



AS.No.396/2015

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.03.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MR. JUSTICE P.B.BALAJI

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- 1.C.Mani [Died]
- 2.Palaniyammal
- 3.Senthilkumar
- 4.Selvi

.. Appellants

****Appellants 2 to 4 brought on
on record as LR's of the deceased
sole appellant viz., C.Mani,
vide order dated 23.09.2022 made
in CMP.No.14593/2021 in AS.No.396/2015**

Vs.

- 1.K.Sampath
- 2.K.Anbalagan
- 3.Saranya Sampath
- 4.Mathanmohan Sampath
- 5.Revathi
- 6.Minor Sowmiya
rep.by next friend guardian
father Mr.K.Anbalagan
- 7.Minor Vasanthakumar
rep.by next friend guardian father Mr.K.Anbalagan



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8.Tamil Selvi
9.Poovapathi

.. Respondents

Prayer:- Appeal Suit filed under Section 96 of CPC against the fair and decreetal order dated 30.04.2015 made in IA.No.198/2014 in OS.No.304/2013 on the file of the learned II Additional District Judge, Salem.

For Appellants : Mr.D.Shivakumaran
For Respondents : Mr.R.Jayaprakash

JUDGMENT

[Judgment of the Court was delivered by S.S.SUNDAR, J.,]

- (1) The sole plaintiff in the suit in OS.No.304/2013 before the learned II Additional District Judge, Salem, is the appellant in the above appeal and the present Appeal Suit is preferred against the fair and decreetal order dated 30.04.2015 made in IA.No.198/2014 in OS.No.304/2013, an interlocutory application filed under Order 7 Rule 11 of CPC to reject the plaint in OS.No.304/2013.
- (2) Pending appeal, the sole appellant died and appellants 2 to 4 are brought on records as legal representatives of the deceased sole appellant.



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(3) Brief facts that are necessary for the disposal of this Appeal Suit are as follows.

(4) The appellants are the legal representatives of the sole plaintiff by name C.Mani who was the plaintiff in the suit in OS.No.304/2013. The plaintiff entered into an Agreement of sale with the respondents for sale of his properties for a total sale consideration of Rs.75 lakhs by a Sale Agreement dated 02.02.2012. In the meanwhile, it appears that a suit in OS.No.110/2012 was filed by some third parties for injunction against some of the respondents herein and others. Following the same, the deceased appellant herein namely C.Mani, also filed a suit in OS.No.317/2012 for bare injunction against the respondents herein and others restraining them from interfering with his peaceful possession and enjoyment of the suit properties. There were also exchange of notices between the appellant and respondents even before the suit for injunction was filed and it is brought to the notice of this Court that a police complaint was also given by the plaintiff/deceased appellant before moving the suit for injunction.



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- (5) Later, the plaintiff Mr.C.Mani filed OS.No.304/2013 before the learned II Additional District Judge, Salem, against defendants for specific performance of Agreement of Sale dated 02.02.2012 and for consequential injunction. There is an alternative prayer seeking refund of a sum of Rs.25 lakhs received as advance on 02.02.2012 with interest @ 24% per annum besides a sum of Rs.1 lakh as damages.
- (6) During the pendency of the said suit, the defendants filed IA.No.198/2014 in OS.No.304/2013 under Order 7 Rule 11 of CPC for rejection of plaint in OS.No.304/2013 only on the ground that the subsequent suit is barred under Order 2 Rule 2 of CPC. The said interlocutory application was allowed by the Trial Court and the plaint was rejected holding that the plaintiff/appellant had the cause of action to file a suit for specific performance even when he filed the suit for injunction. Following the said order, the plaint was rejected. Therefore, the appeal is directed against the fair and decreetal order in IA.No.198/2014 in OS.No.304/2013 rejecting plaint.



