IA GA No. 2 of 2015
Old GA No. 4020 of 2015
CS 250 of 2015
with
IA GA No. 2 of 2021
ALP 4 of 2018

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction

DR. DILIP KR. GHOSH & ANR
V.
FUNIDEA PROJECTS PVT. LTD & ORS.
And
DR. DILIP KR. GHOSH & ANR.
V.
FUNIDEA PROJECTS PVT. LTD & ANR.

For the Plaintiffs	:	Mr. Jishnu Saha, Sr. Advocate Mr. Raja Basu, Advocate Mr. Dipika Bsu, Advocate Mr. Sabyasachi Roy, Advocate
For the Petitioner (In IA GA No. 2 of 2021)	:	Mr. M. K. Ghosh, Sr. Advocate Mr. S. Dutta, Advocate Mr. N. Adhya, Advocate Mr. S. Ganguly, Advocate
Hearing concluded on	:	February 25, 2021
Judgment on	:	March 5, 2021

<u>DEBANGSU BASAK, J.</u> :-

1. Two applications have been taken up for analogous hearing as they concern the same parties.

2. The defendant No. 2 has applied for dismissal of CS No. 250 of 2015 by way of Old GA No. 4020 of 2015 in CS No. 250 of 2015. The defendant No. 2 has applied for dismissal of an application under Clause 13 of the Letters Patent, 1865, filed by the plaintiffs, being ALP No. 4 of 2018 by way of IA GA No. 2 of 2021 in ALP No. 4 of 2018.

3. Learned Senior Advocate appearing for the defendant No. 2 has submitted that, the instant suit relates to dated May 16, 2012 and April 10, 2013 entered into between the plaintiffs and the defendant No. 1. The defendant No.1 instituted Title Suit No. 192 of 2014 in the Court by the learned Civil Judge (Senior Division) Second Court Barasat seeking specific performance of the agreement dated April 10, 2013. The plaintiffs had instituted Money Suit No. 101 of 2015 which was before the learned Civil Judge senior division Second Court at Barasat. The two suits had since been transferred to the Commercial Court.

4. Learned Senior Advocate appearing for the defendant Nos. 1 and 2 has submitted that, the subject matter of the instant suit relates to an immovable property. He has referred to the pleadings

of Money Suit No. 101 of 2015. He has submitted that, the plaintiffs could have sought the same relief as has been sought in the present suit, in the Money Suit. He has pointed out that, although the plaint of Money Suit 101 of 2015 had contained a prayer for leave under Order II Rule 2 of the Code of Civil Procedure, 1908, the plaintiffs did not obtain such leave at the time of institution of the Money Suit No. 101 of 2015. In fact, subsequent to the present application, the plaintiffs had applied in Money Suit No. 101 of 2015 for leave under Order II Rule 2 of the Code of Civil Procedure, 1908. He has contended that, the plea taken in the application for grant of leave under Order II Rule 2 of the Code of Civil Procedure, 1908 in Money Suit No. 101 of 2015 is specious. He has contended that in any event, the fact that, the plaintiffs did not obtained leave under Order II Rule 2 of the Code of Civil Procedure, 1908 is now established. In any event, Money Suit No. 101 of 2015 being prior to the institution of the instant suit and the plaintiffs not having obtained leave under Order II Rule 2 of Code of Civil Procedure, 1908, the present suit is not maintainable. He has contended that, the cause of action forming the basis of money suit No. 101 of 2015 is also the basis for the present suit.

5. Learned Senior Advocate appearing for the plaintiffs has contended that, the subject matter of the instant suit is different from the previous money suit. He has contended that, the parties to the two suits are different. In the money suit, the plaintiffs have claimed recovery of money from the defendants therein. In the present suit, the plaintiffs have claimed reliefs with regard to the two agreements entered into between the parties. He has submitted that, the defendant No. 3 is the assignee of an immovable property. The plaintiffs having faced difficulties with regard to such immovable property and the financial accommodation enjoyed from financial institution, the plaintiffs had entered into an agreement with the defendant Nos. 1 and 2 whereby and whereunder, the defendant Nos. 1 and 2 agreed to bail out the plaintiffs from such financial difficulties on certain considerations. Not only did the defendant Nos. 1 and 2 renegade on such promises, the defendants 1 and 2 arranged the affairs of the defendant No. 3 in such manner so as to wrest control of the defendant No. 3 from out of the plaintiffs. The instant suit is in relation to the management and control of the defendant No. 3 which the defendants 1 and 2 have wrongfully taken over from the plaintiffs.

