

THE HIGH COURT OF MADHYA PRADESH
W.P. No. 4123/2016

1 *Smt. Sunita Sharma V/s. Deepak Sharma & others.*

Indore, dated : 29.08.2018

Shri Vinay Zelawat, Sr. Advocate with shri S.K. Sharma, Advocate for the petitioner.

Shri V.K. Jain, Sr. Advocate with Shri Vaibhav Jain, Advocate for the respondents No.1 and 2.

None for respondents No.3 to 11 though served by way of paper publication.

With the consent of learned counsel for the parties, heard finally.

ORDER

The petitioner/plaintiff has filed the present petition 24.2.2016 by which the application filed under Order 7 Rule 11 of the C.P.C. has been disposed of and the plaintiff has been directed under Order 6 Rule 16 of the C.P.C. to omit the relief regarding the properties which are not mentioned in the previous suit.

2. In this petition, learned counsel appearing for respondents No.1 and 2 has raised a preliminary objection in respect of maintainability of the writ petition. According to Shri Jain, learned senior counsel, by the impugned order, the civil suit has partially been dismissed in respect of the properties which were not mentioned in the previous suit, therefore, the first appeal lies against the said order. The petitioner may be permitted to withdraw this petition with liberty to file the first appeal or he may be permitted to convert this petition into first appeal.

3. Shri Zelawat, learned senior counsel appearing for the petitioner, submits that there is no provision in the Civil Procedure Code in respect of dismissal of the suit partially. The impugned

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order is passed under Order 6 Rule 16 of the C.P.C. and the said order is not appealable, therefore, the plaintiff/petitioner has rightly filed this writ petition, hence the same is maintainable before this Court.

4. Earlier, petitioner/plaintiff – Smt. Sunita Sharma filed the civil suit along with one Smt. Chanu Sharma in the year 2013 claiming 1/6 share in the suit house No.39, Freeganj, Ujjain and also challenged the sale-deed dated 10.3.2011. By order dated 9.7.2013, the plaintiffs were granted last opportunity to pay the Court-fees of Rs.1,50,000/-. On 25.7.2013, plaintiffs filed an application under Order 23 Rule 3 of C.P.C. seeking permission to withdraw the suit with liberty to file a fresh suit. The learned trial Court dismissed the said application and also dismissed the suit under Order 7 Rule 11 of the C.P.C. Thereafter, only Smt. Sunita Sharma, the present petitioner filed the fresh suit for the relief of declaration, permanent injunction and partition of House No.39, Freeganj, Ujjain and House No.82, 'Satkar Bhawan', Teen Batti Chouraha, Ujjain.

5. After notice, respondents/defendants No.1 and 2 filed an application under Order 7 Rule 11 of the C.P.C. by submitting that the second suit is not maintainable in respect of House No.82 under the provisions of Order 2 Rule 2 of the C.P.C. and the suit is liable to be dismissed.

6. The learned trial Court vide order dated 24.2.2016 disposed of the application and held that after dismissal of the previous under Order 7, Rule 11, the plaintiff can bring a fresh suit for the same cause of action, but by virtue of Order 2 Rule 2, he cannot bring the suit for those properties which were not the subject

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matter of the earlier suit, hence directed the plaintiff to delete/omit the relief in respect of the properties under Order 6 Rule 16 of C.P.C.

7. According to Shri V.K. Jain Sr. Advocate appearing for respondents No.1 and 2, the present suit has been dismissed in respect of House No.82, therefore, the writ petition is not maintainable. He further submits that the objection in respect of Order 2 Rule 2 of C.P.C. is not required to be taken in the written statement and no issue is required to be framed. The defendants have successfully demonstrated from the averments made in the plaint itself that the subsequent suit is barred under the provisions of Order 2 Rule 2 of the C.P.C. In support of his contention, he has placed reliance over the judgments of apex Court in the case of Church of Christ Charitable Trust v/s. Ponniamman Educational Trust : (2012) 8 SCC 706; Shamsher Singh V/s. Rajinder Prashad : (1973) 2 SCC 524; Rajni Rani V/s. Khairati Lal : 2015 (4) MPLJ 12; Sejal Glass Ltd. V/s. Navilan Merchants Pvt. Ltd. : AIR 2017 SC 4477; judgment of Karnataka High Court in the case of M/s. Maruthi Enterprises V/s. Smt. Muniyanjamma : AIR 1987 Kar. 264; judgment of this Court in the case of Jamshedji Dubash V/s. Meharbai Rustumji Dubash : 2003 (3) MPLJ 322; and judgment of Delhi High Court in the case of Sandeep Batra V/s. GE Capital Services India : (2007) 10 AD (Delhi) 455.

