

A SUCHA SINGH SODHI (D) THR. LRS.

v.

BALDEV RAJ WALIA & ANR.

(Civil Appeal No. 3777 of 2018)

B APRIL 13, 2018

[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]

Code of Civil Procedure, 1908: O.II, r.2 – Suit to include the whole claim – On facts, first suit seeking injunction by original plaintiff against respondent no 1 withdrawn with the leave of the court – Later suit for specific performance filed by the original plaintiff – Respondent objected to the same, invoking O.II, r.2 that relief of specific performance ought to have been claimed along with relief of injunction in earlier suit which was withdrawn – Both the trial court and High Court dismissed the suit as being barred u/ O.II, r. 2 – On appeal, held: Trial court and the High Court erred in allowing the application filed by respondent No.2 u/O.VII, r. 11 and thereby erred in dismissing the suit as being barred by the provisions of O.II, r. 2 – Provisions of O.II, r. 2 not attracted to the facts of the instant case and, thus, the suit should not have been dismissed as being barred u/O.II, r. 2 – Plaintiff could not claim the relief of specific performance of agreement against the respondents along with the relief of permanent injunction in the previous suit – Further, the court was entitled to take into consideration the statement made by the original plaintiff for withdrawing the suit and filing it afresh and his statement could be made a part of the order for granting permission to withdraw the civil suit and file a fresh suit – Thus, the order passed by the High Court set aside.

Allowing the appeal, the Court

HELD: 1.1 The trial court and the High Court erred in allowing the application filed by respondent No.2 under Order 7 Rule 11 of the Code of Civil Procedure, 1908 and thereby erred in dismissing the suit as being barred by the provisions of Order 2 Rule 2 by taking recourse to the provisions of Order 7 Rule 11 of the Code. The provisions of Order 2 Rule 2 of the Code are not attracted to the facts of the case and, therefore, civil suit

H

should not have been dismissed as being barred under Order 2 A
Rule 2 of the Code. [Para 22] [331-C-D]

1.2 Order 2 Rule 2(1) of the Code provides that every suit shall include the whole of the claim, which the plaintiff is entitled to make in respect of the cause of action. Liberty is, however, granted to the plaintiff to relinquish any portion of his claim with a view to bring the suit within the jurisdiction of any Court. It is clear from the reading of Order 2 Rule (1) of the Code that whenever the plaintiff files a suit on the basis of a cause of action pleaded in the plaint, he is under a legal obligation to include and claim all the reliefs against the defendant, which have accrued to him on the cause of action pleaded by him in his plaint. Order 2 Rule 2(1) of the Code enables the plaintiff to relinquish any portion of his relief with a view to bring the suit within the jurisdiction of any Court. Order 2 Rule 2(2) of the Code, however, provides that where a plaintiff omits to sue or intentionally relinquishes, any portion of his claim/relief in his suit, then in such event, he shall not be allowed afterwards to sue in respect of the claim/relief so omitted or/and relinquished by him in his suit. In other words Rule 2(2) does not permit the plaintiff to file second suit to claim the omitted or/and relinquished relief. [Paras 24-26] [331-F-H; 332-A-C]

1.3 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. [Para 28] [332-D]

1.4 The 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. 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. 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*. In other words, a plaintiff cannot claim a

- 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. 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. On the other hand, the cause of
- B 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. Third, when both the reliefs/claims namely,
- C Permanent Injunction and 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, it is not possible to claim
- D both the reliefs together on one cause of action. The suit filed by the original plaintiff for specific performance of agreement against the respondents (defendants) is not barred by Order 2 Rule 2 and is held maintainable for being tried on merits. [Para 29-35, 37] [332-F-H; 333-A-E, H]
- E
- F 1.5 Reading of the statement of the original plaintiff that he wants to withdraw the suit because he wants to file appropriate proceedings before the competent forum in relation to the subject matter of the suit coupled with the permission granted by the court to withdraw the suit satisfies the requirement of Order 23
- G Rule 1 (3) of CPC. It certainly enabled the plaintiff to file a fresh suit, namely, the civil suit for claiming specific performance of the agreement against the defendants. The court was entitled to take into consideration the statement made by the original plaintiff for withdrawing the suit and filing it afresh and his statement could be made a part of the order for granting permission to withdraw
- H the civil suit and file a fresh suit. [Para 43] [335-D-E]