6. Learned Senior Advocate appearing for the plaintiffs has relied upon ***2010 Volume 10 Supreme Court Cases 141 (Alka Gupta v. Narender Kumar Gupta)*** and ***2014 Volume 6 Supreme Court Cases 424 (Coffee Board v. Ramesh Exports Private Limited)*** in support of his contentions that the present suit is not barred.

7. Learned Senior Advocate appearing for the plaintiffs has contended that, the defendants have deposited a sum of Rs. 3 crores which the Court required the defendants to do as security. He has submitted that, since the causes of action in the two suit are different, the question of dismissal of the present suit being part by Order II Rule 2 of the Code of Civil Procedure, 1908 does not arise.

8. ***Alka Gupta (supra)*** has noted the provisions of Section 11, Order II Rule 2 and Order VI Rule 2 of the Code of Civil Procedure, 1908. It has observed that, the Code of Civil Procedure, 1908 enumerates various circumstances in which civil suit can be dismissed without trial. It has observed in paragraph 28 as follows:-

*“**28.** The Code enumerates the circumstances in which a civil suit can be dismissed without trial. We may refer to them (not exhaustive):*

(a) Dismissal as a consequence of rejection of plaint under Order 7 Rule 11 of the Code in the following grounds:

(i) where it does not disclose a cause of action;

(ii) where the relief in the plaint is undervalued and the plaintiff fails to correct the valuation within the time fixed;

(iii) where the court fee paid is insufficient and the plaintiff fails to make good the deficit within the time fixed by court;

(iv) where the suit appears from the statement in the plaint to be barred by law;

(v) where it is not filed in duplicate and where the plaintiff fails to comply with the provisions of Order 7 Rule 9 of the Code.

(b) Dismissal under order 9 Rule 2 or Rule 3 or Rule 5 or Rule 8 for non service of summary or non-appearance or failure to apply for fresh summons.

(c) Dismissal under Order 11 Rule 21 for non-compliance with an order to answer interrogatories, or for discovery or inspection of documents.

(d) Dismissal under Order 14 Rule 2(2) where issues both of law and fact arise in the same suit and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only and it tries such issue relating to jurisdiction of the court or a bar to a suit created by any law for the time being in force first and dismisses the suit if the decision on such preliminary issue warrants the same.

(e) Dismissal under Order 15 Rule 1 if the Code when at the first hearing of the suit it appears that the parties are not at issue on any question of law or fact.

(f) Dismissal under Order 15 Rule 4 of the Code for failure to produce evidence.

(g) Dismissal under Order 23 Rules 1 and 3 of the Code when a suit is withdrawn or settled out of court.

9. ***Alka Gupta (supra)*** has been noted in Coffee Board (supra). In Coffee Board (supra), the Supreme Court has held as follows :-

*“**11.** The bar of Order 2 Rule 2 comes into operation where the cause of action on which the previous suit was filed, forms the foundation of the subsequent suit; and when the plaintiff could have claimed the relief sought in the subsequent suit, in the earlier suit; and both the suits are between the same parties. Furthermore, the bar under Order 2 Rule 2 must be specifically pleaded by the defendant in the suit and the trial court should specifically frame a specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different. This was held by this Court in Alka Gupta v. Narender Kumar Gupta [(2010) 10 SCC 141 : (2010) 4 SCC (Civ) 73] which referred to the decision of this Court in Gurbux Singh v. Bhooralal [AIR 1964 SC 1810] wherein it was held that: (Alka Gupta case [(2010) 10 SCC 141 : (2010) 4 SCC (Civ) 73] , SCC p. 147, para 13)*

“13. … ‘6. In order that a plea of a bar under Order 2 Rule 2(3) of the 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 latter suit is based there would be no scope for the application of the bar.' (Gurbax Singh case [AIR 1964 SC 1810] , AIR p. 1812, para 6)"

