

**HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT
JABALPUR**

First Appeal No.279/2017

M/s Shubhalaya Villa & others

Vs.

Vishandas Parwani & others.

Date of Judgment	15.05.2020
Bench Constituted	Single Bench
Order delivered by	Hon'ble Shri Justice Sanjay Dwivedi
Whether approved for reporting	Yes
Name of counsels for parties	For Appellants: Smt. M.P.S. Chuckal, Advocate. For Respondents: Shri Sankalp Kochar, Advocate.
Law laid down	(1) If plaint is rejected under the provisions of Order VII Rule 11 of CPC, the plaintiff can file a subsequent suit by presenting fresh plaint on the same cause of action as per the provisions of Order VII Rule 13 of CPC. The Court cannot carve out any distinction holding that under the provisions of Order VII Rule 13 of CPC the subsequent plaint is not maintainable if earlier one is rejected on a particular ground – since the provision of Order VII Rule 13 of CPC does not provide any distinction, therefore, the Court has no right to re-write the provision as per its convenience. (2) Rejecting a plaint on the ground that the same is barred under the provision of Order II Rule 2(3) of CPC is a technical bar, cannot be decided at the threshold without framing the issue and recording the evidence during the

	trial. (3) Application under Order VII Rule 11 of CPC is decided on the basis of averments made in the plaint but not taking into account the plea and defence taken by the defendant.
Significant Para Nos.	21 to 26

Reserved on : 27.02.2020

Delivered on : 15.05.2020

(JUDGMENT)
(15.05.2020)

This appeal is filed under Section 96 of the Code of Civil Procedure against the order dated 27.02.2017 passed by the District Judge, Bhopal in CS No.579-A/2016 thereby decided four applications filed by the defendants separately. Dealing with those applications, the District Judge has finally arrived at a conclusion that the application filed under Order VII Rule 11 read with Section 151 of CPC deserves to be allowed as the suit was not found maintainable in view of the provisions of Order VII Rule 11 (d) of CPC. The court below has found that the suit was barred by time and was also not maintainable in view of the provisions of Order II Rule 2 (3) of CPC.

2. The impugned order has been assailed by the appellants mainly on the ground that the Court below has failed to take note of the fact that the present suit is not hit by the provisions of Order II Rule 2 of CPC inasmuch as relief(s)

claimed in the present suit are the same relief(s) which were claimed in the earlier suit and the cause of action is also same.

3. It is submitted by the learned counsel for the appellants that the trial Court has erred in holding that the present suit is hit by Order II Rule 2(3) of CPC and as such exercised the power under Order VII Rule 11(d) of CPC. It is also submitted by the learned counsel for the appellants that the Court below has failed to see that the suit could not have been dismissed because it is not barred as per the provisions of Order VII Rule 13 of CPC. It is further submitted by the learned counsel for the appellants that the Court below erred in holding that the suit is barred by limitation and as such misread and misinterpreted the Article 54 of the Limitation Act. As per the appellants, the cause of action for filing the present suit accrued on 17.01.2014 that is the date on which the plaintiff received summons of Civil Suit No.17-B/2014 filed by the defendants/respondents. As per the appellants, the limitation begins to run from 17.01.2014 and the question of limitation is mixed question of law and facts and that could have been decided only after recording the evidence.

4. *Per contra*, the learned counsel for the respondents submitted that the impugned order has been rightly passed by the Court below and the benefit of Order VII Rule 13 of CPC