1.6 The reasoning and the conclusion arrived at by the trial court and the High Court which wrongly allowed the application filed by respondent No.2 (defendant No.2) under Order 7 Rule 11 CPC is concurred with and in consequence, the appellants' (plaintiffs') suit is dismissed as being barred by the provisions of Order 2 Rule 2 CPC. The impugned judgment is set aside. The application filed by respondent No.2 under Order 7 Rule 11 CPC is dismissed. The civil suit filed by the appellants against the respondents is held maintainable and is restored to its original file for being tried on merits. [Paras 46-48] [335-H; 336-A-C]

Rathnavathi & Another v. Kavita Ganashamdas (2015) 5 SCC 223; Gurinderpal v. Jagmittar Singh (2004) 11 SCC 219 – relied on.

Case Law Reference

(2015) 5 SCC 223 **relied on** **Para 37**

(2004) 11 SCC 219 **relied on** **Para 42**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3777 of 2018.

From the Judgment and Order dated 18.02.2013 of the High Court of Delhi at New Delhi in RFA No. 353 of 2012.

Bhim Sain Jain, Ms. Prerna Mehta, Advs. for the Appellants.

Jayant Bhushan, Sr. Adv., Ms. V. S. Lakshmi, A. Venayagam Balan, Pramod Dayal, Nikunj Dayal, Ms. Payal Dayal, Advs. for the Respondents.

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J. 1. Leave granted.

2. This appeal arises from the final judgment and order dated 18.02.2014 passed by the High Court of Delhi at New Delhi in RFA No.353 of 2012 whereby the Single Judge of the High Court dismissed the appeal filed by the appellants herein and upheld the judgment and order dated 08.05.2012 passed by the Additional District Judge, Tis Hazari Courts, Delhi in Suit No.135 of 2008 by which the suit of the appellants was dismissed by taking recourse to the powers under Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”).

A 3. In order to appreciate the short legal issue involved in the appeal, few relevant facts, which lie in a narrow compass, need to be mentioned hereinbelow.

4. Appellants are the plaintiffs whereas the respondents are the defendants in the civil suit out of which this appeal arises.

B 5. On 11.10.1996, Sucha Singh(original plaintiff) since dead and now being represented by his legal representatives (appellant Nos.1 to 4 herein) filed a suit being Civil Suit No.705/1996 against respondent No.1 in the Court of Senior Civil Judge, Delhi. The suit was filed only for grant of permanent injunction.

C 6. The plaint was founded on the allegations, *inter alia*, that respondent No.1 was the owner of the house, i.e., basement and half of the first floor of the premises in plot No.1, Gali No.9 situated at Sanwar Nagar Post Office Raipur Khurd, New Delhi, as detailed in the plaint (Annexure-P-2) (hereinafter referred to as “the suit premises”).

D Respondent No.1, on 27.02.1996, agreed to sell the suit premises to Sucha Singh (Plaintiff) for Rs.11,50,000/- and out of the total amount, Sucha Singh paid a sum of Rs.2,00,000/- by way of advance to respondent No.1 by cheque.

E 7. It was further averred that Sucha Singh was placed in possession of the suit premises in February, 1996. It was alleged that in May, 1996 respondent No.1 demanded more money from Sucha Singh pursuant to which Sucha Singh further paid Rs.36,000/- in cash to respondent No.1.

F 8. It was alleged that on 10.10.1996, respondent No.1 threatened to dispossess Sucha Singh from the suit premises and made unsuccessful attempt to dispossess him with the help of henchmen (Para 13 of the plaint).

G 9. It is on this cause of action, Sucha Singh filed a civil suit for permanent injunction on 11.10.1996 against respondent No.1 in relation to the suit premises restraining him from interfering with his possession over the suit premises.

