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OSA No.431 of 2018.

IN THE HIGH COURT OF JUDICIATURE AT MADRAS

DATED : 13.07.2023

CORAM

**THE HONOURABLE MR.JUSTICE R.MAHADEVAN
and
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ**

Original Side Appeal No. 431 of 2018

and

C.M.P. No. 19640 of 2018

M/s. Dynamic Associates
rep. by its Partner
Mr. Sunil P. Piraliya
having office at No.42, Montieth Road
Sindur Plaza, 4th Floor
Egmore, Chennai - 600 008

.. Appellant

Versus

1. Mr. Singaracharlu
2. Ms. Vedavalli (deceased)
3. Mr. R. Jayaraman
4. Mr. R. Sailendra
5. Maruti Builders
rep. by its Partner
Mr. Pyarilal Jain
Sindur Plaza
42, Montieth Road
Egmore, Chennai - 600 008



OSA No.431 of 2018.

6. Mr. Bhadresh Mehta
Mehta Real Estate
rep. by Mr. Bhadresh Mehta
Prince Tower, Shop No.G-6
Ground Floor, 94-113,
Purasawalkam High Road
Chennai - 600 010
(Opposite Abhirami Theater)

7. R. Bhoovarahaswamy

8. Mrs. Vyjayanthi Narasimhan
(RR 7 and 8 were brought on record as legal heirs
of the deceased second respondent as per order
dated 08.12.2021 passed in CMP. No.6770 of 2021
in OSA No. 431 of 2018)

.. Respondents

Appeal filed under Clause 15 of the Letters Patent read with Order XXXVI Rule 9 of the Original Side Rules against the Order dated 04.07.2018 passed in Application No. 365 of 2010 in Tr.C.S. No. 282 of 2011 on the file of this Court.

For Appellants : Mr. G. Rajagopalan, Senior Advocate
for Mr. A.R. Karunakaran

For Respondents : Mr. Parthasarathy, Senior Advocate
for Ms. Sheela Venkatesh for R1

Mr. V. Rajesh Babu for R5

No representation for R7 and R8



JUDGMENT

(Judgment of the Court was delivered by **R.MAHADEVAN, J**)

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This intra-court appeal is filed by the appellant / 4th defendant, aggrieved by the order dated 04.07.2018 passed by the learned Judge, dismissing the Application No. 365 of 2010 in Tr. C.S. No. 282 of 2011 filed to revoke the leave granted to institute the suit on 04.03.2008 in Application No. 1134 of 2008 filed by the plaintiff.

2.(i) The first respondent herein, as plaintiff, has instituted the suit in C.S. No. 272 of 2008 with the following averments:

(ii) The plaintiff is the owner of the plaint schedule property which devolved on him by means of a settlement deed dated 15.07.1953 registered as document No. 1628 of 1953 executed by his father Late. P. Anandhapadmanabhacharlu. The first defendant/second respondent herein is the sister of the plaintiff. According to the plaintiff, his sister / first defendant and Ms. Vyjayanthi, another sister, were also the owners of the properties, which lies adjacent to the plaint schedule property owned by him. As the plaintiff was in United States of America, he could not look after the property and therefore, in good faith, he had executed a General Power of



Attorney deed dated 10.07.2000 in favour of his sister / first defendant authorising her to deal with the plaint schedule property. Based on the General Power of Attorney deed, the first defendant entered into a Joint Development Agreement dated 05.06.2000 with M/s. Mahaveer Finance and Buildings Pvt Ltd., in respect of the property owned by the plaintiff as also the property owned by her and another sister Vyjayanthi. However, the terms and conditions of the Joint Development Agreement were not disclosed to the plaintiff. On the basis of the Joint Development Agreement, the superstructure of the plaint schedule property was demolished, tenants were vacated and a new superstructure was put up thereon. The first defendant also received huge amount from M/s. Mahaveer Finance and Buildings Pvt Ltd., but it was not passed on to the plaintiff. The Plaintiff came to know that due to violation of certain terms and conditions, the first defendant cancelled the Joint Development Agreement dated 05.06.2000 with the builder.