has rightly been refused to the appellants because the same is available only under the circumstance when the previous suit is dismissed for curable defects and the subsequent suit can be maintained provided the defect is cured. It is contended by him that since in the present case, the previous suit is dismissed being barred by law, the subsequent suit for the same cause of action was not maintainable. Learned counsel for the respondents further submits that it is rightly held by the Court below that the instant suit was barred by law in terms of Order II Rule 2(3) of CPC because earlier suit i.e. CS No.439-A/2015 was in relation to specific performance of contract for the same subject matter of the property, between the same parties and compromise agreement dated 23.11.2012 was very much in existence at the time of filing earlier suit i.e. CS No.439-A/2015 but in the said suit no claim was made on the basis of agreement dated 23.11.2012 and as such, it was relinquished/waived by the plaintiffs and those subsequent suits on the basis of agreement dated 23.11.2012 was rightly held not maintainable and the application under Order VII Rule 11 (d) of CPC has rightly been allowed by the Court below. He relied upon various judgments reported in **(2019) 6 SCC 621 (Pramod Kumar and another Vs. Zalak Singh and others); (2013) 1 SCC 625 (Virgo Industries (Eng.) Private Limited**

Vs. Venture Rotech Solutions Private Limited); (2007) 5 SCC 614 (Hardesh Ores (P) Ltd. Vs. Hede and Company); (2005) 5 SCC 548 (N.V. Srinivasa Murthy and others Vs. Mariyamma and others); (2004) 3 SCC 137 (Sopan Sukhdeo Sable and others Vs. Assistant Charity Commissioner and others); (1998) 2 SCC 70 (ITC Limited Vs. Debts Recovery Appellate Tribunal and others) and (1977) 4 SCC 467 (T. Arivandandam Vs. T.V. Satyapal and another).

5. The relevant facts are briefly stated hereinunder to appreciate the rival legal contentions urged on behalf of the parties in this appeal.

The plaintiff Nos.1 and 2 (appellants herein) are partnership firm with the partners namely plaintiff No.3 (respondent No.3 herein) and his wife Smt. Nanda Khare. The suit land is described in paras 2 to 5 of the plaint and was recorded in the name of the defendants. The suit land is described in three parts as blocks 'A', 'B' and 'C'. On 22.10.2006 a partnership firm was created with partners namely plaintiff No.3 and defendants No.1 to 4 (respondents No.1 to 4 herein) in respect of 3.29 acres of land detailed in block 'C'.

On 14.12.2006 an agreement to sale was executed in between plaintiff No.3 and defendants No.1 to 5 for purchase of

the land detailed in block 'A' admeasuring 13.63 acres @ Rs.40 lac per acre. On 01.01.2007, the plaintiff No.1 entered into property development agreement with defendants No.1 to 4 in respect of the land detailed in block 'B' admeasuring 8.37 acres. There were five suits filed between the parties for different reliefs and cause of action.

CS No.109-B/2012 was filed by plaintiff No.1 for recovery of amount of Rs.8,54,42,529/- with interest.

CS No.1089-A/2012 was filed by plaintiff No.3 seeking relief of specific performance of contract in respect of 13.63 acres of the land detailed in block 'A'.

The aforesaid two suits have been withdrawn pursuant to compromise dated 23.11.2012.

On 17.01.2014 the plaintiffs received summons of CS No.17-B/2014 filed by the defendants seeking recovery of amount of Rs.4.22 crore relating to the property given under compromise dated 23.11.2012. This suit is still pending.

On 05.05.2015 plaintiff No.3 filed a CS No.439-A/2015 seeking relief of specific performance of contract in respect of the land detailed in block 'A' admeasuring 13.63 acres on the basis of agreement dated 14.12.2006. This civil suit was dismissed by the trial Court on an application under Order VII

Rule 11 of CPC on the ground that the same was barred in terms of Order XXIII Rule 1(4) of CPC.

On 27.06.2016 the instant suit has been filed by the plaintiffs which has given rise to the impugned order bearing CS No.579-A/2016 for the same cause of action as was involved in CS No.439-A/2015.

In the suit, defendants filed four separate applications under Order VII Rule 11 of CPC seeking rejection of plaint on various grounds mainly that the suit is hit by Order II Rule 2(3) of CPC and is barred by limitation.

6. While deciding the applications, the Court below vide impugned order amounting to decree has dismissed the suit as barred by Order II Rule 2(3) of CPC and also on the ground of limitation.

