

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-2208-2014(O&M)
Date of decision: 03.02.2020

Anil Kumar and others

.....Appellants

Versus

Gulab Singh and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr.Kanwal Goyal, Advocate for the appellants

Mr. Arun Jain, Sr. Advocate with
Mr. Abhishek Dhull, Advocate for respondents No.1,2 &4

ANIL KSHETARPAL, J.

Plaintiffs-appellants are in Regular Second Appeal against the judgment passed by the learned First Appellate Court reversing the judgment passed by the learned Trial Court.

In the considered view of this Court, following question of law arises for adjudication:-

i) Whether in absence of plaint of the previous suit, it would be appropriate to hold that the subsequent suit is barred/not maintainable under Order 2 Rule 2 CPC?

The plaintiffs had instituted a suit for specific performance of the agreement to sell dated 14.10.2004 with consequential relief of possession and permanent injunction. It was pleaded by the plaintiffs that defendants No. 1 and 2 had entered into an agreement to sell with them

on 14.10.2004 agreeing to sell land measuring 73 kanals 14 marlas for a total sale consideration of Rs.52 lacs, on receipt of Rs. 8 lacs as earnest money. Parties had agreed to execute and register the sale deed on 10.7.2005.

Defendants No.1 and 2 filed their separate written statements that defendant No.1 has already entered into an agreement to sell with Balwinder Singh (defendant no.3) s/o Harnam Singh with respect to land measuring 14 kanals and 16 marlas. Defendant No. 1 has also entered into another agreement to sell with defendant no.3 on 25.6.2004 relating to land measuring 14 kanals 16 marlas. It was further pleaded that defendants no.1 and 2 had also entered into an agreement to sell dated 21.8.2004 with defendant no.3 with respect to land measuring 44 kanals 1 marla. Defendants further pleaded that when the plaintiffs contacted them for selling the land in dispute, initially, they refused, however, later on it was agreed that the defendants no. 1 and 2 will request defendant no.3 to cancel the various agreements to sell and if he did not agree for cancellation of the agreements to sell, defendants no. 1 and 2 shall not be bound to execute the sale deed in favour of the plaintiffs. It was pleaded that the thumb impressions/signatures of the defendants were obtained by the plaintiffs on blank papers but earnest money was never paid. It was further pleaded that agreement to sell is result of fraud and misrepresentation.

Defendant no.3 contested the suit by pleading that defendants no. 1 and 2 had entered into agreements to sell with him on 25.5.2004, 25.6.2004 and 21.8.2004. He further pleaded that the

agreement to sell dated 14.10.2004 in favour of the plaintiffs is a procured document.

Learned Trial Court on appreciation of evidence found that the plaintiffs were successful in proving their case, hence, entitled to decree for possession by way of specific performance of the agreements to sell. Learned Trial Court also found that the various agreements to sell set up by the defendants were only in order to defeat the rights of the plaintiffs in the suit land arising from the agreement to sell dated 14.10.2004.

Defendants no.1 and 2 filed an appeal which has accepted only on the ground that the subsequent suit filed by the plaintiffs is barred under Order 2 Rule 2 CPC. It has been held that since the plaintiffs had previously filed a suit for grant of permanent injunction on 9.6.2005 and therefore, the present suit is not maintainable under Order 2 Rule 2 CPC.

This Court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the record.

Learned counsel for the appellants has submitted that previous suit was filed only for grant of decree for permanent injunction as defendants no.1 and 2 were threatening to alienate the suit property. He submitted that on the date the suit for permanent injunction was filed, cause of action for filing the suit for specific performance of the agreement to sell had not even arose because the target date agreed to, between the parties for execution and registration of the sale deed, was 10.7.2005. He further submitted that pleadings of the previous suit for

grant of decree for permanent injunction filed by the plaintiffs has not been produced and in absence thereof, bar to the maintainability of subsequent suit under Order 2 Rule 2 CPC could not be examined. He further relied upon a judgment passed by Constitution Bench of the Hon'ble Supreme Court in the case of **Gurbux Singh vs. Bhooralal** AIR 1964 SC 1810 (1).

On the other hand, learned senior counsel appearing for the respondents has submitted that no doubt the plaint of the previous suit has not been filed, however, from the reading of paragraphs 3 and 8 of the plaint of the present suit, it is apparent that the present suit, which is the subsequent suit, is barred under Order 2 Rule 2 CPC.

This Court has considered the submission of the learned counsel for the parties. Order 2 Rule 2 CPC reads as under:-

“Order 2 Rule 2 CPC

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 relief; 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.