12. *The courts in order to determine whether a suit is barred by Order 2 Rule 2 must examine the cause of action pleaded by the plaintiff in his plaints filed in the relevant suits (see S. Nazeer Ahmed v. State Bank of Mysore [(2007) 11 SCC 75]). Considering the technicality of the plea of Order 2 Rule 2, both the plaints must be read as a whole to identify the cause of action, which is necessary to establish a claim or necessary for the plaintiff to prove if traversed. Therefore, after identifying the cause of action if it is found that the cause of action pleaded in both the suits is identical and the relief claimed in the subsequent suit could have been pleaded in the earlier suit, then the subsequent suit is barred by Order 2 Rule 2."*

10. In order for the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 to apply there must be identity of the causes of action between the previous suit and the subsequent suit. The causes of action for the previous suit must be established to have entitled the plaintiff more than one relief and that, the plaintiff in the subsequent suit had omitted to sue for the relief in the previous suit, that the plaintiff was entitled to from out of the cause of action for the previous suit. The two suits must be between the same parties.

11. In the facts of the present case, the plaintiffs have filed Money Suit No. 101 of 2015 against four defendants. The defendant Nos. 1 and 2 herein have been described as the defendant in Money Suit No. 101 of 2015 while the defendant Nos. 3 and 4 herein have been described as proforma defendants therein. In the present suit, the plaintiffs have impleaded 37 defendants. The first four defendants of the present suit are party defendants in Money Suit No. 101 of 2015 with the defendant Nos. 3 and 4 herein being the proforma defendants therein.

12. In the plaint of the instant suit, the plaintiffs have claimed that, the defendant No. 3 is an assignee of land measuring about 15.0170 kothas of land lying and situated at DN-20 Sector 5 Electronic complex, Kolkata 700091. The plaintiffs have claimed that the plaintiff No. 1 being a doctor had been interested in setting up a hospital. The plaintiff No. 1 had incorporated the defendant No. 3 in order to fulfil such dream. The defendant No. 3 had applied for and obtained credit facilities from the defendant No. 5. As security the defendant No. 3 had mortgaged the Salt Lake property in favour of the defendant No. 5. The plaintiffs had executed personal guarantees in favour of the defendant No. 5.

13. In the plaint of the instant suit, the plaintiffs have claimed that, the authorised share capital of the defendant No. 3 had been Rs. 50 lakhs divided into 5 lakh equity shares of Rs. 10 each. According to the plaintiffs, as on June 29, 2011, the plaintiff No. 1 had held twenty thousand equity shares and the plaintiff No. 2 had held 34,170 equity shares in the defendant No. 3.

14. The plaintiffs have claimed in the plaint that of the instant suit, the plaintiff suffered financial crisis. The plaintiffs had entered

into an agreement with the defendant No. 4 on June 24, 2011 for the purpose of ensuring completion of the project of the defendant No. 3. According to the plaintiffs, the defendant No. 4 had issued letters to the defendant No. 5 promising payments. According to the plaintiffs, the arrangement between the plaintiffs and the defendant No. 4 was that, the plaintiff could transfer the entire shareholding of the plaintiffs in the defendant No. 3 for consideration of Rs. 20 crores. Out of the sum of Rs. 20 crores, the defendant No. 4 would pay Rs. 8 crores to the defendant No. 5, Rs. 50 lakhs to the plaintiffs to meet the sundry creditor of the defendant No. 3. According to the plaintiffs, the defendant No. 4 had failed to keep its commitments and made a partial payment to the defendant No. 5.

15. In the plaint of the instant suit, the plaintiffs have claimed that in December 2011, the plaintiffs were introduced to the defendant No. 2. The defendant No. 2 had expressed the intention to take over the project of the defendant No. 3. The plaintiffs and the defendant No. 2 had entered into an agreement dated May 16, 2012. According to the plaintiffs, although the defendant Nos. 1 and 2 were obliged to honour their commitment under the agreement

dated May 16, 2012, they had failed to do so. The plaintiffs had entered into a subsequent agreement dated April 10, 2013 by superseding the previous agreement to the extent set forth therein. The defendant No. 1 had filed a suit by specific performance of the agreement dated April 10, 2013. According to the plaintiffs, the defendant Nos. 1 and 2 had failed and neglected to pay the agreed consideration of the plaintiffs. According to the plaintiffs, the defendant Nos. 1 and 2 did not comply with the agreement dated May 16, 2012 and April 10, 2013. The plaintiffs had instituted Money Suit No. 101 of 2015. The plaintiffs have alleged that, the defendant Nos. 1 and 2 had issued unallowed shares of the defendant No. 3 in favour of the defendant No. 6 to 33 and have gained wrongful control over the defendant No. 3. through such mechanism. Such issue and allotment had been made in a single day without any consideration thereof. According to the plaintiffs, the defendant Nos. 1 and 2 and the defendant Nos. 5 to 32 have perpetuated fraud on the plaintiffs and the defendant No. 3. The plaintiffs have particularized the fraud so committed in the various sub paragraphs of paragraph 41 of the plaint. According to the plaintiffs, the defendant Nos. 5 to 32 are sell companies over which the defendant Nos. 1 and 2 have absolute control.