7. From the impugned order, it reveals that the Court below has dismissed the suit holding that the same is not maintainable as it is not tenable in view of the provisions of Order II Rule 2(3) of CPC and has also held that the same is barred by time. The applications submitted by the defendants have been decided analogously as in all those applications defendants have made a request that the suit is liable to be dismissed in view of the provisions of Order VII Rule 11(d) of CPC.

8. As per the application submitted by defendant Nos.1 and 5 it is claimed that the plaintiffs in para 5(1) of the plaint claimed the relief regarding specific performance of contract and in addition to that they have claimed recovery of an amount of Rs.48,00,504/- and Rs.4,22,32,529/-. The defendants have submitted that same relief was claimed in CS No.1089-A/2012 which got withdrawn on 23.11.2012 on an application submitted by plaintiff No.3. No relief was granted, therefore, for the same relief on the basis of same cause of action, no subsequent suit could be filed. As per the defendants, the suit was barred by the provisions of Order XXIII Rule 1(4) of CPC. It is further claimed that the plaintiffs again filed a CS No.439-A/2015 on the basis of agreement dated 14.12.2006 which got dismissed on the ground that the same could not have been filed under Order XXIII Rule 1(4) CPC. It is also claimed that the instant civil suit which is based upon agreement dated 14.12.2006 and compromise agreement dated 23.11.2012 is also not maintainable as the same is hit by the provisions of Order XXIII Rule 1(4) and Order II Rule 2 of CPC.

9. Defendant No.2 moved an application saying that the suit i.e. CS No.439-A/2015 was filed in which in paragraph 20, the date for arising of the cause of action was pleaded in the instant suit for the same cause of action and the same date

is mentioned since the suit CS No.439-A/2015 was dismissed vide order dated 18.01.2016 in view of the provisions of Order VII Rule 11 of CPC. It is further mentioned in the application that the document dated 23.11.2012 has been pleaded to be proved as cause of action but the earlier suit i.e. CS No.439-A/2015, the part of the claim was made but remaining claim was relinquished and as such present suit is barred by limitation of Order II Rule 2(3) of CPC. It is also claimed that the suit should have been filed within a period of three years i.e. from 23.11.2012 but it has been filed on 27.06.2016, therefore, the said suit was not maintainable as barred by time.

10. In the application submitted by defendant Nos.3 and 6, they have claimed that the suit is barred by the provisions of Order XXIII Rule 1(4) of CPC and also claimed that earlier suit i.e. CS No.439-A/2015 was dismissed in view of the provisions of Order VII Rule 11 of CPC and in the said suit, the agreement dated 23.11.2012 was the foundation and in the present case i.e. CS NO.579-A/2016 the foundation is of the agreement dated 23.11.2012. Since the subject matter of both the suits was same and, therefore, the same is not maintainable.

11. Likewise, in the application submitted by defendant Nos.4 and 7, it is stated that the suit i.e. CS No.1089-A/2012 based upon the agreement dated 14.12.2006 was withdrawn

without any leave on an application submitted under Order XXIII Rule 1 of CPC and, therefore, after that no suit could have been brought on the basis of agreement dated 14.12.2006.

12. The plaintiffs have filed a reply of all the applications separately but the Court below has considered the same and decided analogously because the stand of the plaintiffs in all those reply was almost same. In a nutshell, the plaintiffs have taken the stand that CS No.439-A/2015 though was rejected on the ground that the same was not maintainable in view of the provisions of Order VII Rule 11 (d) of CPC as the suit was based upon agreement dated 14.12.2006 and earlier suit was also filed for the specific performance of the said agreement and was withdrawn without the leave of the Court and, therefore, subsequent suit was not maintainable for the same subject matter. But, under the provisions of Order VII Rule 13 of CPC the plaintiffs had right to file fresh suit for the same cause of action and could not have been dismissed as per the provisions of Order VII Rule 11 (d) of CPC. So far as the limitation is concerned, it is stated by the plaintiffs that the limitation begins w.e.f. 17.04.2014 but not from 23.11.2012. It is also stated by the plaintiffs that the issue regarding relinquishment of claim and the suit was barred under the provisions of Order II Rule 2(3) of CPC can only be considered

by the Court after recording the evidence because as per the plaintiffs, application under Order VII Rule 11 of CPC has to be decided on the basis of averments made in the plaint.

