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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 21st November, 2019
Decided on : 25th November, 2019

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RFA 917/2018

KAILASH CHAND DIXIT

..... Appellant

Through : Mr.Bipin Kr Jha, Advocate.

versus

MADHU L BHOJWANI

..... Respondent

Through : Mr.U.M.Tripathi, Mr.Anupam
Mishra, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is preferred by the appellant/plaintiff against the order /judgment dated 16.08.2018 passed by the learned Additional District Judge/South-West District, Dwarka Courts, Delhi (hereinafter referred as the learned '*Trial Court*') in CS No.256/2018 whereby the suit of the appellant for specific performance, declaration and permanent injunction was rejected under Order VII Rule 11 CPC, being barred under Order II Rule 2 CPC.

2. The appellant filed the aforesaid suit on 17.03.2018 in respect of the plot bearing No.18, admeasuring 200 square yards falling in Khasra No.40/4/2, in the area of Village Hastsal now known as Defence Enclave Part-I, Mohan Garden, Uttam Nagar, New Delhi – 110059 (hereinafter referred as the '*suit property*').

3. The brief facts are:-

a) the respondent owned a plot admeasuring 469.40 square yards, out of which the subject plot of 200 square yards/suit property was sold to

the appellant and the appellant claims to be in exclusive possession and ownership of such plot of 200 square yards viz. the suit property;

b) the appellant / plaintiff alleges to have purchased it on 09.05.2017 vide registered Will, GPA, Agreement to Sell, Indemnity Bond, Affidavit, Possession Letter, and Receipt for consideration of Rs.15.00 lac which was paid in full;

c) after purchase of the suit property, the appellant raised a boundary wall over it and it exclusively belong to the appellant;

d) in the first week of January 2010, the appellant acquired the knowledge the respondent is looking for a prospective purchaser to dispose of the entire plot of 469.40 square yards, including the suit property, of which, the appellant was an owner, hence the appellant filed civil suit No.CS/SCJ/90/2018 titled as *Kailash Chand Dixit vs Smt.Madhu L Bhojwani* before the learned Civil Judge, wherein written statement was filed by the respondent stating *inter alia* the appellant never purchased the suit property from the respondent and in fact the respondent had sold two of her plots in the same vicinity for a sum of Rs.22.80 Lac and Rs.14.50 lac of the area much less than the suit property and it was highly improbable for the respondent to sell a plot of 200 square yards to the appellant for Rs.15.00 lac only;

e) it was also alleged by the respondent the appellant stood as a witness to those two sale deeds and during those transactions, the appellant played a fraud and by misrepresentation had obtained signatures of the respondent on above documents and had betrayed the respondent;

f) the respondent even filed a police complaint and had cancelled Will on 20.02.2018 and sent a legal notice dated 23.02.2018;

g) the cause of action as alleged in CS/SCJ/98/2018 is as under:-

Cause of Action of CS/SCJ/90/2018

14. That cause of action to file the present suit arose on 16.12.17 when the defendant is in the process and is on look out for a prospective purchaser to when she can disposed off the total plot including the suit property of which the plaintiff is the absolute sole and lawful owner, it further arose in first week of January, 2018 when the defendant openly told the plaintiff that he should forget about the suit property for all times to come. The cause of action is continuing one and subsists till date."

h) the cause of action alleged in the present suit is as under :-

Cause of Action of CS No.256/2018

"17. That cause of action to file present suit arose on 09.05.2017 when the defendant executed the GPA, Will, Agreement to Sell, Indemnity Bond, Affidavit, Possession letter and receipt for consideration in favour of the plaintiff in relation to the suit property; it further arose when the plaintiff was put into possession of the suit property; it again arose when the plaintiff constructed the boundary wall; it further arose in first week of January 2018 when plaintiff came to know about illegal and malafide intentions of defendant, as detailed above. It also arose in last week of January. 2018, and every occasion thereafter, when plaintiff requested defendant to not to indulge in illegal acts and deeds but not only she refused, she also threatened plaintiff of dire consequences, as detailed above. The cause of action is continuing one and subsists till date."

4. The cause of action alleged in both these suits appear to be exactly similar. In both these suits, the cause of action arose in a particular manner viz extending of threats in January 2018 by the respondent to dispose of her entire plot of 469.40 square yards, inclusive of the subject plot of 200 square yards.