8. So far as the provisions of Order 2 Rule 2 are concerned, there is no altercation that the second suit on the same cause of action is not maintainable. U/s. 96 of the C.P.C., first appeal lies

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against the decree. The decree is defined u/s. 2(2) of the C.P.C., according to which, the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint. In order to make an order to treat as a decree, there has to be a rejection of the plaint in its entirety.

9. Admittedly, in the present case, issues have not been framed so far and in the earlier suit also, no issues were framed and adjudicated in respect of house No.82. In the present suit, the entire plaint has not been rejected, but the plaintiff has been directed to amend the relief clause under Order 6 Rule 16 of the C.P.C. by the impugned order.

10. In the case of **Dalip Singh V/s. Mehar Singh Ratee : (2004) 7 SCC 650**, the apex Court has held that when an objection regarding bar to file the suit under Order 2 Rule 2 of C.P.C. is taken, it is essential for the court to know what exactly was the cause of action which was alleged in the previous suit. The plaintiff might be in a position to appreciate whether the cause of action alleged in the second suit is identical with the one that was the subject-matter of the previous suit. The plea is required to be raised in the written statement and the issues are required to be framed. In the present case, the defendants are yet to file the written statement, in which, they are free to raise the objection in respect of Order 2 Rule 2 of the C.P.C.

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11. In the Civil Procedure Code, there is no provision in respect of partial rejection of the plaint. Therefore, trial Court directed the plaintiff to omit the relief clause under Order 6 Rule 16 of the C.P.C. by placing reliance over the judgment of Punjab & Haryana High Court in the case of **ABN-AMRO Bank V/s. Punjab Urban P. and D. Authority : AIR 2000 P&H 44**. It is clear from the aforesaid that the trial Court has not passed the order under Order 7 Rule 11 of the C.P.C, but passed the order under Order 6 Rule 16 of the C.P.C. and that does mean to rejection of the plaint in part. Hence, the writ petition is maintainable. The objection raised by Shri V.K. Jain, Sr. Advocate is not tenable and accordingly rejected.

12. So far as merits of the case is concerned, the apex Court in the case of **Coffee Board V/s. Ramesh Exports Pvt. Ltd. : AIR 2014 SC 2301** also has held that the bar under Order 2 Rule 2 must be specifically pleaded by the defendants and the trial Court must frame specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different. Para 11 and 12 of the aforesaid judgment are reproduced below :

“11. The bar of Order 2 Rule 2 comes into operation where the cause of action on which the previous suit was filed, forms the foundation of the subsequent suit; and when the plaintiff could have claimed the relief sought in the subsequent suit, in the earlier suit; and both the suits are between the same parties. Furthermore, the bar under Order 2 Rule 2 must be specifically pleaded by the defendant in the suit and the Trial Court should specifically frame a specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an

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opportunity to demonstrate that the cause of action in the subsequent suit is different. This was held by this Court in [Alka Gupta v. Narender Kumar Gupta](#) (supra) which referred to decision of this Court in [Gurbux Singh vs. Bhooralal](#)[4] wherein it was held that:

“6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out: (1) 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 later suit is based there would be no scope for the application of the bar.”

12. The Courts in order to determine whether a suit is barred by Order 2 Rule 2 must examine the cause of action pleaded by the plaintiff in his plaints filed in the relevant suits (See: [S. Nazeer Ahmed v. State Bank of Mysore & Ors.](#)[5]). Considering the technicality of the plea of Order 2 Rule 2, both the plaints must be read as a whole to identify the cause of action, which is necessary to establish a claim or necessary for the plaintiff to prove if traversed. Therefore, after identifying the cause of action if it is found that the cause of action pleaded in both the suits is identical and the relief claimed in the subsequent suit could have been pleaded in the earlier suit, then the subsequent suit is barred by Order 2 Rule 2.”

13. In the case of **Dalip Singh (supra)**, the apex Court has held that the objection in respect of Order 2 Rule 2 is required to be taken in the written statement and the issues are required to be framed. In the present case, the learned trial Court has wrongly passed the order while deciding the application filed under Order 7 Rule 11 of the C.P.C. and also in respect of provisions of Order 2

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Rule 2 of the C.P.C., hence the impugned order is liable to be set aside. The defendants are free to raise ground of Order 2 Rule 2 of the C.P.C. in the written statement and the same shall be decided along with other issues.

14. Accordingly, this petition deserves to be and is hereby allowed and the impugned order dated 24.2.2016 is hereby set aside.

No order as to costs.

(VIVEK RUSIA)
JUDGE

Alok/-