(iii) During December 2005, the plaintiff came to India and at that time, the first defendant informed him that the third defendant is interested to purchase the suit property as also the property owned by her and another sister Vyjayanthi. However, the first defendant did not furnish the details of offer made by the third defendant and therefore, the plaintiff did not evince interest to



sell the property. After the plaintiff returned to United States of America, he came to know that the first defendant was attempting to sell the plaintiff schedule property without his knowledge by misusing the power of attorney deed given by him. Therefore, on 28.01.2006, the plaintiff cancelled the Power of Attorney deed dated 10.07.2000 given to his sister, the first defendant and it was also acknowledged by the first defendant on 18.02.2006.

(iv) While so, the plaintiff received a letter dated 03.08.2006 from second defendant, referring to the letter of the third defendant to take care of the court proceedings initiated by Deepak Jain of Mahaveer Finance and Builders Pvt Ltd. The second defendant also stated that the first defendant and other sister of the plaintiff Ms. Vyjayanthi have already given power to the third defendant and therefore it is advisable that the plaintiff also gives power of attorney to the third defendant, who is also prepared to pay Rs.50 lakhs to the plaintiff and pay the balance amount in US Dollars. In the letter, the second defendant also assured the plaintiff that the third defendant would solve the dispute concerning the tenants through the Court and a draft power of attorney was also enclosed along with the letter. Immediately, the plaintiff contacted his sister, first defendant and required to furnish the full details of the transaction that had with the defendants 2 and 3, but nothing was forthcoming. During February 2007, the



daughter and son-in-law of the plaintiff visited India and met the defendants 1, 2 and 3 but they could not elicit any information about the transaction. The plaintiff was also advised to effectively cancel the power of attorney deed dated 10.07.2000 executed in favour of the first defendant, though it was cancelled on 28.01.2006 without being adjudicated in Chennai. Therefore, the plaintiff executed another cancellation deed dated 04.10.2007 in United States and attested by a US Notary, cancelling the power of attorney deed dated 10.07.2000 and got it adjudicated in India on 16.10.2007.

(v) At this stage, the plaintiff came to know that a forged power of attorney deed dated 03.10.2006 was created as if the same was executed by the plaintiff in favour of the first defendant with the active connivance of the second and third defendants. On the basis of the forged power of attorney deed, the first defendant executed a registered sale deed dated 14.06.2007 in favour of the fourth defendant. The Plaintiff therefore applied for a certified copy of the sale deed and issued a notice dated 07.12.2007 to the defendants 1 to 3 stating that the sale deed dated 07.12.2007 will not bind on him and the power of attorney deed dated 03.10.2006 is a forged one. In and by the said notice, the plaintiff also called upon the defendants 1 to 3 to furnish the details of the transaction including the consideration involved thereof. He also demanded Rs.20 crores



with interest at 18% from 01.01.2000 being the market value of the plaint schedule property, a sum of Rs.1 crore towards damages due to mental agony undergone by him.

(vi) The defendants 1 to 3 sent separate replies to the notice dated 07.12.2007 of the plaintiff. In the reply dated 14.12.2007, the third defendant denied his involvement or knowledge of the transaction relating to the property in question with the defendants 1 and 2. The second defendant, in his reply dated 24.12.2007 stated that from the moment the first defendant handed over the files to the plaintiff's daughter and son-in-law to have direct dealings with Mr. Sarath and the third defendant, he was in no way connected with the matter and he had no information to be furnished. Thus, the second defendant in his reply suppressed the fact that he signed as witness in the sale deed dated 14.06.2007 executed by the first defendant in favour of the fourth defendant. On the other hand, the first defendant, in her reply dated 07.01.2008 has stated that to resolve the problem of tenants in the property, the third defendant and one Mr. Sarath came forward and the matter was entrusted to them; and the fourth defendant and Mr. Sarath were prepared to pay Rs.50 lakhs to the plaintiff.

(vii) Notwithstanding the reply notices, the fourth defendant issued a public notice in The Hindu dated 14.01.2008 through his lawyer stating that the



fourth defendant purchased the property in question on 14.06.2007 and such sale will bind on the plaintiff. Subsequent to the publication, on 17.01.2008, Mr. Sunil Piraliya, the owner of the fourth defendant and his advocate Mr. Mohan met the plaintiff in United States of America to convince him to settle the case. They have openly accepted that the power of attorney deed dated 10.03.2006 executed in favour of the first defendant, is a forged document. Therefore, on 01.02.2008, the plaintiff asked the first defendant to furnish the relevant documents, statement of accounts and details of the transaction, but it was not forthcoming. According to the plaintiff, he did not receive any consideration from any of the defendants and the sale deed in favour of the fourth defendant will not bind on him in any manner. However, the fourth defendant along with the fifth defendant, had taken possession of the schedule mentioned property to develop it. The fourth defendant entrusted the construction work to the fifth defendant. The fourth defendant is taking steps to sell the undivided interest in the schedule mentioned property to third parties. The sixth defendant, a real estate agency, had also put up a board in the property for renting out the newly constructed shops, but subsequently, at the instance of the plaintiff, the Board has been removed.



