

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO No. 29 of 2018 (O&M)

Date of Decision: 21.05.2019

Manish Sehgal

...Appellant

VERSUS

Surinder Kumar Arora and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Divanshu Jain, Advocate
for the appellant.

Mr. Harkesh Manuja Advocate
for respondent no. 1.

SURINDER GUPTA, J. (Oral)

Heard.

Respondent no.1-Surinder Kumar Arora filed suit for possession of the part of House No. 5 Sector 15-A, Chandigarh, in which learned trial Court framed the issues as follows:-

1. Whether the plaintiff is entitled to possession of Barsati floor of House No. 5 Sector 15-A, Chandigarh occupied by defendant no. 1 as prayed for? OPP
2. If issue no. 1 is proved in favour of plaintiff whether he is entitled for recovery of damages to the tune of ₹10,000/- per month w.e.f. 01.05.2007 alongwith interest till the possession is restored to him as prayed for? OPP
3. Whether the suit of the plaintiff is not maintainable? OPD
4. Whether the plaintiff has no cause of action to file the present suit? OPD
5. Whether plaintiff has not come with cleans hands and suppressed the true and material facts from the court, if

so, its effect? OPD

5-A. Whether the present suit is barred under Order II Rule 2 CPC? OPD

6. Relief.

Findings were recorded on issues no. 3 and 5-A against plaintiff with the observation that suit filed by him is barred under Order II Rule 2 CPC and by principle of constructive *res judicata* and the same was dismissed without recording findings on other issues.

Plaintiff filed appeal before Additional District Judge, Chandigarh, wherein findings of learned trial Court on issues no. 3 and 5-A were reversed and the case was remanded to learned trial Court with direction to decide the same afresh after providing opportunity to parties to lead evidence, if so required.

Learned counsel for the appellant has argued that in earlier suit plaintiff-respondent no. 1 had sought the relief of mandatory injunction and recovery of damages @ ₹10,000/- per month with the plea that the appellant is licensee in portion of the disputed property. His plea was discarded and suit was dismissed. The judgment against respondent no. 1 was upheld upto Hon'ble Supreme Court. At the time of filing of that suit the plea seeking possession was available to him but was not sought, as such, is deemed to have been relinquished and the trial Court has rightly held the present suit as barred under Order II Rule 2 CPC and principle of constructive *res judicata*.

Learned counsel for respondent no. 1 has argued that while recording finding that plaintiff has failed to prove his plea that appellant is a licensee in the suit property, it was observed that remedy available to him is to file suit for possession. Even otherwise on the failure of respondent

no. 1 to prove his plea that appellant is a licensee, does not render him remediless and he can proceed further to seek possession of suit property in accordance with law. The principle of constructive *res judicata* or as contained in Order II Rule 2 CPC are not applicable to facts and circumstances of the case.

Order II Rule 2 CPC reads as follows:-

“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 internationally 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.*

The cause of action in earlier suit had accrued to respondent no. 1 on cancellation of licence of appellant and relief he had to claim in that suit, if relinquished due to cancellation of licence, would bar the

second suit under Order II Rule 2 CPC based on same cause of action. Once it has been held that appellant is not proved to be licensee and respondent no. 1 is not entitled to relief of mandatory injunction, the remedy available to respondent is to seek possession on the basis of his title and principles as contained in Order II Rule 2 CPC and constructive *res judicata* are not applicable to facts and circumstances of the case and learned Ist Appellate Court has rightly held so while remanding the case. I find no legal infirmity in the order passed by learned lower Appellate Court calling for any interference in this appeal.

Learned counsel for the appellant has further argued that evidence before learned trial Court has already been concluded by parties on all the issues, as such, there was no reason to provide any further opportunity to respondent no. 1 to lead evidence. His submission has been fairly conceded by learned counsel for respondent no. 1.

As a sequel of my above discussion, this appeal is partly allowed. Order of learned lower Appellate Court is maintained to the effect that learned trial Court will proceed further to record its findings on issues no. 1, 2, 4 and 5 on the basis of evidence already on record without allowing further opportunity to lead evidence. The above observations shall not be deemed as obstacle in the event of either of party seeking permission to lead additional evidence and any such application, if so filed, will be decided on merit.

May 21, 2019

jk

**(SURINDER GUPTA)
JUDGE**

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No