

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

% **Date of decision: 13th September, 2018.**

+ **RSA 15/2018 & CM No.4329/2018 (for stay)**

SHABANA REHMAN

..... Appellant

Through: Mr. Suresh Sharma, Adv. with
appellant-in-person.

Versus

MAMTA BISWAS & ORS

..... Respondents

Through: Mr. Arvind Kumar Gupta and Mr.
Prashant Bhardwaj, Advs. for R-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 13th October, 2017 in RCA No.176/2016 of the Court of Additional District Judge-02, Shahdara] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 27th May, 2016 in Suit No.9419/2016 (Old No.RBT No.248/2012) of the Court of Additional Senior Civil Judge, Karkardooma] in a suit filed by the respondent No.1/plaintiff against the appellant/defendant and the respondents No.2&3/defendants.

2. This appeal came up first before this Court on 5th February, 2018, when the counsel for the respondent No.1/plaintiff appeared on caveat and the counsel for the appellant/defendant sought adjournment to file appropriate documents on record. Thereafter, the proceedings were adjourned from time to time. On 28th February, 2018, the counsel for the

respondent No.1/plaintiff stated that the respondent No.1/plaintiff will not execute the decree till the next date of hearing. The said arrangement has continued till now.

3. The counsel for the appellant/defendant has been heard and the copies of the relevant Trial Court record perused.

4. The *sine qua non* for entertaining i.e. issuing notice of a Regular Second Appeal under Section 100 of the CPC being that the facts therein raise a substantial question of law, it has straightway been enquired from the counsel for the appellant/defendant, what is the substantial question of law entailed in this Regular Second Appeal, against the concurrent findings of the Suit Court and the First Appellate Court which are final Courts of fact as held in ***Damodar Lal Vs. Sohan Devi*** (2016) 3 SCC 78.

5. The counsel for the appellant/defendant has contended that the substantial question of law which arises is, of the suit from which this appeal arises being barred by Order II Rule 2 of the CPC.

6. The respondent No.1/plaintiff instituted the suit, from which this appeal arises, for recovery of possession of ground floor of property No.D-378, Lane No.14, Laxmi Nagar, Delhi against her sons N.K. Rehman and Ranjan Biswas and their respective wives namely appellant/defendant and Kiran Biswas. It was the case of the respondent No.1/plaintiff in the plaint, (i) that she was the owner of the subject property and Christian by religion; (ii) that her son N.K. Rehman had however married the appellant/defendant who is Muslim by religion; (iii) that the sons and daughters-in-law of the respondent No.1/plaintiff, as members of the family of the respondent No.1/plaintiff, were residing on the ground floor of the property, on first

floor whereof, the respondent No.1/plaintiff was residing along with her other family members; and, (iv) that the said sons and daughter-in-law of the respondent No.1/plaintiff had been creating nuisance and had not vacated the said ground floor, inspite of being called upon to do so. Reliefs thus, of permanent injunction restraining the appellant/defendant and the respondents No.2&3/defendants from parting with possession of the ground floor of the property and of mandatory injunction directing the appellant/defendant and the respondents No.2&3/defendants to vacate the property were sought in the suit.

7. The counsel for the appellant/defendant has drawn attention to the plea taken in the written statement filed by the appellant/defendant and Kiran Biswas (who is stated to have since died) to the effect that the subject suit was barred by Order II Rule 2 of the CPC.

8. The counsel for the appellant/defendant has drawn attention to the plaint in the earlier suit, on account of which the suit from which this appeal arises is argued to be barred by Order II Rule 2 of the CPC, at page 77 of the paper book of this appeal and particularly to the cause of action paragraph therein. The said suit was filed by the respondent No.1/plaintiff against the same defendants against whom the suit from which this appeal arises was filed and against one Mr. Khalil Khan, for permanent injunction restraining the defendants therein from forcibly dispossessing the respondent No.1/plaintiff or interfering in the possession of the respondent No.1/plaintiff of the first floor of the subject property where the respondent No.1/plaintiff along with other family members was residing.