(viii) The grievance of the plaintiff is that if the fifth defendant is allowed to alienate the schedule mentioned property to third parties or the fifth defendant is allowed to continue with the construction work and the sixth defendant is allowed to market the project, the plaintiff will be put to irreparable loss and hardship. Therefore, the plaintiff has instituted the suit for the following relief:

(i) *Permanent injunction restraining the 4th, 5th and 6th defendants, their men, agents, servants, subordinates or any one from in any manner dealing with or developing or leasing the schedule mentioned property including by way of alienating any portion of the schedule mentioned property either as undivided interest or in specific portion to any other third parties and/or to hand over possession of any portion of the schedule property to any other third party*

(ii) *Mandatory injunction directing the fourth defendant to restore the schedule property on the condition prevailing as on the date of the sale deed dated 14.06.2007 executed by the first defendant conveying the schedule mentioned property in favour of the fourth defendant and for costs.*

(ix) Along with the plaint, the plaintiff has also filed an application in A.No.1134 of 2008 under Order II Rule 2 of the Code of Civil Procedure seeking leave to institute a suit to set aside the sale deed dated 14.06.2007 with the same cause of action.

(x) By order dated 04.03.2008, this Court granted leave in favour of the plaintiff to institute a separate suit on the same cause of action challenging the sale deed dated 14.06.2007 executed in favour of the fourth defendant in the suit.



3. Aggrieved by the aforesaid order dated 04.03.2008 passed in A.No.1134 of 2008, the fourth defendant has filed the instant application No. 365 of 2010 in Tr.C.S.No.282 of 2011 (C.S. No. 272 of 2008) to revoke the leave granted to the plaintiff to file a separate suit.

4. In the said application, it was stated by the fourth defendant *inter alia* that the order dated 04.03.2008 has been passed without notice to him, in spite of the fact that a Caveat Petition was filed on 25.01.2008. The counsel for the plaintiff served a notice only on 11.03.2008 intimating the leave granted by this Court to the plaintiff to institute a separate suit with the same cause of action to challenge the sale deed dated 14.06.2007. In any event, when the plaintiff sought for grant of leave under Order II Rule 2 of CPC to file a separate suit challenging the sale deed dated 14.06.2007 executed in favour of the fourth defendant, notice should have been ordered to be served on the fourth defendant and an opportunity of hearing ought to have been given before passing the order dated 04.03.2008 in Application No. 1134 of 2008. Therefore, the fourth defendant prayed for allowing the said application.

5. The Plaintiff has filed a detailed counter affidavit in Application No. 365 of 2010 stating *inter alia* that grant of leave to sue on the same cause of



action under Order II Rule 2 of CPC is a discretion of the Court and it can be granted depending on the facts and circumstances of the case. In such a case, issuing notice to the defendant(s) is not necessary. Even if notice is issued and objections are raised, still, it is for the Court to exercise its discretion to grant leave or to refuse leave based on the pleadings. In the present case, this Court granted leave to sue on the same cause of action after being satisfied with the averments raised thereon. Thus, even if notice would have been issued, it would not have any difference on the conclusion reached by the Court in granting leave to sue on the same cause of action. The plaintiff therefore prayed for dismissal of the application filed by the fourth defendant.

6. The learned Judge, on consideration of the rival submissions, dismissed the application for revocation of the leave, by order dated 04.07.2018, the releant passage of which is usefully extracted below:

"20. Even assuming that the plaintiff is entitled to more than one relief on the cause of action pleaded in the present suit, he can file a separate suit with the leave of the Court for declaration under Order II Rule, 2 (3) of CPC. That was only done in this case. Even though the cause of action in both the suits are distinct, by way of abundant caution, the plaintiff filed an application under Order II, Rule 2 of CPC and obtained leave from this Court.