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- (7) The learned counsel appearing for the appellants submitted that the cause of action in the previous suit is entirely different and the Trial Court did not consider several facts. He referred to the fact that the suit for injunction was filed not only against the defendants in the present suit but also against strangers who had filed earlier, a suit for injunction against defendants. Learned counsel then submitted that there is an alternative prayer for refund of advance amount as well for damages for breach of contract. Therefore, the plaint as a whole, cannot be rejected on the ground that the suit is barred under Order 2 Rule 2 of CPC in view of the cause of action pleaded by the plaintiffs in the subsequent suit for refund of advance amount and for damages alleging breach of contract. The learned counsel for the appellants also submitted that there is no identity of parties. He also referred to the fact that the suit Agreement itself was not considered by the Trial Court.
- (8) Learned counsel for the appellants, in support of his contentions, relied upon the following judgments:-



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(a) *The judgment of the Hon'ble Supreme Court in the case of*

Rathavathi & Another Vs. Kavita Ganashamdas *reported in*

2015 [5] SCC 223 ;

(b) *The judgment of the Hon'ble Supreme Court in the case of*

Sucha Singh Sodhi [D] through LRs Vs. Baldev Raj Walia and

Another *reported in 2018 [6] SCC 733 [following the earlie*

judgment of the Hon'ble Supreme Court in ***Rathavathi and***

Another].

- (9) ***Per contra***, learned counsel for the respondents submitted that identical facts are pleaded in both suits and therefore, the subsequent suit is barred under Order 2 Rule 2 of CPC. Though he relied upon certain factual aspects to convince this Court that there is identity of cause of action, this Court is unable to countenance the arguments of the learned counsel for the respondents in support of the order of the Trial Court for the following reasons. The plaintiff in the subsequent suit in OS.No.304/2013 has not only prayed for specific performance but also for alternative relief of



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refund of advance amount paid under the suit Agreement. A further relief also is sought for, i.e., payment of Rs.1 lakh towards damages for breach of contract by the defendants.

(10) It is to be seen that the question, whether the subsequent suit is barred by Order 2 Rule 2 of CPC cannot be thrown out at the threshold merely on the statement by way of affidavits regarding identity of cause of action or on the basis of averment in the written statement. Court has to see only the averments in the plaint.

(11) A Constitution Bench of the Hon'ble Supreme Court in the case of **Ghurbux Singh V. Bhooralal** reported in **AIR 1964 SC 1810**, has held as follows:-

4. As already indicated, there is a conflict of judicial opinion on the question whether a suit for possession of immoveable property and a suit for the recovery of mesne profits from the same property are both based on the same cause of action, for it is only if these two reliefs are based on “the same cause of action” that the plea of Order 2 Rule 2 of the Civil Procedure Code that was raised by the appellant



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could succeed. Clause (3) of Order 2 Rule 2 of the Civil Procedure Code that is relevant in this context reads:

“(3) 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 reliefs so omitted.”

Some of the High Courts, notably Madras, have in this connection, referred to the term of Order 2 Rule 4 which runs:

“Rule 4. No cause of action shall unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except—

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damage for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action;

Provided that nothing in this rule shall be deemed to



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prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.”

as an aid to the construction of the term ‘cause of action’ and the expression “relief based on the same cause of action” in Order 2 Rule 2(3). Reading these two provisions together it has been held that the cause of action for suits for possession of immovable property and the cause of action for a suit in respect of mesne profits from the same property are distinct and different. On the other hand, it has been held, particularly by the High Court of Allahabad that the basis of a claim for mesne profits is wrongful possession of property and so is a claim for possession and thus the cause of action for claiming either relief is the same viz. wrongful possession of property to which the plaintiff is entitled. On this reasoning it has been held that a plaintiff who brings in the first instance a suit for possession alone or for mesne profits alone is afterwards debarred from suing for the other relief under Order 2 Rule 2(3). The learned trial Judge had, after referring to the conflict of authority,



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expressed his preference for the Allahabad view and had, therefore, upheld the defence. At the stage of the appeal the learned District Judge had, as already pointed out, expressed his preference for the other view. The learned Single Judge expressed his concurrence with the learned District Judge in preferring the Madras view as against the decisions of the Allahabad High Court.

