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

Date of Decision: 6th February 2018

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RFA 28/2017

MOHD YAMEEN

..... Appellant

Through: Mr. M. M. Singh (M:9818016311)
and Mr. Prashant Singh, Advocates.

versus

SATENDER SINGH SIROHI

..... Respondent

Through: Mohammad Arif, Advocate.
(M:9810405873)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This is an appeal against order dated 19th February 2016 by which the suit filed by the Appellant/Plaintiff (*hereinafter*, 'Plaintiff') has been rejected as being barred under Order II Rule 2 of the Code of Civil Procedure, 1908 (*hereinafter*, 'CPC').

2. The suit filed by the Plaintiff is one for recovery of money paid to the Defendant. Admittedly, the Plaintiff had filed an earlier suit seeking the following prayers.

“(a) to pass a Decree of Mandatory Injunction in favour of the plaintiff and against the defendants thereby directing the defendants to deliver the original copy of Agreement to Sell dated 25.10.2012 duly signed by the defendant no.2 upon which the plaintiff and the witnesses have already signed on 15.10.2012 when the defendant no.1 received Rs.8 lacs from the plaintiff in response of earnest money of Rs.10 lacs out of total consideration amount of sale of the house bearing

No.20, Gali No.B-1, measuring 200 sq. yds. Brijpuri, Mustafabad, Delhi-110053, in the interest of justice;

(b) to pass a Decree of Permanent Injunction in favour of the plaintiff and against the defendants thereby restraining the defendants, their agents, servants, associates, representatives, assignees etc. from negotiating any transaction regarding the house bearing No.20, Gali No.B-1, measuring 200 sq. yds. Brijpuri, Mustafabad, Delhi-110053 for which the defendants have entered into sale transaction with the plaintiff, in the interest of justice.”

3. The cause of action in the said suit was pleaded as under:

“That the cause of action for filing the present suit arose on 24.9.2012 when after completion of negotiations the full and final consideration amount of transaction was settled between the plaintiff and the defendants and handwritten paper was executed in regard to the transaction and the acknowledgement of Rs.2,00,000/- (Rupees two lacs only). The cause of action further arose when the Plaintiff under bonafide impression and trust of defendant no.1 paid Rs.8,00,000/- (Rupees eight lacs only) and asked the defendant no.1 for the signature of defendant no.2 upon the agreement to sell which had been prepared by defendant no.1 at his own. The cause of action further arose when the defendant no.1 received the amount of Rs.8,00,000/- and got the Agreement to Sell signed by the plaintiff and his witnesses and assured that the original Agreement to Sell shall be delivered to the plaintiff after getting the signatures of defendant no.2 who had gone to his native village. The cause of action arose from time to time whenever the plaintiff approached the defendants

to deliver the Agreement to Sell in original after signature of defendant no.2 and the defendant no.1 postponed the matter on one pretext or the other till 25.10.2012 rather the defendant no.1 denied to accompany the plaintiff to his native village for signatures of defendant no.2. The cause of action further arose on 25.10.2012 when the plaintiff got issued a legal notice to the defendants on two addresses i.e. at the house under sale and native village of defendants. The cause of action further arose when the defendants managed to get the notice returned from both the addressed despite having the knowledge of subject matter of the notice. The cause of action still continuing as the defendants despite repeated requests and demands and despite the service of legal notice and despite knowledge of the legal notice the signed original copy of Agreement to Sell has not yet been delivered to the plaintiff.”

4. This suit came to be dismissed vide order dated 24th March, 2014 on the ground that the Plaintiff had failed to seek specific performance and had only sought a mandatory injunction and a permanent injunction. The said order dated 24th March 2014 was accepted by Plaintiff and no challenge was made to the said order.

5. The suit from which the present appeal arises is a suit for recovery of Rs.15.25 Lakhs. Cause of action in this suit is pleaded as under:

“That the cause of action for filing the present suit first arose on 24.9.2012 *when the defendant received Rs.2,00,000/- from the plaintiff regarding the sale of the house No.20, Gali No.B-1, Brijpuri, Mustafabad, Delhi-110094 claiming himself to be competent and empowered to dispose of or sell the said house and a hand written receipt was executed and prepared. The cause of action further*

arose on 15.10.2012 when the defendant received Rs.8,00,000/- from the plaintiff counting the earnest money as Rs.10,00,000/- regarding the sale transaction. The cause of action further arose when the defendant got the signatures of the plaintiff and the witness on the prepared agreement to sell dated 15.10.2012 and assured that after getting the signature of Shri Chaman Singh Sirohi the original agreement to sell shall be delivered to the plaintiff. The cause of action further arose on 16.10.2012, 17.10.2012 and 18.10.2012 when the defendant did not delivered the original agreement to sell to the plaintiff and told the plaintiff that agreement to sell has been sent to the village for getting the signature of his brother. The cause of action further arose on 25.10.2012 when the plaintiff issued a legal notice to the defendant and his brother. The cause of action further arose when the plaintiff filed an injunction suit against the defendant and his brother in the court of Senior Civil Judge of Karkardooma Courts, Delhi bearing suit No. 526/2012. The cause of action further arose when the defendant filed his separate written statement with frivolous defence and the brother of the defendant filed his own written statement denying having receipt any money from the defendant regarding the sale. The cause of action further arose when learned Trial court pleased to decide the preliminary issue on 24.3.2014 finding the injunction suit not to be for the efficacious relief. The cause of action further arose from time to time whenever the defendant assured the plaintiff to refund the amount of Rs.10,00,000/- received by the defendant from the plaintiff on the pretext of earnest money out of which Rs.2,00,000/- on 24.9.2012 and Rs.8,00,000/- on 15.10.2012. The cause of action remained continue as the

defendant has failed to refund Rs.10,00,000/- alongwith interest to the plaintiff. Hence the present suit.”

6. In both the suits, the cause of action is based on the receipt dated 24th September 2012. Both suits relate to the same property transaction. The suits are between the same parties. In the first suit, the Plaintiff failed to seek specific performance and the suit was dismissed. The Plaintiff ought to have sought the relief of recovery of the alleged payment made to the Defendant, in the first suit itself. Having not done so, a subsequent suit would be barred under the provisions of Order II Rule 2 as no leave was sought in the first suit. On the date when the first suit was filed, the Plaintiff's cause of action for seeking recovery of the sum allegedly paid, had already arisen. Thus the Plaintiff clearly omitted to sue for the relief of specific performance and/or recovery in the first suit. The first suit having been dismissed, the subsequent suit on the same cause of action would not lie.

7. The Supreme Court in **Gurbax Singh v. Bhooralal AIR 1964 SC 1810** (hereinafter, 'Gurbax Singh') laying down the scope of Order II Rule 2 of the CPC held as under:

“7. 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. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning.....”

8. The Supreme Court, thereafter, has consistently reiterated this legal position, even recently in *Virgo Industries (Eng.) P. Ltd. v. Venturetech Solutions P. Ltd. (2013) 1 SCC 625* and *Rathnavati v. Kavita Ganashamdas (2015) 5 SCC 223*.

9. In these circumstances, the trial court order cannot be faulted with. The plaint has been rightly rejected. No ground is made out for interference with the impugned order. Appeal is accordingly dismissed.

PRATHIBA M. SINGH
Judge

FEBRUARY 06, 2018/dk