21. So far as the next contention of the learned counsel for the applicant regarding non service of notice to the caveator before obtaining leave is concerned, it is true that on the date of application, the caveat was in force and without serving any notice to the applicant herein, the first respondent/plaintiff had obtained leave to sue. The first respondent has filed a detailed counter affidavit explaining the reasons for non service of notice. In



Para 5 of the counter affidavit, the 1st respondent contended that it was a bona fide mistake and there was no mala fide intention on the part of the 1st respondent in non serving the notice on the applicant who was the caveator. No doubt, the applicant, being caveator, was entitled for notice of hearing in the leave application. But in the instant case, leave was granted as early as on 04.03.2008. Subsequently, much water has flown in this matter. Earlier, the suit was transferred to the City Civil Court, Chennai for want of pecuniary jurisdiction and thereafter, the suit was again re-transferred to this Court. The applicant has filed his written statement and issues have also been framed by this Court for trial. Now, the 1st respondent/plaintiff has filed another suit which is also being contested by the 4th defendant. On merits also, as already discussed above, the plaintiff is entitled to get leave to file a separate suit for declaratory relief. Therefore, at this stage, leave granted to the plaintiff need not be revoked merely on the ground that no notice was served on the applicant herein.

22. For the foregoing discussions, I find no merit in this application and the same deserves only to be dismissed.

23. In the result, this application is dismissed."

The aforesaid order dated 04.07.2018 passed by the learned Judge in A.No.365 of 2010 in Tr.C.S.No.282 of 2011 (C.S.No.272 of 2008) is under challenge at the instance of the fourth defendant.

7.(i) Assailing the order passed by the learned Judge dismissing the application to revoke the leave granted to the plaintiff, Mr. G. Rajagopalan, learned Senior counsel appearing for the appellant / 4th defendant would submit that the learned Judge erred in holding that the suit in Tr.C.S. No. 282 of 2011 (C.S.No.272 of 2008) and C.S. No. 535 of 2009 are based on different cause of action. The plaintiff in both the suits admitted in no uncertain terms, in the counter filed in A.No. 365 of 2010 that the two suits were based on the same



cause of action. The Plaintiff also admitted that the second suit in C.S. No. 535 of 2009 was filed only for comprehensive relief. Except this, no other reason has been assigned for filing the second suit. Thus, the cause of action for seeking the relief sought for in the second suit was very much available to the plaintiff at the time of institution of the first suit, while so, leave ought not to have been granted to institute the second suit on the same cause of action. At the time of instituting the first suit, the plaintiff was fully aware of the sale deed dated 14.06.2007 executed in favour of the applicant herein, which is glaringly evident from the plaint averments. While so, the subsequent suit is clearly hit by the provisions of Order II Rule 2 of CPC which was lost sight of by the learned Judge. The learned senior counsel further submitted that the learned Judge granted leave to the plaintiff ignoring the fact that he has not even served notice on the appellant / fourth defendant in Application No. 365 of 2010 who has filed a caveat petition. The Plaintiff has not stated in the application seeking leave, as to how the second suit was filed on a different cause of action than the one disclosed in the first suit. According to the learned Senior counsel, the cause of action for the relief of injunction and declaration are one and the same and the two suits are based on the same cause of action. In this context, the learned Senior counsel for the appellant relied on the decision of the Honourable Apex Court in *Sucha*



Singh Sodhi (d) through LRs vs. Baldev Raj Walia and another [(2018) 3 Law

Weekly Page No.1] wherein it has been held as follows:

"27) In our opinion, the sine qua non for invoking Order 2 Rule 2 (2) against the plaintiff by the defendant is that the relief which the plaintiff has claimed in the second suit was also available to the plaintiff for being claimed in the previous suit on the causes of action pleaded in the previous suit against the defendant and yet not claimed by the plaintiff.

28) Therefore, we have to examine the question as to whether the plaintiff was entitled to claim a relief of specific performance of agreement in the previous suit on the basis of cause of action pleaded by the plaintiff in the previous suit against the respondents/defendants in relation to suit property.

29) In other words, the question that arises for consideration is whether Sucha Singh (original plaintiff) could claim the relief of specific performance of agreement against the respondents/defendants in addition to his claim of permanent injunction in the previously instituted suit?

30) Our answer to the aforementioned question is in favour of the plaintiffs (appellants) and against the defendants(respondents). In other words, our answer to the aforementioned question is that the plaintiff could not claim the relief of specific performance of agreement against the defendants along with the relief of permanent injunction in the previous suit for the following reasons.

31) First, the cause of action to claim a relief of permanent injunction and the cause of action to claim a relief of specific performance of agreement are independent and one cannot include the other and vice versa.