Explanation – For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

It is apparent from the plain reading of Order 2 Rule 2 CPC that a plaintiff is required to include whole of the claim in respect of the cause of action in one suit. If the plaintiff omits to sue in respect of or intentionally relinquish any portion of his claim in respect of the cause of action, he is debarred from filing subsequent suit with respect to the relief so omitted or relinquished. The idea behind making such provision is to reduce the multiplicity of the litigations. However, before dismissing subsequent suit on the ground that it is barred under Order 2 Rule 2 CPC it is necessary to arrive at a definite conclusion that the previous suit as well as subsequent suit is in respect of the same cause of action. For arriving at that conclusion it is necessary that the plaint of the previous suit is brought on file of the subsequent suit, failing which it would be very difficult for the Court to arrive at such finding. The Hon'ble Supreme Court in the case of Gurbux Singh (supra) has examined

provisions of Order 2 Rule 2 CPC in the context of technical bar to the maintainability of the subsequent suit. It has been held that before invoking bar to maintainability of subsequent suit is required to be established that the second suit is in respect of same cause of action. Relevant discussion is in para 6 and 7 which are extracted as under:-

“6. 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. It is for this reason that we consider that a plea of a bar under 0. 2. r. 2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. It is common ground that the pleadings in C.S. 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under 0. 2. r. 2, Civil Procedure Code. The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellants case and pointed out, in our opinion rightly, that without the plaint in the previous suit being on the record, a plea of a bar under 0. 2. r. 2, Civil Procedure Code was not maintainable. Learned counsel for the appellant, however, drew our attention to a passage in the judgment of the learned Judge in the High Court which read:

"The plaint, written statement or the judgment of the earlier court

has not been filed by any of the parties to the suit. The only document filed was the judgment in appeal in the earlier suit. The two courts have, however, freely cited from the record of the earlier suit. The counsel for the parties have likewise done so. That file is also before this Court."

It was his submission that from this passage we should infer that the parties had, by agreement, consented to make the pleadings in the earlier suit part of the record in the present suit. We are unable to agree with this interpretation of these observations. The statement of the learned Judge "the two courts have, however, freely cited from the record of the earlier suit" is obviously inaccurate as the learned District Judge specifically pointed out that the pleadings in the earlier suit were not part of the record and on that very ground had rejected the plea of the bar under O. 2. r. 2, Civil Procedure Code. Nor can we find any basis for the suggestion that the learned Judge had admitted these documents at the second appeal stage under O. 41. r. 27, Civil Procedure Code by consent of parties. There is nothing on the record to suggest such an agreement or such an order, assuming that additional evidence could legitimately be admitted in a second appeal under O. 41. r. 27, Civil Procedure Code. We can therefore proceed only on the basis that the pleadings in the earlier suit were not part of the record in the present suit.

7. Learned counsel for the appellant, however, urged that in his plaint in the present suit the respondent had specifically referred to the previous suit having been for mesne profits

and that as mesne profits could not be claimed except from a trespasser there should also have been an allegation in the previous suit that the defendant was a trespasser in wrongful possession of the property and that alone could have been the basis for claiming mesne profits. We are unable to accept this argument. In the first place, it is admitted that the plaint in the present suit was in Hindi and that the word 'mesne profits' is an English translation of some expression used in the original. The original of the plaint is not before us and so it is not possible to verify whether the expression 'mesne profits' is an accurate translation of the expression in the original plaint. This apart, we consider that learned counsel's argument must be rejected for a more basic reason. Just as in the case of a plea of res judicata which cannot be established in the absence on the record of the judgment and decree which is pleaded as estoppel, we consider that a plea under O. 2. r. 2, Civil Procedure Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. As the plea is basically founded on the identity of

the cause of action in the two suits the, defence which raises the bar has necessarily to establish the ,cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. It is not impossible that reliefs were claimed without the necessary averments to justify their grant. From the mere use of the words 'mesne profits' therefore one need not necessarily infer that the possession of the defendant was alleged to be wrongful. It is also possible that the expression 'mesne profits' has been used in the present plaint without a proper appreciation of its significance in law. What matters is not the characterization of the particular sum demanded but what in substance is the ,allegation on which the claim to the sum was based and as regards the legal relationship on the basis of which that relief was sought. If is because of these reasons

that we consider that a plea based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. We therefore consider that the order of remand passed by the learned Additional District Judge which was confirmed by the learned Judge in the High Court was right. The merits of the suit have yet to be tried and this has been directed by the order of remand which we are affirming.”