13. Considering the stand of the defendants in their separate applications and the stand taken by the plaintiffs in reply to those applications, the Court below has formulated as many as seven questions to be adjudicated and finally held that the suit was barred by time and also not maintainable under the provisions of Order II Rule 2(3) of CPC. The Court below has also considered the fact regarding benefit of Order VII Rule 13 of CPC and has held under the circumstances when suit is already dismissed exercising the power under Order VII Rule 11 of CPC as barred by law then provisions of Order VII Rule 13 of CPC would not be applicable and no benefit of the respective provisions can be granted to the plaintiffs.

14. I have heard the arguments advanced by the learned counsel for the parties and perused the record.

15. As per arguments advanced by the learned counsel for the appellants the core question involved in the case which is to be adjudicated as to whether the Court below has rightly considered the applications of Order VII Rule 13 of CPC or not and whether question of limitation and applicability of provision of Order II Rule 2(3) of CPC at the threshold while deciding the

application under Order VII Rule 11 of CPC. As such, I am confining myself to adjudicate the issue as to whether under the present facts and circumstances of the case, the instant suit i.e. CS No.579-A/2016 was maintainable as per the provisions of Order VII Rule 13 of CPC or not and whether the Court below has rightly considered the application submitted by the defendants under Order VII Rule 11 of CPC.

16. Indisputably, from the impugned order the Court below has observed that the present suit was barred as per the provisions of Order VII Rule 11(d) of CPC as the same was not maintainable as per the provisions of Order II Rule 2(3) of CPC and the same was also barred by time. It is required to see the provisions of Order VII Rule 11 of CPC under which the Court below has exercised the power and dismissed the suit. The respective provision is quoted hereinbelow:-

11. Rejection of plaint.—The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

17. The Court below has exercised the power under Order VII Rule 11 of CPC and dismissed the suit as per the provisions of Order VII Rule 11(d) of CPC as the suit was found barred by law.

18. In assessing the merits of rival submissions, it would, at the outset, be necessary to advert to the provisions of Order VII Rule 13 of CPC and hence for the purpose of convenience it is quoted hereinbelow:-

13. Where rejection of plaint does not preclude presentation of fresh plaint.—The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

19. From a bare reading of the provisions of Order VII Rule 13 of CPC, it is clear that the statute has not provided any distinction as to under what circumstances, the plaintiffs cannot

present the fresh plaint in respect of the same cause of action if the earlier plaint has been rejected exercising the power provided under Order VII Rule 11 of CPC. On the contrary, it enables the plaintiffs to present fresh plaint if the earlier one was rejected on any of the grounds mentioned under Order VII Rule 11 of CPC.

20. The Court below in paragraph 38 of the order has carved out the distinction under which the provision of Order VII Rule 13 of CPC is applied and has described as under:-

38. आदेश 7 नियम 13 व्य.प्र.सं. में यद्यपि यह स्पष्ट रूप से कहा गया है कि “किसी भी कारण से” वाद यदि अस्वीकार किया गया है तो भी नया वाद प्रस्तुत किया जा सकता है। परन्तु यदि वाद विधि द्वारा वर्जित होना पाया जा चुका है तो यह वर्जना सतत् रूप से कायम रहेगी, जो नया वाद प्रस्तुत करते समय भी आकृष्ट होने के कारण उक्त वाद को अस्वीकार योग्य बनायेगी। अतएव आदेश 7 नियम 13 व्य.प्र.सं. का लाभ वादीगण को प्राप्त नहीं हो सकता।