H 10. Respondent No.1 filed the written statement, *inter alia*, alleging therein that he has already transferred the suit premises to respondent No.2 herein and, therefore, the remedy of plaintiff-Sucha Singh, if any, would be to file a civil suit for specific performance of the agreement

against respondent No.1 but not in prosecuting the suit for permanent injunction. A

11. On 27.11.1998, Sucha Singh (plaintiff) made a statement in the Court that he wants to withdraw the civil suit. He also made a statement that he is withdrawing the civil suit with a view to file proceedings before the competent forum to claim appropriate relief against respondent No.1. B

12. The Trial Court, on 27.11.1998, allowed the original plaintiff (Sucha Singh) to withdraw the civil suit and passed the following order:

“It is submitted by the counsel for plaintiff that he wants to withdraw the suit from this court to be filed before the appropriate forum. Counsel for defendant has no objection for withdrawal of the suit by the plaintiff, however asking for cost incurred. Statements of both the parties have been recorded separately. Parties shall be bound by their statements as their undertakings in the court.” C D

I have perused the records of the file and statements of both the parties. The plaintiff is allowed to withdraw the suit subject to cost of Rs.500/- to be paid to the defendant. Cost paid in the court. After completion file be consigned to Record Room.” E

**(ARCHANA SINHA)
CIVIL JUDGE, DELHI.
27.11.1998. ”**

13. On 25.02.1999, Sucha Singh, filed civil suit No.54 of 1999 (Re-numbered as Suit No.135 of 2008) in the Court of Additional District Judge, Tis Hazari Courts, Delhi against respondent No.1 for specific performance of the agreement dated 27.02.1996. In Para 13, the plaintiff stated the facts for constituting the accrual of cause of action for filing the suit for specific performance of the agreement. F

14. Respondent No.2 i.e. the alleged subsequent purchaser filed an application under Order 1 Rule 10 of the Code to become a party (defendant) in the suit. The application was allowed and respondent No.2 was arrayed as defendant No. 2. G

15. Both the respondents (defendants No.1 and 2) filed their written statement and denied the plaintiff’s claim on various grounds on facts H

A and in law. Respondent No.2 also filed an application under Order 7 Rule 11 of the Code for rejection of the plaint.

16. It was, *inter alia*, alleged that the suit in question (specific performance of agreement) is hit by the provisions of Order 2 Rule 2 of the Code because the relief of specific performance, which is claimed in
B the present suit could be and ought to have been claimed by the plaintiff - Sucha Singh in the previously instituted suit which he had filed for permanent injunction. It was contended that non-claiming of relief of specific performance of the agreement in the previously instituted
C suit though available to the plaintiff for being claimed on the cause of action pleaded in the previous suit would attract the bar contained in Order 2 Rule 2 of the Code to the subsequently instituted civil suit wherein a relief of specific performance of agreement is claimed and, therefore, such suit cannot be now tried on merits.

17. During the pendency of the suit, Sucha Singh died on 04.08.2000 and his legal representatives (appellants herein) were brought on record
D as plaintiffs to continue the *lis*. The appellants (plaintiffs) opposed the application filed by defendant No.2 (respondent No.2 herein) and contended that the suit for specific performance of agreement is maintainable and not barred by Order 2 Rule 2 of the Code.

18. The Trial Court, however, by order dated 08.05.2012 allowed
E respondent No.2's application and, in consequence, dismissed the appellants' suit holding that it is barred by the provisions of Order 2 Rule 2 of the Code. In other words, the Trial Court held that the plaintiffs ought to have claimed the relief of specific performance of the agreement in the previous suit, which was filed by Sucha Singh (original plaintiff)
F for permanent injunction because according to the Trial Court such relief was available for being claimed when the first suit was filed.

19. The plaintiffs felt aggrieved and filed appeal before the High Court of Delhi. By impugned judgment, the High Court while concurring with the reasoning and the conclusion of the Trial Court dismissed the
G appeal. Against the said judgment, the plaintiffs felt aggrieved and have filed the present appeal by way of special leave in this Court.

