

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CIVIL REVISION PETITION No.5185 of 2016

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, assailing the order dated 01.6.2016 passed in I.A.No.43 of 2016 in O.S.No.251 of 2011 on the file of the Court of Principal Senior Civil Judge, Tenali.

2. Heard the learned counsel for both the parties.

3. The petitioner filed O.S.No.251 of 2011 against the respondents for specific performance of oral agreement of sale dated 03.8.2017. During the pendency of the suit, the first respondent filed I.A.No.43 of 2016 under Order II Rule 2 and Section 151 of CPC seeking to dismiss the suit. The petitioner filed counter *inter alia* contending that the petition is not maintainable in law. The trial Court, after affording reasonable opportunity to both parties, allowed the petition. Hence, the revision.

4. The learned counsel for the petitioner submitted that the trial Court failed to consider the scope of Order II Rule 2 of CPC and allowed the petition on erroneous grounds. He further submitted that the trial Court failed to consider that the cause of action for filing a suit for injunction is entirely different to that of a suit for specific performance. He further submitted that the trial Court failed to consider that the cause of action for filing the earlier suit i.e., O.S.No.163 of 2010 and the present suit i.e., O.S.No. 251 of 2011 is not one and the same. ***Per contra***, learned counsel for first respondent submitted that the subject matter of O.S.No.163 of 2010 and O.S.No.251 of 2011 is one and the same; therefore, the

present suit is not maintainable in view of Order II Rule 2 of CPC. He further submitted that the trial Court rightly considered the scope of Order II Rule 2 of CPC and allowed the petition.

5. Now, the point that arises for consideration in this revision is:

Whether there is any illegality, irregularity or impropriety in the impugned, which warrants interference of this Court?

6. The trial Court allowed the I.A., on the ground that O.S.No.251 of 2011 is hit by Order II Rule 2 of CPC. To substantiate the argument, learned counsel for the petitioner has drawn the attention of this Court to the judgement in **Rathnavathi v Kavita Ganashamdas**¹, wherein the Hon'ble apex Court held at paragraph Nos.29 to 38 (from ALD) as follows:

29. In the instant case when we apply the aforementioned principle, we find that the bar contained in Order 2 Rule 2 CPC is not attracted because of the distinction in the cause of action for filing the two suits. So far as the suit for permanent injunction is concerned, it was based on a threat given to the plaintiff by the defendants to dispossess her from the suit house on 2-1-2000 and 9-1-2000. This would be clear from reading Para 17 of the plaint. So far as the cause of action to file suit for specific performance of the agreement is concerned, the same was based on non-performance of agreement dated 15-2-1989 by Defendant 2 in the plaintiff's favour despite giving legal notice dated 6-3-2000 to Defendant 2 to perform her part.

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

31. In case of former, the plaintiff is required to make out the existence of prima facie case, balance of convenience and irreparable loss likely to be suffered by the plaintiff on facts with reference to the suit property as provided in Section 38 of the Specific Relief Act, 1963 (in short "the Act") read with Order 39 Rules 1 and 2 CPC. Whereas, in case of the 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 Act.

¹ 2015 (1) ALD 115 (SC) = (2015) 5 SCC 223

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

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

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

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

36. The submission has a fallacy for two basic reasons. *Firstly*, as held above, cause of action in two suits being different, a suit for specific performance could not have been instituted on the basis of cause of action of the first suit. *Secondly*, merely because pleadings of both suits were similar to some extent did not give any right to the defendants to raise the plea of bar contained in Order 2 Rule 2 CPC. It is the cause of action which is material to determine the applicability of bar under Order 2 Rule 2 CPC and not merely the pleadings. For these reasons, it was not necessary for the plaintiff to obtain any leave from the court as provided in Order 2 Rule 2 CPC for filing the second suit.

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

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

7. Let me consider the facts of the case on hand, in the light of the above legal principle.

8. The suit schedule property is an extent of Acs.0.017 cents situated in D.Nos.108/7 and 108/8 of Chinaravuru village of Guntur District. The first respondent, who owned an extent of Acs.4.19 cents of agricultural land in D.Nos.108/7 and 108/8, let out the same to the petitioner. The petitioner filed A.T.C.No.3 of 2007 against the first respondent seeking perpetual injunction and the same was dismissed as settled out of Court. During the pendency of the A.T.C., the first respondent alienated the petition schedule property in favour of second respondent under a registered sale deed dated 12.5.2010. The petitioner filed O.S.No.163 of 2010 on the file of the Court of Principal Junior Civil Judge, Tenali, seeking perpetual injunction in respect of the suit schedule property. O.S.No.163 of 2010 was transferred to the Court of Principal Senior Civil Judge, Tenali and renumbered as O.S.No.311 of 2012, which was subsequently dismissed as it was withdrawn by the petitioner. The petitioner filed O.S.No.251 of 2011 seeking specific performance of oral agreement of sale dated 03.8.2007 against the respondents.

9. The petitioner filed O.S.No.311 of 2012 seeking the relief of perpetual injunction perpetual injunction restraining the respondents from interfering with the suit schedule property. The cause of action for filing O.S.No.311 of 2012 is the alleged interference of the respondents with the suit schedule property by the petitioner. As mentioned above, O.S.No.251 of 2011 is filed for specific performance of the oral agreement of sale dated 03.8.2007. The relief sought in O.S.No.251 of 2011 is to direct the first respondent to execute registered sale deed in favour of the

petitioner in respect of the suit schedule property. Thus, the relief sought in both the suits are entirely different. The cause of action in both the suits is not one and the same.

10. The trial Court allowed the petition basing on the judgment in **M/s.Virgo Industries (Engg.) (P) Ltd., v M/s.Venturetech Solutions (P) Ltd**². The Hon'ble apex Court, in **Rathnavathi** (1st cited supra) after referring **M/s.Virgo Industries** made observation in paragraph No.29 (extracted above). The facts of the case on hand are almost similar to the facts of the case in **Rathnavathi** (1st cited supra). If the impugned order is allowed to stand, it would certainly amount to miscarriage of justice.

11. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that the impugned order is devoid of merits and liable to be set aside.

12. In the result, the civil revision petition is allowed, setting aside the order dated 01.6.2016 passed in I.A.No.43 of 2016. Consequently, I.A. No.43 of 2016 is dismissed and O.S.No.251 of 2011 on the file of the Court of Principal Senior Civil Judge, Tenali, shall stand restored. Miscellaneous petitions, if any, pending in this revision shall stand closed.

T.SUNIL CHOWDARY, J

Date: 24.8.2018
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² (2013) 1 SCC 625 = 2012 (5) ALT 57 (SC)