21. As per the aforesaid explanation given by the Court, it indicates that the if the plaint is rejected under the provisions of Order VII Rule 11(d) of CPC then the provisions of Order VII Rule 13 would not be applicable and the plaintiffs cannot take advantage of the same. I am not convinced with the interpretation of the Court below in regard to the provisions of Order VII Rule 13 of CPC because such interpretation has no foundation and is completely contrary to the intention of the statute. The Court cannot rewrite the provision and carve out a distinction which is not available under the provisions and which makes the provision redundant or equivocal. The learned

counsel for the respondents has submitted that as per the settled principle of law, the provision of Order VII Rule 13 of CPC applies to the cases where the previous plaint is dismissed for curable defects and thus in such cases the subsequent suit on the same cause of action can be maintained provided the defect is cured. He further submits that looking to the factual matrix of the previous suit which has been dismissed being barred by law, the present suit on the same cause of action is clearly barred by law and as such rightly held by the Court that the same is not maintainable and further denied to give any benefit of the provision of Order VII Rule 13 of CPC saying that the same is not attracted in the present factual matrix. However, as discussed hereinabove, I am not convinced with the submissions made by the learned counsel for the respondents. Even otherwise, as per the law laid down in the case of **Sopan Sukhdeo Sable** (supra), the Supreme Court has considered the provisions of Order VII Rule 13 of CPC and has held that the said provision does not preclude the presentation of a fresh plaint even though the earlier one is rejected on a legal ground. Accordingly, the view taken by the Court below by not applying the provisions of Order VII Rule 13 of CPC is not sustainable and the order passed by the Court below deserves to be set aside on this ground also as the Court

has misconstrued the said provision. The Division Bench of High Court in the case of **Har Prasad Sharma v. Smt. Nisha Sharma and others 2009 ILR (MP) 2965 = 2009 (3) MPWN 105**, has considered the application filed under the provision of Order VII Rule 13 of CPC and allowed the appeal setting aside the order of the Court below as the same has not considered the applicability of Order VII Rule 13 of CPC. Accordingly, the order impugned is also not sustainable and deserves to be set aside because the Court below has wrongly interpreted the provision of Order VII Rule 13 of CPC.

22. Here in this case, the Court below has also dismissed the suit on the ground that the same was barred by time and has held in paragraph 13 of the impugned order that the limitation starts for filing the suit w.e.f. 23.11.2012. This finding is given in paragraph 31 of the order but the Court below has not assigned any reason as to why, the limitation would not start from the date of acquiring the cause of action by the plaintiffs as pleaded in the plaint. As per the facts and circumstances of the case when the plaintiffs have pleaded in paragraph 18 of the plaint that they acquired the cause of action from the date i.e. 17.11.2014 when they received summons of CS No.17-B/2014. It is settled principle of law that application under Order VII Rule 11 of CPC is decided only on

the basis of averments made in the plaint. It has nothing to do with the stand taken by the defendants in their written-statement and the pleadings made by them in this regard. The Supreme Court in the following cases has laid down such a legal position:-

(i) Saleem Bhai v. State of Maharashtra AIR 2003 SC 759; and

(ii) Popat and Kotecha Property v. State Bank of India Staff Association (2005) 7 SCC 510.

23. Under such circumstances when cause of action is pleaded w.e.f. 17.11.2014 it was a question of fact as to whether the said date was correct date for acquiring the cause of action or not and that could have been determined only after recording the evidence by the parties. As such, finding as given by the Court below in paragraph 31 which is quoted hereinunder is also not sustainable as the Court has not assigned any reason as to on what basis, he arrived at a conclusion that limitation begins from the date of agreement and, therefore, application under Order VII Rule 11 of CPC could not have been allowed at the threshold holding that the suit is barred by time.

