



2025:KER:28540

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 7TH DAY OF APRIL 2025 / 17TH CHAITHRA, 1947

RFA NO. 82 OF 2017

**AGAINST THE DECREE AND JUDGMENT DATED 19.11.2016 IN O.S. NO.159 OF 2011
OF SUB COURT, MUVATTUPUZHA**

APPELLANT/PLAINTIFF:

**A.R.PETER
S/O. RAPPEL, AGED 59 YEARS, AATTUPURAM HOUSE, THANKALAM
KARA, THRIKKARIYLOOR VILLAGE, KOTHAMANGALAM TALUK.**

**BY ADVS.
SRI.P.M.JOSHI
SRI.T.S.NAZIMUDDIN
SMT.SIJI K.PAUL**

RESPONDENT/DEFENDANT:

**SARADA NARAYANAN
W/O. NARAYANAN, D/O. LATE RAMAN, AGED 51 YEARS, PERUMBAMKUDI
HOUSE, THANKALAM KARA, THRIKKARIYLOORVILLAGE, KOTHAMANGALAM
TALUK.**

BY ADV SRI.N.K.MOHANLAL

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 27.03.2025,
THE COURT ON 07.04.2025 DELIVERED THE FOLLOWING:**



“C.R”

JUDGMENT

Dated this the 7th day of April, 2025

This regular first appeal has been filed under Section 96 read with Order XLI Rule 1 of the Code of Civil Procedure, 1908 [hereinafter referred as ‘CPC’ for short], challenging the decree and judgment dated 19.11.2016 in O.S. No.159/2011 on the files of the Sub Court, Muvattupuzha, disallowing the relief of specific performance of Ext.A1 agreement, while granting the alternative relief of return of advance amount. The appellant herein is the plaintiff and the respondent is the defendant.

2. Heard the learned counsel for appellant and the learned counsel appearing for the respondent. Perused the verdict under challenge, the records of the trial court and the decisions placed by both sides.

3. Parties in this appeal shall be referred with reference to their status before the trial court, hereafter.

4. The plaintiff approached the trial court seeking



performance of Ext.A1 sale agreement dated 26.08.2010, whereby it is alleged that the defendant has agreed to execute sale deed in respect of the plaint schedule property, having an extent of 7 $\frac{1}{4}$ cents, at the rate Rs.55,000/- per cent. According to the plaintiff, at the time of execution of the agreement, Rs.50,000/- was paid to the defendant as advance and thereafter on 06.10.2010, Rs.15,000/- was also given being part of the sale consideration. Even though, the plaintiff has been ready and willing to perform his part of the contract in the matter of execution of the sale deed by paying the balance consideration, the defendant failed to execute the sale deed. Accordingly, the plaintiff sought the relief of execution of the agreement or in the alternative, to get back the advance amount.

5. Defendant filed written statement and resisted the suit, disputing execution Ext.A1 agreeing to sell the plaint schedule property. According to the defendant, her husband had borrowed Rs.50,000/- from the plaintiff on 26.08.2010 for the construction of residential building and as demanded by the plaintiff Ext.A1 agreement was executed as a security



document. The defendant also raised contention that the suit is barred under Order II Rule 2 of CPC, in view of filing of earlier suit vide O.S. No.340/2011 by the plaintiff, seeking the relief of injunction and filing of the present suit, after withdrawing the same, without seeking permission of court to file a fresh suit for specific performance.

6. The trial court raised necessary issues and tried the matter. PWs 1 to 3 were examined and Exts.A1 to A5 were marked on the side of the plaintiff. DW1 was examined and Exts.B1 to B3 were marked on the side of the defendant.

7. Finally, in paragraph No.11 of the judgment, the trial court found that the second suit filed by the plaintiff seeking the relief of specific performance, based on Ext.A1 agreement is clearly hit by Order II Rule 2 of CPC. Thereafter, on finding proof of execution of Ext.A1, the trial court granted the alternative relief of return of advance amount, with 12% interest from the date of the suit till realization.