32) In other words, a plaintiff cannot claim a relief of specific performance of agreement against the defendant on a cause of action on which he has claimed a relief of permanent injunction.

33) Second, the cause of action to claim temporary/permanent injunction against the defendants from interfering in plaintiff's possession over the suit premises accrues when defendant No.1 threatens the plaintiff to dispossess him from the suit premises or otherwise cause injury to the plaintiff in relation to the suit premises. It is governed by Order 39 Rule 1 (c) of the Code which deals with the grant of injunction. The limitation to file such suit is three years from the date of obstruction caused by the defendant to the plaintiff (See - Part VII Articles 85, 86 and 87 of the Limitation Act).

34) On the other hand, the cause of action to file a suit for claiming specific performance of agreement arises from the date fixed for the performance or when no such date is fixed, when the plaintiff has noticed that performance is refused by the defendant. The limitation to file such suit is three years from such date (See - Part II Article 54 of the Limitation Act).

35) Third, when both the reliefs/claims namely, (1) Permanent Injunction and (2) Specific Performance of Agreement are not identical, when the causes of action to sue are separate, when the factual ingredients necessary



to constitute the respective causes of action for both the reliefs/claims are different and lastly, when both the reliefs/claims are governed by separate articles of the Limitation Act, then, in our opinion, it is not possible to claim both the reliefs together on one cause of action.”

(ii) The learned Senior counsel for the appellant also relied on the decision of the Honourable Supreme Court in ***Virgo Industries (Eng) Private Limited vs. Venturetech Solutions Private Limited [(2013) 1 Supreme Court Cases 625]*** wherein it was held that the cardinal requirement for application of the provisions contained under Order II Rules 2 (2) and (3) is that the cause of action in the later suit must be the same as in the first suit. In Para Nos.11 and 12, it was held as follows:

"11. The cardinal requirement for application of the provisions contained in Order 2 Rule 2 (2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. It will be wholly unnecessary to enter into any discourse on the true meaning fo the said expression i.e., cause of action, particularly in view of the clear enunciation in a recent judgment of this Court in Church of Christ Charitable Trust and Educational Charitable Society v. Ponnamman Educational Trust (2012) 8 SCC 706. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally distract from what is stated in Halsbury's Laws of England (4th Edn.)

17. The learned Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in R. Vimalchand v. Ramalingam (2002) 3 MLJ 177 holding that the provisions of Order 2 Rule 2 CPC would be applicable only when the first suit is disposed of. As in the present case the second set of suits were filed during the pendency of earlier suits. It was held, on the ratio of the aforesaid decision of the Division Bench of the High Court, that the provisions of Order 2 Rule 2 (3) will not be attracted. Judicial discipline required the learned single Judge of the High Court to come to the aforesaid conclusion. However, we are unable to agree with the same in view of the object behind the enactment of the provisions of Order 2 Rule 2 CPC as already discussed by us, namely, that Order 2 Rule 2 CPC seeks to avoid multiplicity of litigations on the same cause of action. If



*that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully subserved by holding that the provisions of Order 2 Rule 2 CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit. Rather, Order 2 Rule 2 CPC will apply to both the aforesaid situations. Though direct judicial pronouncements on the issue are somewhat scarce, we find that a similar view had been taken in a decision of the High Court at Allahabad in *Murti v. Bhola Ram ILR (1894) 16 All 165* and by the Bombay High Court in *Krishnaji Ramchandra vs. Raghunath Shankar AIR 1954 Bom 125*."*

(iii) By placing reliance on the above decisions, the learned Senior counsel for the appellant would submit that the plaintiff cannot choose to file two suits on his whims and fancy when the law required him to sue for all the reliefs that are available to him at the first instance when he filed the former suit. In any event, even at the time when the former suit was filed, the cause of action to seek the relief, which he sought in the second suit, is very much available. This was overlooked by the learned Judge while dismissing the application for revocation of leave and hence, the same warrants interference by this Court.

8. (i) Per contra, Mr. Parthasarathy, learned Senior counsel appearing for the first respondent/plaintiff would contend that the order dismissing the application seeking revocation of leave, was passed by the learned Judge in exercise of sound discretion and upon being satisfied with the reasons based on which leave was granted to the plaintiff to institute the subsequent suit on the



same cause of action. Therefore, he would submit that the present appeal is devoid of any merits and is liable to be dismissed.