In view of the aforesaid authoritative pronouncement, this Court proceeds to examine the facts of the present case. As noticed above, learned counsel for the respondents admit that the plaint of the previous suit has not been placed on the file of the present suit. Paras 3 and 8 of the plaint of the present suit are extracted as under:-

“Para 3- That the defendants became dishonest and tried to defeat the rights of the plaintiffs under the above said agreement dated 14.10.2004 and tried to sell the suit land in favour of one Balwinder Singh son of Harnam Singh resident of village Tharva Majra, Tehsil Assandh, District Karnal and with this intention the defendants went to the office of Sub Registrar Assandh along with said Balwinder Singh and purchased the stamp papers for the registration of the sale deed of the suit land in favour of Balwinder

Singh. However, the plaintiff's got a wind of the agreement to sell illegally entered into between the defendants and Balwinder Singh, therefore, the plaintiff filed a suit for permanent injunction seeking to restrain the defendants from executing and registering the sale deed of the suit land in favour of said Balwinder Singh. The said suit was assigned to the court of Shri Devender Singh, learned Additional Civil Judge, Karnal and the said court was pleased to pass a restrain order directing the parties to maintain status quo regarding the suit property. The said suit is still pending for 20.2.2006 for filing of reply by on of the defendants.

Para 8 – That since at the time of the said suit for permanent injunction the target date of the sale deed has not yet arrived, therefore, the plaintiff did not have the option of filing a suit for specific performance of the contract and hence a simple suit for injunction was filed.”

On careful reading of the aforesaid paragraphs, it is apparent that it has been pleaded that defendants no. 1 and 2 had become dishonest and tried to defeat the rights of the plaintiffs by executing sale deed in favour of Balwinder Singh i.e defendant No.3 and therefore, plaintiffs rushed to the Court and sought injunction. In para 8 it has been pleaded that when the previous suit was filed, relief of specific performance of the

agreement to sell was not sought, as on the date first suit for grant of relief of injunction was filed, the cause of action for filing suit for specific performance of the contract had not arisen. At the cost of repetition, it may be noted that the suit for injunction was filed on 9.6.2005 whereas as per agreement to sell, the parties had agreed to execute and register the sale deed on 10.7.2005.

Keeping in view the aforesaid facts, it is apparent that the Court does not find itself in position to record a finding as to whether previous suit was in respect of same cause of action or not. It is for this reason that the Constitution Bench in the case of Gurbux Singh(supra) has held that before a suit is dismissed under Order 2 Rule 2 CPC, it has to be established by the defendants, beyond reasonable doubt, that the subsequent suit was based on same cause of action as was the previous suit. The Hon'ble Supreme Court has held that bar under Order 2 Rule 2 CPC cannot be presumed on the basis of inferential reasoning.

Still further this aspect can be examined from another angle. Undisputedly, on the day, first suit for grant of decree for permanent injunction was filed, the target date agreed to between the parties as per the agreement, for execution and registration of the sale deed had not arrived. If the plaintiff has considered it appropriate to file a suit for possession by way of specific performance of the agreement to sell after expiry of the target date i.e 10.7.2005 should the plaintiffs be non-suited only on this ground?

In the considered view of this Court answer to the aforesaid question has to be in negative. Bar to the maintainability of the

subsequent suit on technical objection can only be invoked by the Court once the Court arrives at a conclusion that the plaintiffs in the previous suit had relinquished any part of their claim or had intentionally omitted to sue for the part of the claim. In absence of such finding, it would not be appropriate for the Court to dismiss a meritorious suit.

It is apparent from the phraseology used in Order 2 Rule 2 CPC that bar can be invoked by a defendant only on establishing that first suit was with respect to same cause of action and the plaintiff either relinquished any portion of his claim or omitted to sue for that part of the claim. As noticed in this case, the plaintiffs, in fact, did not had cause of action to file a suit for specific performance of the agreement to sell on the date, first suit for grant of decree of injunction was filed.

Learned First Appellate Court has relied upon the judgment passed by the Hon'ble Supreme Court in the case of **Virgo Industries (Eng.) Private Ltd. Vs. Venturetech Solutions Private Ltd.** (2013) 1 SCC 625. On careful reading of the aforesaid judgment, it is apparent that in the aforesaid case the proposed vendor has clearly intimated to the proposed purchaser that they are not willing to perform their part of the contract and had in fact forwarded the amount by tendering cheques of the amount paid. In those facts, the Hon'ble Supreme Court has held that after receipt of the cheque for refund of the earnest money from the proposed vendors with explicit intimation that agreement to sell stand cancelled, it would not be appropriate for the proposed purchaser to file a suit for injunction only omitting to file a suit for specific performance to the agreement to sell while filing the previous suit. The facts of the

aforesaid case as noticed are clearly distinguishable. This Court, with highest respect, forms an opinion that in the facts of the present case, the judgment in the case of Virgo Industries (supra) shall not be applicable.

In view of the aforesaid discussion, the judgment passed by the learned First Appellate Court is set aside and that of the learned Trial Court is restored.

Appeal allowed.

03.02.2020	(ANIL KSHETARPAL)
rekha	JUDGE
Whether speaking/reasoned	Yes / No
Whether Reportable	Yes / No