.....

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; (i) 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



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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. 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 Order 2 Rule 2 of the 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 CS 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2 Rule 2 of the 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



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matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's 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 Order 2 Rule 2 of the Civil Procedure Code was not maintainable.

Learned Counsel for the appellant, however, drew our attention to a passage in 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.



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“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 Order 2 Rule 2 of the 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 Order 41 Rule 27 of the 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 Order 41 Rule 27 of the 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.”

- (12) Following the above judgment, a Larger Bench of the Supreme Court in the case of ***Vurimi Pullarao Vs. Vemari Vyankata Radharani*** reported in ***AIR 2020 SC 395***, has held as follows:-

"13. On the other hand, supporting the view which weighed with the trial court, the appellate court and



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the High Court, it has been urged by Mr Satyajit A Desai, that the plaint in the earlier suit contains a clear reference to the agreement to sell, to the payment of consideration and to the notice of performance that was issued by the plaintiff. Not only this, para 2 of the plaint contained a specific recital of the fact that the plaintiff intended to institute a suit for specific performance before the Court of the Civil Judge, Senior Division, Khamgaon. Despite this, it was submitted that the plaintiff omitted to seek leave of the court under Order 2 Rule 2(3). This, it was submitted, must necessarily result in the bar under the provision being attracted. The learned counsel submitted that the distinction with the situation as it arose before the Constitution Bench in Gurbux Singh [Gurbux Singh v. Bhooralal, AIR 1964 SC 1810] is that in the present case, the plaint in the earlier suit was duly marked as an exhibit without any objection from the plaintiff. The learned counsel in that regard has also relied upon on the decisions of this Court in Virgo Industries (Eng.) (P) Ltd. v. Venturetech Solutions (P) Ltd. [Virgo Industries (Eng.) (P) Ltd. v. Venturetech Solutions



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(P) Ltd., (2013) 1 SCC 625 : (2013) 1 SCC (Civ) 679] and Pramod Kumar v. Zalak Singh [Pramod Kumar v. Zalak Singh, (2019) 6 SCC 621 : (2019) 3 SCC (Civ) 370] .

14. Order 2 Rule 2 is extracted below:

“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.



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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.”

15. Order 2 Rule 2(1) is premised on the foundation that the whole of the claim which a plaintiff is entitled to make in respect of a cause of action must be included. However, it is open to the plaintiff to relinquish any portion of the claim in order to bring the suit within the jurisdiction of the court. Order 2 Rule 2(1) adopts the principle that the law does not countenance a multiplicity of litigation. Hence, a plaintiff who is entitled to assert a claim for relief on the basis of a cause of action must include the whole of the claim. A plaintiff who omits to sue in respect of or intentionally relinquishes any portion of the claim, shall not afterwards be entitled to sue in respect of the portion omitted or relinquished. This is the mandate of Order 2 Rule 2(2). Order 2 Rule 2(3) stipulates that a person who is entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs. However, a plaintiff



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who omits to sue for all the reliefs, without the leave of the court, shall not afterwards sue for any relief so omitted. The leave of the court will obviate the consequence which arises under Order 2 Rule 2(3). In the absence of leave being sought and granted, a plaintiff who has omitted to sue for any of the reliefs to which they were entitled to sue in respect of the same cause of action would be barred from subsequently suing for the relief which has been omitted in the first instance. The grant of leave obviates the consequence under Order 2 Rule 2(3). But equally, it is necessary to note that Order 2 Rule 2(2) does not postulate the grant of leave. In other words, a plaintiff who has omitted to sue or has intentionally relinquished any portion of the claim within the meaning of Order 2 Rule 2(2), shall not afterwards be entitled to sue in respect of the portion so omitted or relinquished."