(ii) The learned Senior counsel for the first respondent/plaintiff placed reliance on the decision of the Honourable Supreme Court in ***Jamia Masjid vs. Sri. K.V. Rudrappa (since dead) by legal representatives and others [(2022) 9 Supreme Court Cases]*** wherein it was held in Para No.62 thus:

"62. It was averred in the plaint that the cause of action arose when the first defendant, who had no right and interest in the suit schedule property was trying to interfere with the possession of the plaintiff with the assistance of the second, third and fourth defendants. The relief which was sought in the suit was a permanent injunction restraining the defendants from interfering with the possession of the plaintiff - Karnataka Board of Wakfs. The suit was instituted on 04.08.1983. Significantly, the suit out of which the present dispute arises was instituted on 05.11.1984 for seeking declaration and possession. It was only thereafter on 22.11.1984 that O.S. No. 100 of 1983 was withdrawn. O.S. No. 100 of 1983 was a suit for a bare injunction and no declaration was claimed. In any event there was no adjudication on merits."

(iii) The learned Senior counsel for the first respondent/plaintiff also invited the attention of this Court to the averments made in Application No. 1134 of 2008 seeking leave, wherein, it was specifically stated that the plaintiff is restricting his right in the present suit to seek only the relief of permanent injunction and he reserves his right to file a separate suit on the same cause of action to set aside the sale deed dated 14.06.2007 and for recovery of possession of the schedule mentioned property and for cancellation of CMDA approval for development of the schedule property at a future date. The plaintiff also stated



that he is the absolute owner of the property in question and without his knowledge, the forged power of attorney deed was created and the property was sold to the fourth defendant. Therefore, the sale deed dated 14.06.2007 will not bind on him and he continues to be the owner of the plaint schedule property. Thus, by disclosing the nature of relief sought in the present suit and his intention to sue the defendants on the same cause of action after collecting the required particulars, the application for leave has been filed as an abundant caution. The learned Judge, on being satisfied with the genuine averments made by the plaintiff, refused to revoke the leave and dismissed the application filed by the appellant / 4th defendant. The learned Senior counsel therefore prayed for dismissal of this appeal.

9. We have heard the learned counsel for both sides and perused the materials placed on record.

10. On appreciation of the plaint averments, it is evident that the plaintiff has filed the suit for bare injunction as well as a mandatory injunction. However, while filing the plaint, the plaintiff did not challenge the sale deed dated 14.06.2007, instead, he has filed the application under Order II Rule 2 of the CPC seeking leave to institute a separate suit to set aside the sale deed dated



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14.06.2007 with the same cause of action. The learned Judge allowed the application seeking leave on 04.03.2008. Challenging the order dated 04.03.2008, the fourth defendant has filed Application No. 365 of 2010 in Tr.CS.No.282 of 2011 (C.S. No. 272 of 2008), which was dismissed by the learned Judge on 04.07.2018.

11. The learned senior counsel for the appellant raised a two fold contentions. Firstly, the learned Judge did not issue notice to the appellant even though he has filed the Caveat Petition. Secondly, he would contend that the cause of action for assailing the sale deed dated 14.06.2007 is very much available to the plaintiff at the time of instituting the present suit, while so, he ought not to have filed the application seeking leave to challenge the sale deed dated 14.06.2007 by filing a separate suit. According to the learned Senior counsel for the appellant, the cause of action in the later suit to be instituted is the same as in the first suit. The plaintiff/first respondent herein did not satisfy the above requirement and therefore, the learned Judge ought not to have granted leave.

12. Before venturing into the contentions raised on the side of the appellant, it is necessary to look into the relevant provisions of CPC in this



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"ORDER 2 Rule 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.

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.

Illustration

A lets a house to B at a yearly rent of Rs. 1200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907."

A plain reading of the above provision demonstrates that every suit must ordinarily include the whole of the claim and the plaintiff cannot omit to sue in respect of a claim or relinquish any part of his claim and must seek all the reliefs. However, the above conditions are not absolute. The order itself carves out the following exceptions:

a. A portion of the claim can be relinquished to bring the suit within the jurisdiction of the court,



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b. The plaintiff can omit to seek a particular relief which he ought to have sought on the same cause of action with the leave of the court and later, file a separate suit,

c. If the cause of action is different, he can necessarily file a separate suit.

