2(3) in such situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from beginning a subsequent suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. It is, therefore, clear from the conjoint reading of the provisions of Order 2 Rule 2(2) and (3) of the CPC that the aforesaid two sub-rules of Order 2 Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim for which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of several reliefs for which, he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit provided that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit.

The object behind enactment of Order 2 Rule 2 (2) and (3) CPC has been defined in para Nos.10 and 11 of the judgment rendered by Hon'ble the Apex Court in **M/s Virgo Industries (Eng.) P. Ltd.'s case (supra)** and the same is reproduced as under: -

*“10. The object behind enactment of Order II Rule 2 (2) and (3) of the CPC is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons. The situations where the bar under Order 2 Rule 2 (2) and (3) will be attracted have been enumerated in a long line of decisions spread over a century now. Though each of the aforesaid decisions contain a clear and precise narration of the principles of law arrived at after a detailed analysis, the principles laid down in the judgment of the Constitution Bench of this Court in **Gurbux Singh v. Bhooralal, AIR 1964 SC 1810** may be usefully recalled below:*

“In order that a plea of a bar under O. 2. r. 2 (3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish

primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar.”

*The above principles have been reiterated in several later judgments of this Court. Reference by way of illustration may be made to the judgments **Deva Ram & Anr. v. Ishwar Chand & Anr., 1995(3) R.R.R. 717 : 1995(6) SCC 733** and **M/s. Bengal Waterproof Ltd. v. M/s Bombay Waterproof Manufacturing Co.& Anr., AIR 1997 SC 1398**.*

*11. The cardinal requirement for application of the provisions contained in Order 2 Rule 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, 2012(3) Recent Apex Judgements (R.A.J.) 600 : 2012 (3) R.C.R. (Civil) 811 : JT 2012(6) SC 149**. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury's Law of England, (4th Edition). The following reference from the above work would, therefore, be apt for being*

extracted hereinbelow:

“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 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 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.”

In the present case, the earlier suit was filed for permanent injunction and the same was dismissed as withdrawn vide order dated 04.03.2008. The subsequent suit was filed for specific performance and the cause of action to pray for relief of specific performance is different and it was maintainable even without getting liberty to file second suit as the cause of action for specific performance arose either on 06.02.2008 or thereafter. Even at the time of filing of suit for permanent injunction, the appellant was not entitled for making a prayer for specific performance of the agreement. Accordingly, it cannot be said that the principle of Order 2 Rule 2 CPC was applicable. The suit for permanent injunction was filed on an apprehension of alienation of the property. Thereafter, the suit was dismissed as withdrawn with the liberty. It is also to be considered as to whether a premature suit is required to be entertained or not but it is a

question of discretion, which is to be exercised by the Court. In case, any suit is filed, which is premature then the plaintiff can file fresh suit even on the same cause of action subsequently, when cause of action has arisen. Even the order granting liberty by the Court at the time of withdrawal of the suit was exhibited as Ex.P-1.

In view of the facts and law position as discussed above, there is merit in the contentions raised by learned counsel for the appellant. As such, the present appeal is allowed and impugned judgment and decree dated 17.11.2012 passed by the Lower Appellate Court is set-aside and the judgment and decree dated 13.09.2010 passed by the trial Court is upheld.

23.03.2017
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(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned

√
Yes/No

Whether Reportable

√
Yes/No