8. While assailing the verdict of the trial court, the learned counsel for the plaintiff submitted that, the finding of the trial court, holding the view that the present suit is



hit under Order II Rule 2 of CPC is wrong. He submitted further that, as per the evidence tendered by the plaintiff as PW1, supported by the evidence of PW2, the scribe and PW3, the document writer, the execution of Ext.A1 agreement is proved. That apart, readiness and willingness on the part of the plaintiff also is proved. Therefore, the relief of specific performance ought to be granted by the trial court. The learned counsel for the plaintiff has placed decision of the Apex Court reported in **[MANU/SC/0979/2014 : (2015) 11 SCC 12]** ***Inbasegaran v. S. Natarajan***, to contend that, since the cause of action for filing the first suit seeking the relief of injunction is not the cause of action for filing the second suit for specific performance, the present suit is not hit under Order II Rule 2 of CPC.

9. Whereas, the learned counsel for the defendant strongly supported the finding of the trial court holding the view that, the suit is barred by Order II Rule 2 of CPC, while conceding that even now also the defendant is ready to pay the advance amount ordered to be returned by the trial court. The learned counsel for the defendant has placed



decision of the Apex Court reported in **[2019 ICO 3246 : AIR 2020 SC 395 : (2020) 14 SCC 110] Vurimi Pullarao v. Vemari Vyankata Radharani Dhankoteswarrao**, wherein an identical situation has been dealt by the Apex Court and held that the second suit is barred under Order II Rule 2 of CPC, finding that there was identity of cause of action in the earlier suit and the subsequent suit.

10. Addressing the rival submissions, the points to be determined are:

1. Whether the trial court went wrong in holding that the present suit is hit by Order II Rule 2 of CPC?

2. What are the essentials to find out bar under Order II Rule 2 of CPC?

3. Whether the trial court went wrong in not granting the discretionary relief of specific performance instead of granting the alternative relief of return of advance amount?

4. Whether the decree and judgment of the trial court would require interference?

5. Reliefs and costs.

11. Here, while holding that the present suit is hit under Order II Rule 2 of CPC, the trial court relied on the



decision of the Apex Court reported in **[2012 KHC 4492 : 2013 (1) SCC 625 : ILR 2012 (4) Ker. 464] Virgo Industries (Eng.) P. Ltd. (M/s.) v. M/s. Venturetech Solutions P. Ltd.**, wherein the facts of the case are discussed in paragraph Nos. 3 and 4. The same read as under:

3. The brief facts that would be required to be noticed for the purpose of the present adjudication may now be recapitulated. The respondent in the two appeals, as the plaintiff, instituted C.S No. 831 of 2005 and C.S. No. 833 of 2005 before the Madras High Court seeking a decree of permanent injunction restraining the appellant (defendant) from alienating, encumbering or dealing with the plaint schedule properties to any other third party other than the plaintiff. The aforesaid relief was claimed on the basis of two agreements of sale entered into by the plaintiffs and the defendant both on 27.7.2005 in respect of two different parcels of immovable property consisting of land and superstructures built on plot No. 65 (old No.43) and plot No. 66 (old No.42), Second Main Road, Ambattur Industrial Estate,



Chennai. In each of the aforesaid suits the plaintiff had stated that under the agreements of sale different amounts were paid to the defendants, yet, on the pretext that restrictions on the alienation of the suit land were likely to be issued by the Central Excise Department on account of pending revenue demands, the defendants were attempting to frustrate the agreements in question. In the suits filed by the plaintiff it was also stated that as the period of six months fixed for execution of the sale deeds under the agreements in question was not yet over, the plaintiff is not claiming specific performance of the agreements. The plaintiff, accordingly, sought leave of the court to omit to claim the relief of specific performance with liberty to sue for the said relief at a later point of time, if necessary. The two suits in question, i.e., C.S. Nos. 831 and 833 of 2005 were filed by the plaintiff on 28.8.2005 and 9.9.2005 respectively.