13. In the present case, the grounds for challenge are that (a) since the cause of action for both the suits was the same and was available to the plaintiff on the date of initiation of the first suit, the plaintiff ought to have filed a comprehensive suit and leave ought not to have been granted; and (b) the grant of leave without opportunity to the appellant, despite filing a caveat, vitiates the order and hence, must have been revoked.

14. Insofar as the contention that the cause of action for the relief in the first suit namely Tr. C.S 282 of 2011 (C.S 272 of 2008) and the subsequent suit namely C.S. No. 535 of 2009 is same, we disagree with it. The cause of action for a permanent injunction or a mandatory injunction cannot be the same. The relief of injunction is sought, when there is a threat to the right of the plaintiff either by any affirmative act or omission by the defendant(s) and mandatory



injunction is sought, when the right has been violated and status quo-ante is sought to be restored. Whereas, the relief of declaration is sought against after a solemn act is performed by the defendant(s), which according to the plaintiff is illegal affecting his right. It would be appropriate to mention here that the plaintiff has claimed that the second power of attorney was forged. The cause of action for the relief of injunction in the present case is further alienation and alteration of the structure, whereas the cause of action for the declaration is the execution of the sale deed. There is a difference between the existence of the cause of action and the same cause of action. Though the contention of the appellant to the extent that the cause of action was available is correct, even then it cannot amount to the same cause of action. The judgement of the Apex Court in *Sucha Singh Sodhi (d) through LRs vs. Baldev Raj Walia and another* [(2018) 3 Law Weekly Page No.1] (Supra), to which a reference can be had here clearly distinguishes the cause of action for injunction and specific performance. Therefore, the contention of the appellant that cause of action is one and the same cannot be accepted. Further, on the contention that the cause of action was available and hence a comprehensive suit ought to have been filed, we are of the view that such a contention is also unsustainable in view of the fact that the Code of Civil Procedure itself carves out an exception. If such a contention is



accepted, it would then render the exception under Order 2 Rule 2 (3) otiose. What is not to be lost sight here is, the fact that despite the cause of action being different, the plaintiff as an abundant caution, treating them to be the same, sought for leave and the same was granted. Therefore, the contention that the second suit is not maintainable, is rejected.

15. The next line of contention is that no opportunity was granted by the Court before leave was granted despite a caveat. It is settled law that the consequence of an order passed without notice to a caveator is not a nullity. It may be useful to refer to the following judgements on the scope and effect of caveat.

(a) The Division Bench of the this Court in ***M.Ranka Vs Hon'ble Chief Justice of Tamil Nadu High Court, Madras & Others [1991 SCC OnLine Mad 140 : (1991) 2 LW 225]***, held as follows:

“A caveat is nothing but a formal notice, which literally is not different from a caution. Its origin as a petition to Court is generally traced to the proceedings in the Courts of probate. It is just an intimation given to the Court notifying it that it ought to beware or suspend proceedings before it until the merits of the caveat are determined. It does not create any obligation upon the Court to desist from making any order in the proceeding before it unless the caveat is decided. All that a Court is expected to do on the face of a caveat is to beware and to hear the caveat or before a decision is taken. A caveator does not get a right to defeat the proceedings at the there-shold or to insist that he must be heard on merits of the case before any interim order is passed.”

(b) ***This extract is taken from the case in Reserve Bank of India***



Employees... v. Reserve Bank of India and others, [1981 SCC OnLine AP 31 :

(1981) 1 AP LJ 338 : AIR 1981 AP 246 : (1981) 1 ALT 387 : (1981) 1 ALT

(NRC 2) 49 at page 342], wherein, the Andhra Pradesh High Court held as under:

