

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

MA No. 15/2006 c/w

MA No. 02/2005

Reserved on: 27.07.2023

Pronounced on: 22 .09.2023.

Shakeel Ahmad Kuchay

...Petitioner(s)

Through: Mr Wali Mohammad Shah, Advocate.

Vs.

Manmohan Lal

...Respondent(s)

Through: Mr M. Ashraf, Advocate.

CORAM:

HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE

JUDGEMENT

By virtue of the instant two appeals the appellate jurisdiction of this Court is being invoked by the appellant herein under Order 43 CPC.

MA No. 02/2005

1. The facts which has led to the filing of instant appeal would reveal that : -

- An agreement to sell came to be executed by the respondent herein with the appellant herein agreeing to sell 3 storied Tin Roof building namely "Bhagat Building" situated at Amira Kadal, Srinagar, (for short the Building) for an amount of Rs. 51 lacs and for the said purpose a general Power of Attorney was executed by the respondent herein in favour of the appellant herein on 30.07.2001. Prior to the execution of aforesaid agreement to sell, the appellant herein claimed to have paid an amount of Rs. 1 lac to the respondent herein on the date of execution of the agreement and thereafter an amount of Rs. 13 lacs as an earnest money. Whereas, the balance amount had to be paid within 90 days from the date of aforesaid agreement and thereafter possession of

the building had to be delivered to the appellant herein completing the transaction of sale.

- The appellant herein claimed to have acted diligently in accordance with agreement to sell as also the general Power of Attorney besides having spent a huge of sum of money on the renovation and repair of the building to be sold by the respondent herein to the appellant herein pursuant to the aforesaid agreement. The respondent herein, however, refused to complete the sale of the building as also started interfering with the right of the appellant to **entry and possession** of the building resulted into filing of a suit on 28.04.2007 along with interim application, for specific performance of agreement to sell dated 07.08.2001 seeking therein a decree for permanent injunction as well for restraining the defendant respondent herein from interfering into the peaceful possession and right of entry and also from creating 3rd party interest. The suit came to be filed before the Court of 1st Additional District Judge, Srinagar, (for short the trial Court) which Court passed an order of status-quo on 28.04.2007 itself in the application for interim relief.
- Upon service of the summon in the said suit to the defendant respondent herein written statement to the suit along with a counter claimed came to be lodged by the defendant respondent herein seeking a decree of injunction against the plaintiff appellant herein. The defendant respondent herein in the written statement admitted the execution of agreement to sell, the Power of Attorney, as also receipt of earnest money to the extent of Rs. 7.05 lacs besides pleading that he had performed his part of the agreement and it has been the plaintiff appellant herein who did not fulfill his part thus, rendering the agreement void and compelling the defendant respondent herein to cancel and revoke the

power of attorney in terms of revocation deed dated 10.05.2004.

- As per the defendant respondent herein the agreement to sell provided that if the plaintiff appellant herein failed to pay the balance sale consideration within 90 days of the execution of the agreement, the defendant respondent herein had a right to cancel agreement and forfeit the earnest money as damages and the plaintiff appellant had no claim as such, over the defendant respondent herein or the building and that the cheques issued by the plaintiff appellant herein in terms of the agreement got bounced and the said fact was brought into the notice of the plaintiff appellant herein in terms of notice dated 17.11.2001 by the defendant respondent herein besides informing him about the rendering of the agreement as void on account of his failure to pay the balance consideration amount.
- With respect to the plea of injunction, the defendant respondent herein pleaded that since the possession of building in question was never handed over to the plaintiff respondent herein, therefore, there was no question of interference by the defendant respondent herein in the building in question.

The trial Court upon considering the application for interim relief for final disposal vide order dated 27.12.2004 dismissed the application and vacated the interim order granted earlier vide order dated 28.07.2004.

2. The impugned order is being challenged by the appellant herein on the grounds urged in the instant appeal.

Heard counsel for the parties and perused the record.