4. Thereafter on 29.5.2007, O.S. Nos. 202 and 203 were filed by the plaintiff in the Court of the District Judge, Tiruvallur seeking a decree against the defendant for execution and registration of the sale deeds in respect



of the same property and for delivery of possession thereof to the plaintiff. In the aforesaid latter suits it was mentioned by the plaintiff that in respect of the same suit property it had earlier filed suit Nos. C.S. 831 and 833 of 2005 seeking the relief of permanent injunction. As the time for performance of the agreements of sale had not elapsed when C.S. No.831 and 833 of 2005 were instituted and the plaintiff was 'under the bona fide belief that the defendants would perform the agreement' the relief of specific performance was not claimed in the aforesaid suits. However, as inspite of a legal notice issued to the defendants on 24.2.2006, the sale deeds had not been executed by the defendant the latter suits i.e. O. S. Nos. 202 and 203 were instituted.

12. Thereafter, the Apex Court held in paragraph No.11 that, *the cardinal requirement for application of the provisions contained in Order II R.2(2) and (3), therefore, is that the cause of action in the latter suit must be the same as in the first suit. It will be wholly unnecessary to enter into any discourse on the true meaning of the said*



expression, i.e. cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in the Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/ Managing Trustee, JT 2012 (6) SC 149. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury's Law of England, (4th Edition). The following reference from the above work would, therefore, be apt for being extracted hereinbelow: 'Cause of Action' has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action the part of the defendant which gives the plaintiff his cause of complaint, or the subject matter of grievance founding



the action, not merely the technical cause of action.

13. In fact, in the decision placed by the learned counsel for the plaintiff in **Inbasegaran's** case (supra), the Apex Court referred the decision in **Virgo Industries's** case (supra) and also the decision of the Constitution Bench of the Apex Court, discussing the scope and applicability of Order II Rule 2 of CPC in **[MANU/SC/0241/1964 : AIR 1964 SC 1810] Gurbux Singh v. Bhooralal** and extracted paragraph No.6 therein. The same reads as under:

6. In order that a plea of a Bar under Order 2 Rule 2(3) of the Code of Civil Procedure 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 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 Code of Civil Procedure 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 Code of Civil Procedure. The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District



Judge noticed this lacuna in the 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 Code of Civil Procedure was not maintainable.

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It was his submission that from this passage we should infer that the parties had, by agreement, consented to make the pleadings in the earlier suit part of the record in the present suit. We are unable to agree with this interpretation of these observations. The statement of the learned Judge. "The two courts have, however, freely cited from the record of the earlier suit" is obviously inaccurate as the learned District Judge specifically pointed out that the pleadings in the earlier suit were not part of the record and on that very ground had rejected the plea of the bar under Order 2 Rule 2 of the Code of Civil Procedure. 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 Code of Civil Procedure 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 Code of Civil Procedure. 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.

14. In **Vurimi Pullarao's** case (supra), the Apex Court considered the earlier decisions and followed the ratio in **Virgo Industries's** case (supra) and also referred the Constitution Bench decision in **Gurbux Singh's** case (supra), in a case where initially the plaintiff therein filed a suit for injunction restraining the defendant from obstructing the possession of the plaintiff and a subsequent suit filed for specific performance of the contract, wherein the Apex Court held that the cause of action in both suits is identical, while upholding the bar under Order II Rule 2 of CPC.

15. The learned counsel for the plaintiff placed decision of this Court in **Mathew and Others v. Elikutty and Others** reported in **[2018 ICO 2908 : 2019 (2) KLJ 323 : 2019 (2) KHC 160]**, where this Court held that



when the plaintiff had consciously abandoned the relief of specific performance despite accrual of a cause of action for such a suit in his favour and the plaintiff had abandoned the first suit without seeking leave under Order XXIII Rule 1 of CPC, the second suit is barred under Order II Rule 2 of CPC.

16. While analyzing the legal position, it is apposite to extract Order II Rule 2 of CPC. The same provides as under:

“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.