- (13) This Court, in the case of ***Neela Sports Development and Educational Trust Vs. Vadhula Engineering Co., Pvt Ltd rep.by its Director and Others*** in ***AS.No.839/2009*** vide judgment dated 01.02.2023, has considered the scope of Order 7 Rule 11 of CPC in



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the context of rejection of plaint on the ground that the suit is barred under Order 2 Rule 2 of CPC. This Court has held as follows:-

"21. In the present case, the parties have not produced the sale agreement even though the execution of suit agreement is not in dispute. As per the plaint averments, the Defendants 1 and 2 have agreed to sell the suit property at the cost of Rs.4 lakhs per acre and received an advance of Rs.1,50,000/- on the date of the agreement. It was further stated that the Plaintiffs agreed to pay a sum of Rs.15 lakhs within a period of 20 months from the date of the sale agreement to the mortgagee of the suit property through the Defendants 1 and 2 and the remaining balance of Rs.9,10,000/- was to be paid within three months thereafter to the Defendants 1 and 2.

22. The suit was filed on 09.08.2004 and the previous suit was filed on 28.06.2004, three months prior to the expiry of time granted for performance. The prayer can be amended for an alternative prayer for refund of advance amount. In paragraph 8 of the plaint, it is stated as follows:- "Besides, there existed another encumbrance and the Plaintiffs also do not know the mortgagee. " If there is an undisclosed mortgage, the Plaintiff as purchaser may compel the vendor to redeem the mortgage and to obtain a valid discharge in terms of Section 13(1)(c) of the Specific Relief Act. On account of undisclosed mortgage, the right of the Plaintiff to seek specific performance along with appropriate relief has to be gone into. In



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the said circumstances, the plaint need not be rejected at the threshold on the ground of bar under Order 2 Rule 2 of CPC. It will be appropriate for the Trial Court to deal with all other issues jointly. The impugned order, rejecting the plaint, at this stage without going into all other issues, may result in failure of justice. Hence, the impugned order dated, 20.12.2007 made in IA.No.648 of 2006 in OS.No.549 of 2004, by the Additional District Sessions Judge (FTC-III) Coimbatore is set aside and the suit stands restored. The suit shall be disposed of, on merits by the Trial Court on all issues including the issue relating to bar under Order 2 Rule 2 of CPC. It is made clear that the lower Court shall dispose of the suit purely, on merits, uninfluenced by any one of the observations made by this Court in this order, touching the merits of the contentions raised by the parties."

- (14) In the present case, it is true that the plaintiff himself has produced the copy of plaint filed in the earlier suit in OS.No.317/2012. It is contended by the appellants that they are put in possession of the property and therefore, they are also entitled to the relief of injunction. The question whether the appellants are entitled to protection under Section 53A of the Transfer of Property Act is not required to be decided in this appeal. However, on the interpretation of the contract and conduct of parties, the Court may



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in appropriate cases, can mould the relief.

- (15) Having regard to the nature of the claim and the facts narrated in the plaint, this Court finds that the suit cannot be thrown at the threshold on the application filed under Order 7 Rule 11 of CPC without even looking into the facts, documents and evidence in support of the plaint averments, particularly, when further reliefs are prayed for in the second suit.
- (16) Hence, the **Appeal Suit stands allowed** and the order impugned dated 30.04.2015 made in IA.No.198/2014 in OS.No.304/2013 passed by the learned II Additional District Judge, Salem, is set aside and the suit in **OS.No.304/2013** stands **restored**. The Trial Court is directed to dispose of the suit in OS.No.304/2013 on merits on all issues including the issue relating to the bar under Order 2 Rule 2 of CPC, uninfluenced by any of the observations made by this Court in this judgment touching merits and the contentions raised by the parties. No costs.

[SSSRJ] [PBBJ]



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Internet : Yes

To

1.The II Additional District Judge,
Salem.

2.The Section Officer
VR Section, High Court
Chennai.

S.S.SUNDAR, J.,

AND

P.B.BALAJI, J.

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