“31. समयावधि की बाधा के आधार पर वाद अस्वीकार किया जा सकता है अथवा नहीं, यह प्रश्न इस बात पर निर्भर करता है कि क्या वाद पत्र के अभिवचनों के अवलोकन से ही यह स्पष्ट ज्ञात किया जा सकता है अथवा नहीं कि वाद समयावधि बाह्य है। वादीगण ने

समयावधि की गणना उस दिनांक से होनी बताई है जबकि उन्हें व्यवहार वाद क्र.17-ए/2016 का नोटिस प्राप्त हुआ था। परन्तु यह स्पष्ट है कि इस नोटिस की दिनांक से समयावधि की गणना नहीं की जायेगी। ऐसी स्थिति में यह वाद समयावधि बाह्य भी होना पाया जाता है क्योंकि यह वाद 05.07.2016 को प्रस्तुत किया गया है जो 23.11.2012 के तीन वर्ष के अंदर का नहीं है। एन. व्ही. श्रीनिवास (पूर्वोक्त) के न्यायदृष्टांत में माननीय सर्वोच्च न्यायालय ने यह अवधारित किया है कि आदेश 7 नियम 11 व्य.प्र.सं. के आवेदन के स्तर पर न्यायालय द्वारा यह देखा जा सकता है कि समयावधि के आधार पर वाद क्या वर्जित है?”

Accordingly, the finding given by the Court below in paragraph 31 of the impugned order holding that the suit was barred by time is also without any foundation and based on presumption ignoring the fact that the cause of action as pleaded by the plaintiff in paragraph 18 of the plaint is correct or not can only be determined after recording the evidence but at the threshold it cannot be considered that the same cause of action is not correct. Thus, in my opinion, the Court below erred in deciding the said issue while deciding the application under Order VII Rule 11 of CPC.

24. The Court below in paragraph 29 of the impugned order has held that the suit is also not maintainable as the same is barred by the provisions of Order II Rule 2(3) of CPC. The Court below has relied upon the decision of the Supreme Court in case of **Virgo Industries** (supra). The learned counsel for the appellants submitted that earlier civil suit i.e. CS No.439-A/2015 was rejected by the Court below allowing the application under Order VII Rule 11 of CPC holding that the suit

is barred under the provisions of Order XXIII Rule 1(4) of CPC. It is submitted by the learned counsel for the appellants that the plaintiffs have submitted the fresh plaint as per the provisions of Order VII Rule 13 of CPC. The subsequent suit was objected by the respondents on the ground that the additional relief claimed by the plaintiffs in the instant suit could have been claimed in earlier suit but that was not claimed and suit was dismissed by the Court below by allowing the application of Order VII Rule 11 of CPC, therefore, the subsequent is barred under the provisions of Order II Rule 2(3) of CPC. The Supreme Court in the case of **Virgo Industries** (supra) has considered the object of the provisions of Order II Rule 2 & 3 of CPC and observed as under:-

“The object behind the enactment of Order 2 Rules 2(2) and (3) CPC is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the court which leave, naturally, will be granted upon the satisfaction and for good and sufficient reasons.”

The Supreme Court in the same case has also considered whether the provision of Order II Rule 2 of CPC is attracted in a situation when first suit is disposed of or even in a case which is pending and second suit is filed during the pendency of first

one. The Supreme Court has also laid down that for applicability of such provision, it is not required that the suit has to be disposed of but even during pendency of first suit in which in relief is relinquished, for the same relief second suit is not maintainable.