20. Heard Mr. Bhim Sain Jain, learned counsel for the appellants, Mr. Jayant Bhushan, learned senior counsel for respondent No.1 and Mr. Pramod Dayal, learned counsel for respondent No.2.

H

21. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal and while setting aside the judgment and order of the High Court and the Trial Court, dismiss the application filed by respondent No.2 (defendant No. 2) under Order 7 Rule 11 of CPC and restore the civil suit No.54 of 1999 (re-numbered as Suit No.135/2008) filed by the appellants herein against the respondents out of which this appeal arises for being tried on merits in accordance with law. A
B

22. In our considered opinion, the Trial Court and the High Court erred in allowing the application filed by respondent No.2 under Order 7 Rule 11 of the Code and thereby erred in dismissing the suit as being barred by the provisions of Order 2 Rule 2 of the Code by taking recourse to the provisions of Order 7 Rule 11 of the Code. In our opinion, the provisions of Order 2 Rule 2 of the Code are not attracted to the facts of this case and, therefore, civil suit should not have been dismissed as being barred under Order 2 Rule 2 of the Code. C

23. Order 2 Rule 2 of the Code reads as under: D

“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. E

(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.” F

24. Order 2 Rule 2(1) of the Code provides that every suit shall include the whole of the claim, which the plaintiff is entitled to make in respect of the cause of action. Liberty is, however, granted to the plaintiff to relinquish any portion of his claim with a view to bring the suit within the jurisdiction of any Court. G

25. It is clear from the reading of Order 2 Rule (1) of the Code that whenever the plaintiff files a suit on the basis of a cause of action pleaded in the plaint, he is under a legal obligation to include and claim all the reliefs against the defendant, which have accrued to him on the cause of action pleaded by him in his plaint. In other words, if on the H

A basis of cause of action pleaded by the plaintiff in the plaint, he is entitled to claim two reliefs, namely, “A” and “B” against the defendant(s), then he is under an obligation to claim both “A” and “B” reliefs together in the suit. Order 2 Rule 2(1) of the Code enables the plaintiff to relinquish any portion of his relief with a view to bring the suit within the jurisdiction of any Court.

B
26. Order 2 Rule 2(2) of the Code, however, provides that where a plaintiff omits to sue or intentionally relinquishes, any portion of his claim/relief in his suit, then in such event, he shall not be allowed afterwards to sue in respect of the claim/relief so omitted or/and relinquished by him in his suit. In other words Rule 2(2) does not permit the plaintiff to file second suit to claim the omitted or/and relinquished relief.

C
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.

D
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.

E
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?

F
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.

G
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*.

H

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. A

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). B C

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). D

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. E

36. This Court in **Rathnavathi & Another vs. Kavita Ganashamdas** (2015 (5) SCC 223) had the occasion to examine this very question on somewhat similar facts in detail. This Court after taking into account the earlier decisions of this Court which dealt with this question held in Paras 22 to 31 that bar contained in Order 2 Rule 2 of the Code on such facts is not attracted against the plaintiff so as to disentitle him from filing the subsequent suit to claim specific performance of agreement against the defendants in relation to the suit property. F G

37. We apply the law laid down in the case of **Rathnavathi** (supra) and hold that the suit filed by the original plaintiff for specific performance of agreement against the respondents (defendants) is not barred by Order 2 Rule 2 of the Code and is held maintainable for being tried on merits. H

