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S.A.No.759 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 29.02.2024

Coram:

THE HONOURABLE Mr. JUSTICE P.B.BALAJI

S.A.No.759 of 2017

K. Moorthy.

... Appellant/Respondent/Plaintiff

/versus/

1. V.Kasirajan (Died)*.

2. K.Anbuselvi.

... Respondents/1st defendant

* R1 died, RR2 is B/R as LR of the deceased R1 vide Court order dated 20.11.2023 made in C.M.P.Nos.24259, 24254 & 24261 of 2023 in S.A.No.759 of 2017 (SSJ).

Prayer: Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 12.03.2015 made in A.S.No.214 of 2014 on the file of the Hon'ble XV Additional City Civil Court, Chennai, confirming the Fair and Decretal Order dated 18.02.2014 made in I.A.No.5751 of 2012 in O.S.No.2298 of 2010 on the file of the Hon'ble XVII Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.M.Stalin

For R1 : Died

For R2 : No appearance

J U D G M E N T

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The appellant is the unsuccessful plaintiff in a suit for declaration. The brief facts that are necessary for adjudication of the Second Appeal are that the plaintiff's father had executed a settlement deed in his favour on 08.11.2006, by way of a registered deed of absolute settlement. However, subsequently, the plaintiff's father has unilaterally chosen to cancel the same without notice to the plaintiff and therefore, the plaintiff has filed the suit. It appears that the plaintiff had filed an suit earlier in O.S.No.649 of 2008 for a bare injunction, to restrain his father from disturbing the peaceful possession and enjoyment of the suit property by the plaintiff.

2. The said suit was decreed based on the specific pleading in the written statement that the appellant herein was willing to permit his father to reside with him, despite the settlement deed in his favour. It is also an admitted fact that the father had earlier filed a suit in O.S.No.8012 of 2007 for the relief of permanent injunction to restrain the appellant herein, from interfering with his peaceful possession and enjoyment of the suit schedule property.

3. The plaintiff's suit in O.S.No.649 of 2008 for injunction was



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however dismissed in view of the decree in O.S.No.8012 of 2007 filed by the father. Thereafter, the plaintiff has taken legal advice that even though the settlement deed is a void document, by way of abundant caution, it would be advisable for them to get the same declared as null and void. In such circumstances, he has filed the present suit.

4. The defendant took out an application under Order VII Rule 11 (d) of C.P.C., for rejecting the plaint in view of the bar under Order II Rule 2 of C.P.C., for not having obtained the leave of the Court, at the time of filing the suit for permanent injunction in O.S.No.649 of 2008. The Trial Court as well as the First Appellate Court have concurrently accepted the case of the defendant that the plaint was liable to be rejected and consequently, the suit in O.S.NO.2298 of 2010 under which the present Second Appeal arises was rejected by the Courts below.

5. Aggrieved by the said judgment and decree, the plaintiff/Appellant has preferred the present Second Appeal.

6. On 07.12.2017, the Second Appeal was admitted on the following



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substantial questions of law:-

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a. Whether the first appellate Court is correct in applying the principles of Order 2 Rule 2 of C.P.C to reject the plaint in O.S.No.2298 of 2010 on the file of the XVII Assistant City Civil Court?

b. Whether the findings of the first appellate Court that there was sufficient cause of action to declare the cancellation deed dated 05.11.2007 as null and void even on the date of filing C.S.No.649 of 2008 by the appellant/plaintiff and that the suit is hit under Order 2 Rule 2 of C.P.C is perverse and contrary to the principles of Order 2 Rule 2 of C.P.C and test laid down by Hon'ble Supreme Court and principles laid down by Hon'ble Supreme Court in Rathnavathi - vs- Kavitha Ganashamdas reported in (2015) 5 SCC 223.?

c. Whether the suit in O.S No.2298 of 2010 is still hit by the provisions of Order 2 Rule 2 C.P.C when the 2nd defendant in the said suit was not a party in the earlier suit in O.S.No.649 of 2008?

7. I have heard Mr.M.Stalin, Learned Counsel for the appellant. The respondent, who was the defendant in the suit namely, the father of the appellant, Mr.V.Kasirajan died, pending the Second Appeal and his other legal heir namely, his daughter has been impleaded as the 2nd respondent. However, the 2nd respondent has not chosen to appear and contest the Second Appeal, by defending

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the judgment and decree of the Courts below in favour of her father. Therefore, I proceeded to hear the Second Appeal finally.