25. I have perused the law laid down by the Supreme Court in the case of **Virgo Industries** (supra) which has been further considered by the Bench of Madras High Court in case of **P. Shyamla v. Ravi 2015 (3) CTC 259**. The Madras High Court taking into consideration all relevant judgments on this aspect, has observed that the objection regarding maintainability of suit under the provision of Order II Rule 2 (3) of CPC is a technical bar and the same will not fall under Order VII Rule 11 of CPC. It is further held by Madras High Court that the said aspect can be considered at the time of trial by framing appropriate issues but the plaint cannot be rejected at the threshold stage that too at the stage of application under Order VII Rule 11 of CPC because the said application is decided on the basis of averments made in the plaint and not the defence taken by the defendants. Even in my opinion, the Court below has erred in deciding the application of Order VII Rule 11 of CPC by dismissing the suit as barred by the provision of Order II Rule 2 of CPC because the relief claimed in CS No.439-

A/2015 though not claimed, cannot be claimed by the plaintiffs/appellants in a subsequent suit i.e. instant CS No.579-A/2016. If the facts of the present case are seen, it is clear that the object of the said provision as has been quoted hereinabove is not frustrated because there is no multiplicity of suit pending vexing defendants in multiple litigation. In the facts of the present case, the earlier suit was dismissed by the Court at the threshold deciding the application of Order VII Rule 11 of CPC. The plaintiff therefore filed a subsequent plaint i.e. CS No.579-A/2016 as per the provisions of Order VII Rule 13 of CPC on the same cause of action as is permissible. The additional relief said to have been claimed and the plea has been raised by the defendants, the said additional relief could have been claimed in earlier suit i.e. CS No.439-A/2015 or not is an issue needed to be determined at the time of trial. The additional relief which is said to have been claimed, could have been claimed by the plaintiffs/appellants if that would have been pending and continued, even by way of amendment but the said suit has been dismissed at the threshold, the present suit has been filed and in view of the law laid down by the Madras High Court in case of **P. Shyamala** (supra), the suit could not have been dismissed allowing the application of Order VII Rule 11 of CPC on technical bar of Order II Rule 2(3)

of CPC. The facts of the case of **Virgo Industries** (supra) are altogether different than that of present one. In the said case, two suits were pending and relief claimed in first one could have been claimed in the subsequent suit. Here in this case, the suit filed by the plaintiffs/appellants i.e. CS No.439-A/2015 was dismissed and rejected by the Court below at the threshold then subsequent suit was filed. In the case of **Virgo Industries** (supra), the Supreme Court has not considered this issue as to whether while considering the application under Order VII Rule 11 of CPC at the threshold the technical bar like bar for filing the subsequent suit under the provision of Order II Rule 2(3) of CPC can be decided. But, this aspect has been considered in case of **P. Shyamala** (supra) and has observed by the Madras High Court that said issue has to be decided by the Court during trial framing appropriate issue. The view taken by Madras High Court in case of **P. Shyamala** (supra) also persuaded me to take similar view. Accordingly, in my opinion, the finding given by the Court below in paragraph 29 holding that the suit is barred is also not sustainable and is hereby set aside. The counsel for the respondents relied upon several decisions as quoted hereinabove, but in none of the decisions this aspect has been considered by the Court except in a case of **P. Shyamala** (supra) that while deciding the application

under Order VII Rule 11 of CPC filed at the initial stage of suit, the suit can be dismissed at the threshold on the ground that the same is not maintainable under the provisions of Order II Rule 2(3) of CPC, as has already been observed hereinabove that deciding such a technical bar by the Court, an application under Order VII Rule 11 of CPC is not the appropriate stage and the Court below has not considered this aspect. Therefore, in my opinion, the said finding as given in paragraph 29 is also not sustainable and is hereby set aside.

26. In view of the aforesaid, it is clear that the Court below has erred in deciding the application of Order VII Rule 11 of CPC in appropriate manner and has further not considered the provisions of Order VII Rule 13 of CPC in an appropriate manner. Accordingly, in view of the reasons aforesaid, the impugned order passed by the Court below is hereby set aside.

27. The appeal is **allowed**. The applications filed under Order VII Rule 11 of CPC are rejected and the matter is remitted back to the Court below for further adjudication. The respondents have liberty to raise their objection at an appropriate stage and same will be decided by the Court below in accordance with law.

(Sanjay Dwivedi)
Judge