3. Perusal of the record in general and the impugned order in particular would reveal that the trial Court dismissed the application for interim relief of the plaintiff appellant primarily on two grounds; firstly, **that since the parties had expressly agreed to the termination of the**

agreement to sell in case of failure of the plaintiff appellant herein to pay the balance sale consideration and such failure having happened, the plaintiff appellant was not entitled to an injunction and secondly, that the plaintiff appellant herein did not plead in his plaint that he was in possession of the property in question pursuant to the agreement to sell which agreement as per the defendant respondent herein had been rendered void and unenforceable and that he claimed to have occupied the property in question by virtue of the power of attorney which attorney stood revoked thus, disentitling the plaintiff appellant herein for injunction.

The trial Court on the above two counts came to the conclusion that the plaintiff appellant herein failed to fulfill and satisfy three golden principles governing and regulating the grant of injunction being prima-facie case, balance of convenience and irreparable loss.

4. Law relating to the grant or refusal of injunction has been set at rest by the Apex Court in a series of judgments. A reference of few of which being relevant and germane herein are made hereunder: -

(i) In case titled as **“Dalpat Kumar and Another Vs. Prahlad Singh and Ors. reported in 1992 (1) SCC 719”** . In para 5 the Apex Court has held as under: -

5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infringement of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility

of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.

(ii) In case titled as **“Manjunath Anandappa urf Shivappa Hanasi Vs. Tammanasa and Ors, reported in 2003 (10) SCC 390”** . The Apex Court in para 23 has held as under: -

23. The said averments were held to be in spirit and substance although may not be in letter and form of "readiness and willingness" on the part of the Plaintiff stating: (SCC pp.341-42, para 10)

"10.It is true that in the pleading the specific words "ready and willing to perform" in this nomenclature are not there but from the aforesaid plea, could it be read that the plaintiff was not ready and willing to perform his part of that obligation ? In other words, can it be said that he has not pleaded that he is "ready and willing" to perform his part ? Courts cannot draw any inference in the abstract or to give such hypertechnical interpretation to defeat a claim of specific performance which defeats the very objective for which the said Act was enacted. The section makes it obligatory to a plaintiff seeking enforcement of specific performance that he must not only come with clean hands but there should be a plea that he has performed or has been and is ready and willing to perform his part of the obligation. Unless this is there, Section 16(c) creates a bar to the grant of this discretionary relief. As we have said, for this it is not necessary to plea by any specific words, if through any words it reveals the readiness and

willingness of the plaintiff to perform his part of the obligation then it cannot be said there is non-compliance of the said section."

(iii) In case titled as **“Seema Arshad Zaheer and Ors. Vs. Municipal Corporation of Greater Mumbai and Ors. reported in 2006 (5) SCC 282”** . The Apex Court at para 28 has held as under: -

28. Reference was also made to Laxmikant V. Patel v. Chetanbhai Shah [2002 (3) SCC 65], where this Court, after referring to the above observations in Wander (supra), proceeded to observe as follows :

"Neither the trial court nor the High Court have kept in view and applied their mind to the relevant settled principles of law governing the grant or refusal of interlocutory injunction in trade mark and trade name disputes. A refusal to grant an injunction in spite of the availability of facts, which are prima facie established by overwhelming evidence and material available on record justifying the grant thereof, occasion a failure of justice and such injury to the plaintiff as would not be capable of being undone at a later stage. The discretion exercised by the trial court and the High Court against the plaintiff, is neither reasonable nor judicious. The grant of interlocutory injunction to the plaintiff could not have been refused, therefore, it becomes obligatory on the part of this Court to interfere."

And in case titled as **“M. Gurudas and Ors. Vs. Rasaranjan and Ors, reported in 2006 (8) SCC 367”** the Apex Court in para 21 has held as under:

21. While considering the question of granting an order of injunction one way or the other, evidently, the court, apart from finding out a prima facie case, would consider the question in regard to the balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiffs if the prayer for injunction is to be refused. The contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not only on a mere triable issue. [See Dorab Cawasji Warden v. Coomi Sorab Warden and Others , (1990) 2 SCC 117, Dalpat Kumar and Another v. Prahlad Singh

and Others (1992) 1 SCC 719, United Commercial Bank v. Bank of India and Others (1981) 2 SCC 766, Gujarat Bottling Co. Ltd. and Others v. Coca Cola Co. and Others (1995) 5 SCC 545, Bina Murlidhar Hemdev and Others v. Kanhaiyalal Lokram Hemdev and Others (1999) 5 SCC 222 and Transmission Corpn. of A.P. Ltd.