8. The Learned Counsel for the appellant would first and foremost contend that in order to reject the plaint, by taking note of the bar under Order II Rule 2 of C.P.C., the defendant ought to have filed the pleadings in the earlier suit and in the absence of same being filed, the Courts below clearly fell in error in rejecting the plaint, invoking the provisions of Order VII Rule 11 (d) r/w Order II Rule 2 of C.P.C.

9. Further, the Learned Counsel for the appellant would also state that the cause of action for filing the suit for permanent injunction was entirely different and the cause of action for filing the present suit for declaration was also not the same cause of action on which, the earlier suit for injunction came to be filed. In this regard, he would place reliance on the decision of the Hon'ble Supreme Court in *Rathnavathi and another -vs- Kavita Ganashamdas* reported in in (2015) 5 SCC 223 and the recent decision of the Hon'ble Supreme Court in *Bharat Petroleum Corporation Ltd and another -vs- ATM Constructions Pvt Ltd*



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reported in **2024 (1) CTC 104.**

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10. The Learned Counsel would also place reliance on the decision of this Court in ***Kamalammal (died) Annapoornammal (dead) -vs- Girija and two others*** reported in **2010 (2) CTC 379.**

11. On going through the decisions of the Hon'ble Supreme Court in ***Rathnavathi and another case cited supra*** as well as the ***Bharat Petroleum Corporation Ltd case cited supra***, it is seen that when the cause of action for the subsequent suit is not based on the very same cause of action on which the earlier suit was filed, then the bar under Order II Rule 2 of C.P.C., would not stand attracted. The same view has been taken by this Court also in ***Kamalammal's*** case referred herein above.

12. Further, in ***Kamalammal*** case, this Court also held that in order to succeed in a plea raised under Order II Rule 2 (3) of C.P.C, the defendant has to show that the earlier suit was identical and on the same cause of action, based on which the second suit has been filed and in order to establish the same, the



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defendant has to necessarily file the pleadings in the earlier suit before seeking to invoke the bar under Order II Rule 2 of C.P.C

13. In the present case, I find that admittedly, the defendant has not placed the pleadings in the earliest suit in O.S.No.8012 of 2007 or in the subsequent suit filed by the plaintiff herein in O.S.No.649 of 2008. Therefore, on this technical ground itself, the plaint ought not to have been rejected by the Courts below and they fell in error in this regard.

14. Even on the merits, as rightly contended by the Learned Counsel for the appellant, the earlier Suit was filed by the father seeking a permanent injunction to restrain the plaintiff herein, from not disturbing his peaceful possession and enjoyment. In the said suit filed by the father, as defendant, the appellant had fairly conceded that being the father as well as the settlor, he could reside in the suit property along with him and there would be absolutely no interference caused to the possession of the father. However, the trial Court taking note of the said pleadings advanced by the plaintiff herein, defendant in the said suit, proceeded to decree the suit for permanent injunction in favour of the father.



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15. Taking advantage of the decree, the plaintiff's possession was sought to be interfered with, which necessitated the plaintiff to approach the Court by way of a relief of permanent injunction. This was the specific cause of action on which the plaintiff approached the Court, even though, there was a different cause of action available on that day namely, to challenge the cancellation deed. Thus, when the cause of action is clearly distinct in both the suits, the bar under Order II Rule 2 of C.P.C., will not stand attracted. Later, the plaintiff has been advised to file the suit to seek declaration that the cancellation deed executed by the father, revoking the settlement in favour of the plaintiff was null and void. This suit was necessitated because there was a threat to the title of the plaintiff. In his earlier suit, threat was only with regard to the possession of the plaintiff and therefore, the plaintiff cannot be non-suited on the ground that the relief of declaration ought to have been sought for even in the earlier suit.

16. If the cause of action in both the suits are different, Order II Rule 2 of C.P.C, must not be applied mechanically. Therefore, the Court below had



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clearly fell in error in allowing the application for rejection of the plaint, invoking

Order VII Rule 11 (d) r/w Order II Rule 3 of C.P.C.

17. In fine, the substantial questions of law are answered in favour of the appellant. The judgment and decree passed by the IV Additional City Civil Court, Chennai, in A.S.No.214 of 2014, dated 12.03.2015 is hereby set aside and the Judgment and Decreetal order made in I.A.No.5751 of 2012 in O.S.No.2298 of 2010, dated 18.02.2014 on the file of the XVII Assistant Judge, City Civil Court, Chennai is restored. Accordingly, the ***Second Appeal is Allowed.*** No costs.

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Index :Yes/No.

Internet :Yes/No.

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1. The XV Additional City Civil Court, Chennai
2. The Learned XVII Assistant Judge, City Civil Court, Chennai.

P.B.BALAJI,J.

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