5. In his subsequent suit viz CS No.256/2018 for specific performance, the appellant nowhere has alleged he was always *ready* and *willing* to perform his part of obligation viz to get the sale deed registered. It is also not disclosed if he ever requested the respondent to execute sale deed in his favour, yet the respondent had denied or did not come forward.

6. The learned Trial Court rejected the plaint along with application under Order VI Rule 17 CPC filed by the appellant, more specifically under Order II Rule 2 CPC, while holding:-

"12. In view of the aforesaid, it can safely be concluded that the entire plaint filed by the plaintiff does not disclose any cause of action for seeking specific performance. However, now, by way of the present application u/0. 6 Rule 17 CPC, the plaintiff is trying to introduce the same by inserting para no.2 in the plaint which was not part of the pleadings of the plaintiff at the time of institution of the present suit. The Hon'ble Calcutta High Court in Union Bank of India vs. Vithal Bhal Pvt. Ltd., MANU/WB/0279/2009 has held that by allowing amendment to a plaint which is initially not maintainable as it does not furnish a cause of action, the case does not become maintainable. The Hon'ble Supreme Court in case of A. K. Gupta & Sons vs. Damodar Valley Corporation MANU/SC/0014/1965 has laid down that a party is not allowed to set up a new cause of action by amendment. Likewise, the Hon'ble Supreme Court in Ganesh Trading Company vs. Moji Ram MANU/SC/0018/1978 has held that if a plaintiff seeks to alter cause of action itself and to introduce indirectly through an amendment of his pleading entirely a new cause of action amounting virtually to the substitution of a new plaint or new cause of action in place of what was originally there, the court will refuse to permit it.

13. When the aforesaid settled law is applied to the facts and circumstances of the present case, it is beyond any doubt that the plaintiff in the present suit for specific performance has not made even a whisper that at any point of time, the plaintiff had asked the defendant to execute title documents in his favour and the defendant had refused to execute the same. Even in the proposed amendment, the plaintiff is making a bald pleading to the effect that defendant did not execute the sale deed in his favour despite the specific request of the plaintiff many times. However, no details in this regard has been provided. Be that as it may, when the initial suit filed by the plaintiff does not disclose a cause of action, he cannot be allowed now at this stage to introduce the same by way of amendment under Order 6 Rule 17 CPC and therefore, the application of the plaintiff under Order 6 Rule 17 CPC is required to be dismissed and therefore, the same is dismissed.

14. In view of the aforesaid facts and circumstances and settled law, the plaint filed by the plaintiff does not disclose any cause of action and therefore, the same is barred under Order 7 Rule 11(a) CPC and therefore, the application under Order 7 Rule 11 CPC filed by the defendant is allowed in view of the aforesaid terms. The suit of the plaintiff is rejected. It is ordered accordingly. File be consigned to record room."

7. The only issue to be decided is if this subsequent suit of the appellant is barred by Order II Rule 2 CPC.

"ORDER II- FRAME OF SUIT

1. Frame of suit— Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

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.”

8. In *Manjeet Singh vs Kuldip Kaur : 2016 (4) ICC 47* the Punjab and Haryana High Court observed this rule has been directed against two evils i.e. the splitting of claims and splitting of the remedies and is based upon the principle that defendant should not be vexed twice for the same cause of action. It was rather held if the plaintiff omits any portion of claims which he is entitled to make or any of the remedy which he is entitled to claim in respect of same cause of action in his suit, he shall not thereafter sue for the same portion of claim or the remedy so omitted. However, this rule does not preclude the suit based on a separate and distinct cause of action.

9. Further in *Nutan Tyagi vs Nirmala Dabas 2016 (232) DLT 60* wherein the issue was as to if the subsequent suit for specific performance and injunction in respect of immovable property on the basis of agreement to sell would be barred where the plaintiff had previously filed a civil suit for permanent injunction but did not include the claim of specific performance, despite even having sought leave of the Court to file a separate suit for same cause of action.

The Court relied upon various decisions including *Ratnavathi vs Kavita Ganashamdas* (2015) 5 SCC 223; *M/s. Virgo Industries (Eng) Pvt limited vs M/s Venturetech Solutions Pvt ltd* (2013) 1 SCC 625 and held as under:-

“20. It is not the case of the appellant/plaintiff that after the institution of the earlier suit for injunction she had approached the respondent/defendant to perform her part of the agreement or that the respondent/defendant had refused or that anything else had happened after the institution of the suit for injunction which may have furnished a cause of action for the suit for specific performance.