9. The counsel for the appellant/defendant has argued that the dates of the cause of action for the earlier suit and the dates of the cause of action for the subsequent suit, from which this appeal arises, are the same.

10. However, having not found any decision in the judgment of the Suit Court or in the judgment of the First Appellate Court qua such plea of Order II Rule 2 of the CPC, I have enquired from the counsel for the appellant/defendant, whether the appellant/defendant sought any issue on the plea of Order II Rule 2 of the CPC taken in the written statement.

11. The counsel for the appellant/defendant fairly states that no issue was claimed.

12. I have next enquired from the counsel for the appellant/defendant, whether the appellant/defendant during the course of evidence, even in the absence of any issue, prove the pleadings in the earlier suit, on the basis whereof the plea of Order II Rule 2 of the CPC was taken.

13. The counsel for the appellant/defendant again fairly states that no evidence whatsoever was led on the plea of Order II Rule 2 of the CPC and the plaint in the earlier suit which is filed before this Court has also been filed for the first time before this Court only and was not on the suit record.

14. It has been held in (i) **Jayantilal Chimanlal Patel Vs. Vadilal Purushottamdas Patel** (2017) 13 SCC 409; (ii) **S. Nazeer Ahmad Vs. State Bank of Mysore** (2007) 11 SC 75; ;(iii) **Bengal Waterproof Limited Vs. Bombay Waterproof Manufacturing** (1997) 1 SCC 99; and, (iv) **Gurbux Singh Vs. Bhooralal** AIR 1964 SC 1810 that for a plea of Order II Rule 2 of the CPC to be considered, it is necessary for the defendant to prove the

pleadings in the earlier suit and without doing so, the plea cannot be agitated in appeal.

15. The counsel for the appellant/defendant however contends that there is no dispute about the earlier suit having been filed by the respondent No.1/plaintiff.

16. Though the counsel for the appellant/defendant states that there is no dispute but has chosen not to file replication in the suit from which this appeal arises, from where the response of the respondent No.1/plaintiff to the said plea could have been known.

17. The counsel for the respondent No.1/plaintiff, on enquiry, has shown replication filed by the respondent No.1/plaintiff to the written statement containing the plea of Order II Rule 2 of the CPC and wherefrom it is found that there is no admission of the respondent No.1/plaintiff in this regard as claimed and the respondent No.1/plaintiff, in the replication had denied that the suit was barred.

18. Even though issues in a suit are to be framed by the Court, but with the assistance of the counsels and it was the duty of the counsel for the appellant/defendant to, even if the Court on its own had not framed the issue qua the plea of Order II Rule 2 of the CPC, urge the said issue. The appellant/defendant clearly did not do so. Moreover, from the factum of the appellant/defendant having not led any evidence also on the said plea, it is quite clear that the plea, though taken in the written statement, was abandoned and not pressed. It is further borne out from the judgments of the Suit Court and the First Appellate Court that no such argument was raised by the counsel for the appellant/defendant before either of the two

Courts below. The plea of Order II Rule 2 of the CPC, as aforesaid, is not a purely legal plea which can be urged for the first time in Second Appeal. Though the counsel for the appellant/defendant has drawn attention to passages in the judgments of the Suit Court and the First Appellate Court recording the said plea but merely because the Court, while dictating judgment records various pleas taken in the written statement, does not amount to the said pleas having been urged.

19. The counsel for the appellant/defendant, at this stage, has drawn attention to paras 19 & 20 of the judgment of the Suit Court reasoning, that the earlier suit was with respect to first floor of the property and the subject suit was with respect to ground floor of the property and the appellant/defendant had not placed on record the pleadings in the earlier suit to show that the cause of action was the same.