“5. The word “Caveat” has not been defined by the Civil Procedure Code. In fact it has, been introduced into it only recently. We have to take its ordinary meaning. Wharton's Law Laxicon which is a dictionary combined with a small commentary on each word has the following interesting entry describing the office of caveat: “In Scotland any one who excepts certain proceedings to be taken by another may lodge with the Clerk of the Court a “Caveat” He is then entitled to be informed by the Clerk if and when the proceedings are taken”. Jowitt's Dictionary of English Law gives the meaning of the word ‘caveat’ as an entry made in the books of the offices of a registry or Court to prevent a certain step being taken without, previous notice to the person entering the caveat, who is called the caveator. What appears to me to be significant from the above two meanings taken out from the two well known legal dictionaries is the fact that none of these standard works puts the caveat so high as to act as a fetter on the exercise of power by the Court, In other words, they do not say that any action taken by the Court without giving prior notice to the caveator would be a nullity. The reason seems to me to be that the caveat has no effect on the exercise of powers by the Court. It follows, therefore, that the order passed by a Court without giving a notice to the caveator cannot be treated as a nullity. If a statute intends to demolish the ordinary powers of a Civil Court, it is well settled proposition of law that it can only be done by a direct piece of legislation enacted for that purpose and not by the effect, of an indirect legislation as if it were by a sidewind. The powers of a Civil Court are to be sacrosanct to be allowed to be diluted or to be curtailed by a mere remote implication. I, therefore, hold that as there is no specific provision declaring any action taken by the Court contrary to its mandatory duty under Sub section (3) to give a notice would be void, the order passed by the Court below on 30-10-1980 is not a nullity. In other words, it appears to me that the mere lodgement of a caveat would not deprive the Court of its power to pass an order even if the caveator was not informed of the date of hearing of the matter. As the lodgement of a caveat is merely a right to be informed of the hearing date and it has no effect by way of curtailing the powers of a civil court to pass an appropriate order on the merits of the case, I hold that the order passed in this case on 30th October, 1980 is not without jurisdiction and is, therefore operative till it is set aside in appropriate proceedings.”



16. The above view was accepted by the Division Bench of the Delhi High Court in the order dated 15.01.2014 in Review Petition No.526/2013 & CMP Nos.14330, 14331 & 14332/2013 in WP(C) No.5889/2013. The court is always within its right to pass any orders even if the caveat has been launched. The failure of the plaintiff to put on notice the caveator would render the order irregular, but not a nullity. However, this proposition cannot be universal. As a matter of right, the caveator is entitled to notice of hearing. The effect of failure to service notice depends upon the facts of the each case, the prejudice that is alleged to be caused together with the reason for not serving notice on the caveator. In the present case, the plaintiff has accepted and contended that the notice was not served on the caveator due to oversight. The plaintiff has also stated that the leave was sought and the subsequent suit was filed only as an abundant caution and after the appellant has been contesting it all along, this application to revoke has been filed after a long delay. Now, coming to the question of prejudice, considering the facts of the case, we have already concurred with the Learned judge and held that both the cases arise out of different cause of action. Hence, there cannot be any real prejudice to the appellant as opposed to the prejudice that will be caused when an interim order of injunction is granted, the test of which lies on the three principles of



prima facie case, balance of convenience and irreparable loss. On the contrary,

It is well settled that granting leave to sue on the same cause of action under Order II Rule 2 of CPC is a discretion vested with the Court. The Court can grant leave by taking note of the overall facts and circumstances of the case. While granting leave, the Court may or may not issue notice to the respondents inasmuch as the order to be passed in such an application is based on the exercise of discretion by the Court. Unless the discretion exercised by the learned Judge is found to be arbitrary or based on irrelevant material, this Court cannot interfere with the same. The consideration of grant of leave is essentially on the basis of the application filed by the applicant and the averments made therein. If the Court is satisfied that grant of leave would meet the ends of justice, then, leave to sue can be granted. In the present case, by grant of leave in favour of the plaintiff to file a separate suit, even if, on the same cause of action to assail the sale deed dated 14.06.2007, no prejudice will be caused to the appellant. Thus, there is no bar for the plaintiff to invoke the provisions contained under Order II Rule 2 (3) of CPC and seek leave to file a separate suit with the presumption of same cause of action, even if the cause of action for instituting the suits is distinct and separate. In any event, even based on the assumption that cause of action is same, the plaintiff / first respondent has also



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filed a separate suit which is also contested by the fourth defendant/appellant by filing written statement. While so, at this stage, the application filed by the appellant to revoke the leave already granted, has become academic. Further, the suits were filed in the years 2008 and 2009. We have already expressed that as per law, even on the same cause of action, the plaintiff with leave can file a separate suit. Even in cases, where some prejudice is caused, unless the prejudice goes to the root of the matter, so as to deny the caveator of an indefeasible right to contest on the merits of the case or when his position at the time of filing the suit is not altered, interference is not to be called for, that too after this length of time. In such view of the matter, we find no reason to interfere with the discretion exercised by the learned Judge and the order in dismissing the application filed by the appellant to revoke the leave.

17. In the result, the Original Side Appeal fails and it is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No

Internet : Yes / No

(R.M.D., J) (M.S.Q., J)

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