16. In the plaint of the instant suit, the plaintiffs have sought reliefs with regard to the agreement dated May 16, 2012 and April 10, 2013 as also the control and management of the defendant No. 3.

17. As has been noted above, there are three suits between the parties. The defendant Nos. 1 and 2 have filed a suit for specific performance of the agreement. The plaintiffs have filed a Money Suit. In order to consider the applicability of the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 so far as the present suit is concerned, the cause of action of Money Suit No. 101 of 2015 have to be taken into consideration as the present suit has been filed by the plaintiffs herein. In Money Suit No. 101 of 2015, although the plaintiffs have claimed that the defendant Nos. 1 and 2 had acted deceitfully in relation to the agreement between the parties, the plaintiffs did not claim any relief with regard to the issue and allotment of shares of and in the defendant No. 3. The defendant Nos. 1 and 2 have not brought any material on record to

substantiate that the plaintiffs were aware of the issue and allotment of shares of and in the defendant No. 3 at the time of filing of Money Suit No. 101 of 2015. The cause of action of the two suits are different. The plaintiffs have claimed reliefs with regard to the issue and allotment of shares of and in the defendant No. 3 which are absent in the earlier suit.

18. In such circumstances, I am of the view that the present suit is not barred under provisions of Order II Rule 2 of the Code of Civil Procedure, 1908.

19. In such circumstances, IA GA No. 2 of 2015, Old GA No 4020 of 2015 CS No. 250 of 2015 is dismissed without any order as to costs.

20. The plaintiffs have claims with regard to two agreements in the plaint of the present suit. The agreements on the basis of which the plaintiffs have sued the defendants relate to a company incorporated under the provisions of the Companies Act, 1956 and it relates to the shareholding of the defendant No. 3. The disputes can therefore be said to form a commercial dispute within the meaning of the Commercial Courts Act, 2015. The suit has been

valued in excess of the prevailing the Specified Value. Two other suits on the basis of the agreements in question in the suit have been transferred to the Commercial Court. In such circumstances, it would be appropriate to invoke the provisions of Section 15 of the Act of 2015 to the Commercial Division of this Hon'ble Court. CS No.250 of 2015 shall stand transferred to the "Commercial Division" of this Hon'ble Court. The department shall take all requisite steps in this regard. The advocate on record for the plaintiffs will insert the words "Commercial Division", immediately after the words "Ordinary Original Civil jurisdiction" in the cause title of the pleadings. The plaintiffs are at liberty to comply with all formalities in this regard.

21. The defendant No. 2 has filed IA GA No. 2 of 2021 in ALP No. 4 of 2018 seeking dismissal of the same. The plaintiffs have filed ALP No. 4 of 2018 seeking transfer of Money Suit No. 101 of 2015 to this Hon'ble Court for dismissal.

22. Learned Senior Advocate appearing for the plaintiffs have submitted that they want to withdraw ALP No. 4 of 2018 and file afresh on the self same cause of action before the appropriate forum

since Money Suit No. 101 of 2015 has been transferred to the Commercial Court and CS No. 250 of 2015 has been transferred to the Commercial Division.

23. Having considered the prayer of the plaintiffs it would be appropriate to treat ALP No. 4 of 2018 as on the day's list and permit the plaintiffs to withdraw ALP No. 4 of 2018 with liberty to file afresh on the self same cause of action before the appropriate forum. ALP No. 4 of 2018 is dismissed as withdrawn with the liberty as prayed for.

24. Consequent upon withdrawal of ALP No. 4 of 2018, IA GA NO. 2 of 2021 does not survive. IA GA No. 2 of 2021 is disposed of. The points raised therein are kept open.

[DEBANGSU BASAK, J.]