20. The same also does not advance the cause of the appellant/defendant any further.

21. I have even otherwise invited attention of the counsel for the appellant/defendant to Order II Rule 2(1) of the CPC, which is as under:

“(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.”

and have enquired, as to whether the plaintiff is required to sue for all the causes of action which may be available to the plaintiff against the

defendant or only required to sue for the reliefs arising from the same cause of action.

22. The counsel for the appellant/defendant has drawn attention to ***Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd.*** (2013) 1 SCC 625, particularly where it holds that at the time of filing of the first suit for injunction, it was open to the plaintiff therein to also claim the relief of specific performance which was subsequently claimed.

23. The aforesaid judgment of the Supreme Court has been explained in the subsequent judgment in ***Inbasagaran Vs. S. Natarajan*** (2015) 11 SCC 12 where it has been explained that in the facts of the case in ***Virgo Industries (Eng.) P. Ltd.*** supra, the cause of action was the same but else the cause of action for a suit for permanent injunction is not the same, as the cause of action for a suit for specific performance of an agreement of sale of the same property qua which the suit for permanent injunction was filed and it is only all reliefs arise from the same cause of action which, if not claimed, are barred by Order II Rule 2 of the CPC and not reliefs accruing from a separate cause of action. I have in ***Nutan Tyagi Vs. Nirmala Dabas*** (2016) 232 DLT 60 culled out the reasoning and ratio in ***Inbasagaran*** supra.

24. The relationship of the respondent No.1/plaintiff with the appellant/defendant can also not be lost sight of. The appellant/defendant is the daughter-in-law of the respondent No.1/plaintiff. If the respondent No.1/plaintiff, at the time of filing the earlier suit restraining the appellant/defendant from interfering with the possession of the respondent No.1/plaintiff of the first floor of the property, did not choose to evict the daughter-in-law from the ground floor, it cannot be said that the

appellant/defendant, as daughter-in-law of the respondent No.1/plaintiff, can never be evicted by the respondent No.1/plaintiff from the premises.

25. There is thus no substantial question of law which arises qua the plea of Order II Rule 2 of the CPC.

26. No other argument has been urged.

27. Dismissed. No costs.

28. Decree sheet be drawn up.

29. At this stage, the counsel for the appellant/defendant, under instructions from the appellant/defendant present in person, states that the appellant/defendant does not want to litigate further with the respondent No.1/plaintiff or claim any other rights or the right which was claimed in the proceedings from which this appeal arises with respect to the said property but only seeks time of one year to vacate the property.

30. On enquiry, it is stated that the appellant/defendant and her daughter namely Isha Rehman only are in control and possession of the entire ground floor of the property and none else is in occupation or possession thereof.

31. The appellant/defendant, as identified by her Advocate, undertakes to this Court to:

(I) hand over vacant, peaceful physical possession of the entire ground floor of property No.D-378, Lane No.4, Laxmi Nagar, Delhi to the respondent No.1/plaintiff or her heirs on or before 31st August, 2019;

(II) not to induct any other person into the ground floor or any other portion of the property;

(III) not to cause any disturbance to the peaceful residence of the respondent No.1/plaintiff or any other member of the family in the first floor of the property or passage to the first floor from the ground floor of the property;

(IV) continue to pay electricity charges with respect to the ground floor of the property till the date of vacation of the property;

(V) not to allow any of her family members from paternal side to visit the property save as guest for short period;

(VI) not to claim any right as claimed in the suit from which this appeal arises or any such right in the property or any part thereof.

32. The aforesaid undertakings of the appellant/defendant are accepted and the appellant/defendant explained the consequences of breach of undertaking given to the Court.

33. Upon the failure of the appellant/defendant to comply with the undertakings aforesaid, the respondent No.1/plaintiff, besides being entitled to forthwith execute the decree, shall also be entitled to take proceedings against the appellant/defendant for breach of undertaking given to the Court.

34. Subject to the appellant/defendant complying with the undertakings aforesaid, the decree impugned is made inexecutable till 31st August, 2019.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 13, 2018

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