Sub-rule (1) of Order II Rule 2 of the Code deals with the frame of suit and it enables a plaintiff to abandon or relinquish a part of his claim before instituting the suit. The provisions in Order II Rule 2 indicate that if the plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the court in one suit. This provision is based on the cardinal principle that the defendant should not be vexed twice for the same cause. One of the objects of Order II Rule 2 of the Code is to avoid multiplicity of proceedings. Statement of law in Sub-rule (2) to Order II



Rule 2 of the Code is clear; where the 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. This is an absolute bar.

Sub-rule (3) of the above provision gives no room for any doubt regarding its extent and operation. A person entitled to more than one relief in respect of the same cause of action may sue for all or any such reliefs. But, if he omits, he shall not afterwards sue for any relief so omitted, unless he had omitted to sue with the leave of the court. In other words, if a plaintiff omits, without obtaining a leave of the court to sue in respect of all reliefs arising out of the cause of action available to him at the time of filing the suit, he shall not afterwards sue for any relief so omitted. As mentioned above, the principles enunciated in Order II Rule 2 of the Code are based on a public policy and with a salutary object that no person shall be vexed twice for the same cause. It is therefore clear that the bar should be determined having regard to the facts and circumstances in each case.



17. Reading the statutory text along with the binding precedents discussed, the legal position is no more *res-integra* on the point that, if two suits have been filed by the plaintiff and the relief claimed therein are based on the same cause of action, then the subsequent suit would be barred under Order II Rule 2 of CPC. But, if the cause of action is different in the earlier suit, then the subsequent suit based on a distinct and different cause of action will not be barred under Order II Rule 2 of CPC. In order to find as to whether both suits have been filed on the same cause of action, the test to be applied is whether the relief sought for in the second suit can also be claimed in the first suit itself. Otherwise, the first suit has to be withdrawn with leave of the Court to proceed with the second suit. To put it otherwise, in cases involving contract for sale, once a person files a suit for injunction restraining alienation of the property alone, the cause of action for the suit is the contract of sale and its non performance. So, the cause of action to sue for specific performance is very much available at the time of filing the first suit itself. If so, the second suit seeking specific performance of the contract,



based on the same contract of sale emerges from the same cause of action is barred under Order II Rule 2 of CPC.

17. Following the above legal position, the finding of the trial court that the suit is barred under Order II Rule 2 of CPC is only to be confirmed.

18. In this case, even though the defendant disputed execution of Ext.A1 agreement offering sale of the plaint schedule property, which belonged to the defendant and her mother jointly, the defendant admitted borrowing of Rs.50,000/- by her husband for the purpose of constructing a residential building. However, the plaintiff himself got examined as PW1 to prove execution of Ext.A1 and payment of advance amount to the tune of Rs.65,000/- [Rs.50,000 + Rs.15,000]. That apart, PW2, the scribe and PW3, the document writer were also examined to prove execution of Ext.A1. Since the evidence tendered by PWs 1 to 3 were not shaken during the cross-examination, the finding of the trial court that the plaintiff succeeded in proving Ext.A1 agreement is only to be confirmed. While calculating the sale consideration at the rate of Rs.55,000/- per cent for the plaint schedule property having an extent



of 7 $\frac{1}{4}$ cents, the amount would come to Rs.3,98,750/-, but the advance amount paid by the plaintiff is only Rs.65,000/-.

19. In this matter, even though the suit is found to be hit by Order II Rule 2 of CPC, the trial court granted the alternative relief to return the advance amount on the principle of unlawful enrichment. Once the suit is found to be barred under Order II Rule 2 of CPC, no relief can be granted in the suit, other than to dismiss the suit. It is fairly conceded by the learned counsel for the defendant that, as far as return of advance money is concerned, the defendant has no objection. In view of the above, the decree and judgment under challenge are only to be confirmed. Therefore, there is no reason to interfere with the verdict of the trial court. Holding so, the trial court verdict does not require any interference.

20. In the result, the appeal stands dismissed and the verdict under challenge stands confirmed. Having considered the facts of the case, the parties shall suffer their respective costs.



All interlocutory applications pending in this regular first appeal stand dismissed.

Sd/-

**A. BADHARUDEEN
JUDGE**

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