- A 38. This takes us to examine another question as to whether in the absence of any permission/liberty granted by the Trial Court to the plaintiff at the time of withdrawing the previous suit filed for permanent injunction, the plaintiff was entitled to file the suit for specific performance of agreement against the defendants in relation to the suit property?
- B 39. In our considered opinion, this question does not now survive for consideration in the light of what we have held above. In any event, keeping in view the law laid down by this Court in **Gurinderpal vs. Jagmittar Singh** (2004) 11 SCC 219, the question is answered against the respondents.
- C 40. In somewhat similar facts, the question arose before this Court in **Gurinderpal's case** (supra), namely, if the order granting permission to withdraw the suit under Order 23 Rule 1(3) of the Code does not specifically mention the fact of granting liberty to the plaintiff to file a fresh suit, whether filing of fresh suit would be hit by Order 2 Rule 2 of the Code?
- D 41. This Court (three Judge Bench), speaking through Justice R.C. Lahoti (as His Lordship then was), held that filing of the second suit is not hit by Order 2 Rule 2 of the Code and is maintainable for being tried on merits. This is what this Court held in Para 6:
- E **“6. Having heard the learned counsel for the parties, we are satisfied that the judgment of the High Court as also of the first appellate court cannot be sustained to the extent to which the bar enacted under Order 2 Rule 2 CPC has been applied. The provisions of Order 2 Rule 2 CPC bar the remedy of the plaintiff-appellant and, therefore, must be strictly construed. The order of the trial court dated 15-6-1994 passed in the earlier suit, extracted and reproduced hereinabove, has to be read in the light of the statement of the plaintiff-appellant recorded by the court on that very date. The plaintiff-appellant had clearly stated that he was seeking leave to withdraw the suit with the liberty of filing a fresh suit. The trial court recorded that the suit was being dismissed as withdrawn “in view of the statement of the plaintiff”. A conjoint reading of the order of the court and the statement of the plaintiff, clearly suggests that the suit was dismissed as withdrawn because the plaintiff wanted to**
- F
- G
- H

file a fresh suit, obviously wherein the plaintiff would seek the decree of specific performance and not of a mere injunction as was prayed for in the suit which was sought to be withdrawn. In the subsequent suit, the first appellate court was not right in forming an opinion that liberty to file the fresh suit was not given to the plaintiff in the order dated 15-6-1994. That finding of the first appellate court ought not to have been sustained by the High Court.”

42. Applying the aforementioned principle of law to the case at hand, we find that the original plaintiff (Sucha Singh), in clear terms, had stated in the previous suit that he wants to withdraw the suit because he wants to file appropriate proceedings before the competent forum in relation to the subject matter of the suit. The Trial Court recorded his statement on 27.11.1998 and allowed withdrawal of the suit.

43. In our considered opinion, reading of the statement of the original plaintiff (Sucha Singh) coupled with the permission granted by the Court to withdraw the suit satisfies the requirement of Order 23 Rule 1 (3) of the Code. It certainly enabled the plaintiff to file a fresh suit, namely, the civil suit for claiming specific performance of the agreement against the defendants. In our view, the Court was entitled to take into consideration the statement made by the original plaintiff (Sucha Singh) for withdrawing the suit and filing it afresh and his statement could be made a part of the order for granting permission to withdraw the civil suit and file a fresh suit as was held in the case of **Gurinderpal** (supra).

44. In our view, therefore, this submission urged by the learned counsel for the respondents has no merit.

45. Learned counsel for respondent No.2 (defendant No.2) then addressed the Court on the merits of the suit. We are afraid, we cannot go into any question relating to the merits of the controversy involved in the suit. It is for the Trial Court to now proceed to try the suit on merits and decide the suit in accordance with law.

46. In view of the foregoing discussion, we cannot concur with the reasoning and the conclusion arrived at by the Trial Court and the High Court which wrongly allowed the application filed by respondent No.2 (defendant No.2) under Order 7 Rule 11 of the Code and, in

A
B
C
D
E
F
G
H

A consequence, dismissed the appellants' (plaintiffs') suit as being barred by the provisions of Order 2 Rule 2 of the Code.

47. As a consequence, the appeal succeeds and is accordingly allowed. The impugned judgment is set aside. The application filed by respondent No.2 (defendant No.2) under Order 7 Rule 11 of the Code is

B dismissed.

48. The civil suit (No.54/99 re-numbered as 135/2008) filed by the appellants against the respondents is held maintainable. It is accordingly restored to its original file for being tried on merits and in accordance with law.

C 49. The Trial Court is directed to decide the civil suit on merit expeditiously and preferably within one year without being influenced by any of our observations.

Nidhi Jain

Appeal allowed.