21. Rather it is the express case of the appellant/plaintiff that she was filing the suit for specific performance after withdrawing the earlier suit for permanent injunction with liberty to file a fresh suit.

22. In this view of the matter, there is nothing in the dicta of Rathnavathi supra also which dissuades me from following M/s Virgo Industries (Eng) P. Ltd. supra which has not been disagreed with therein also. I therefore answer the first of the aforesaid questions in favour of the respondent/defendant and against the appellant/plaintiff and hold that in terms of M/s Virgo Industries (Eng) P. Ltd. supra and Lakhbir Singh supra the suit from which this appeal arises was barred by Order II Rule 2 of CPC.”

The Court further noted:-

“24. Notice may also be taken of yet another judgment of a bench of two Judges in Coffee Board Vs. Ramesh Exports Pvt. Ltd. (2014) 6 SCC 424 where in the context of successive suits for recovery of money, the second suit for recovery of money was held to be barred by Order II Rule 2 CPC reasoning that (i) one ought not to be vexed twice for the same cause; (ii) if different reliefs and claims arise out of the same cause of action then the plaintiff must place all his claims before the Court in one suit and cannot omit one of the reliefs and claims except without leave of the Court; (iii) the bar of Order II Rule 2 CPC comes into operation where the cause of action on which previous suit was filed forms the foundation of the subsequent suit and when the plaintiff could have claimed the relief sought in subsequent suit, in earlier suit; (iv) both plaints must be read as a whole to identify the cause of action which is necessary to maintain a claim or necessary for plaintiff to prove if traversed; (v) if relief claimed in subsequent suit could have been pleaded in earlier suit, the subsequent suit would be barred.

31. According to M/s Virgo Industries (Eng.) Pvt. Ltd. supra the bar to Order II Rule 2 CPC is attracted on the date of institution of the suit omitting to claim a relief which could and ought to have been claimed therein and is not dependent upon the decision of the suit. Therefrom it appears that the said bar once attracted could not have been taken away by subsequent grant of permission to withdraw that suit with liberty to file fresh one, specially when no specific permission was taken to, in the new suit, claim the relief of specific performance. However, as aforesaid, I am bound by the judgment of the Division Bench of this Court in Shri N.D. Tiwari supra. As per the said judgment, the effect of grant of permission to institute a fresh suit is as

if the earlier suit had not been filed and as a consequence whereof the bar of Order II Rule 2 CPC which was attracted on filing thereof would also disappear.

33. I however find that the suit from which this appeal arises was being taken up along with a suit for ejectment of the appellant/plaintiff from the premises filed by the respondent/defendant. The agreement to sell of which the appellant/plaintiff claims specific performance is not a registered one. The appellant/plaintiff cannot thus be said to be in possession of the premises in part performance of the agreement to sell and benefit of Section 53A of the Transfer of Property Act, 1881 would thus not be available. This question has been dealt by me in Jagdambey Builders Pvt. Ltd. Vs. J.S. Vohra MANU/DE/0310/2016."

10. Now, coming to the facts of this case, I may note the earlier suit viz. CS/SCJNo.90/2018 for permanent injunction was withdrawn during the pendency of the subsequent suit, after seeking leave of the Court to file fresh suit on *same cause of action*, hence, the learned Trial Court was right in dismissing this suit holding it being barred by Order II rule 2 CPC, since seeking specific performance was a cause *different* than that of permanent injunction.

11. The facts of this case are akin to *Nutan Tyagi* (supra) except only with a difference viz here the entire consideration is alleged to have been paid but whereas in the *Nutan Tyagi* (supra) still some consideration was left, hence, the learned counsel for appellant argues, at least, he be allowed to sue for refund of the consideration paid. Admittedly, no prayer of this sort was ever made in either of the two complaints, hence there is no merit in the argument and thus the appeal is dismissed. However, the dismissal of appeal shall not preclude the appellant to seek such legal remedy, if permissible, per Order VII Rule 13 CPC. Pending applications, if any, also stand dismissed. No order as to costs.

YOGESH KHANNA, J.

NOVEMBER 25, 2019/M