5. Having regard to the aforesaid principles of law and coming back to the case in hand, a closer examination of the same would reveal that the trial Court has exercised its judicial discretion in refusing temporary injunction in favour of the plaintiff appellant herein on well established principles of law, as such, the impugned order does not call for any interference, more so in view of the fact that the powers of the appellate Court in the matter of injunction are circumscribed and the appellate Court would be loath to interfere with the exercise of discretion and would not be justified in interfering with the exercise of discretion of the Court below under appeal solely on the grounds that the if the appellate Court had considered the matter at the trial stage, it may have come to a contrary conclusion. Thus, exercise of discretion by the trial Court in a reasonable and judicious manner would not be interfered by the appellate Court unless it is noticed that the trial Court has exercised discretion arbitrarily or has ignored relevant facts.
6. Viewed thus what has been observed, considered and analyzed hereinabove, the appeal fails and accordingly is **dismissed**.

MA No. 15/2006

1. The instant appeal has been preferred by the appellant herein against order/judgement dated 04.03.2006 (for short the impugned order) passed by the Court of 1st Additional District Judge, Srinagar, (for short the trial Court) upon an application filed by the respondents herein under Order 7 Rule (11) read with Section 10 CPC by virtue of which the plaint filed by the plaintiff appellant herein instituted against the defendants respondents herein came to be rejected being barred under Order 2 Rule (2) CPC.
2. Before advertng to the grounds of challenge urged in the appeal, facts reveal that a suit came to be filed by the plaintiff appellant herein

seeking specific performance of a contract against defendant respondent 1 herein claiming the occupation of building namely “Bhagat Building” situated at Amira Kadal Srinagar (for short the Building) based on a registered Power of Attorney executed by the defendant respondent 1 herein in favour of the plaintiff appellant herein.

In the written statement filed to the suit the defendant respondent 1 herein herein pleaded that the Power of Attorney executed by him stood revoked by a registered revocation deed and the said revocation deed came to be questioned by the plaintiff appellant herein in a subsequent suit wherein it was pleaded that he obtained the knowledge of the said revocation only after the aforesaid written statement was filed by the defendant respondent 1 herein.

An application under Order 7 Rule (11) CPC read with Section 10 CPC in the aforesaid suit came to be filed by defendant respondent 1 herein seeking stay of the suit or rejection of the plaint. The application came to be opposed by the plaintiff/appellant herein *inter-alia* on the ground that the subsequent suit was based on a separate cause of action, the parties in the suit were different and that the reliefs claimed as well are different inasmuch as the first suit was for specific performance for contract, whereas, the subsequent suit was for declaration of the revocation of Power of Attorney as void.

The trial Court upon considering the application in terms of the impugned order dated 04.03.2006 rejected the plaint of the plaintiff appellant herein on the ground that the same is hit by Order 2 Rule 2 CPC as plaintiff had knowledge about the revocation of power of attorney and yet the plaintiff appellant herein did not chose to question the same in the first suit.

3. The impugned order is being challenged by the plaintiff appellant herein on the grounds urged in the appeal.
4. Before proceeding to deal with the grounds urged in the appeal, it would be appropriate to refer to order 7 Rule (11) CPC as also Order 2 Rule (2) CPC hereunder: -

“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 provision of Rule 9];

[Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers 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 from correcting the valuation or supplying the requisite stamp papers, 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.”]

Order 2 Rule 2 CPC

“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.”

A reference hereunder to the judgement of the Apex Court passed in case titled as “**P.V. Guru Raj Reddy & Anr Vs. P. Neeradha Reddy & Ors reported in 2015(8) SCC 331**” becomes imperative wherein it has been held that rejection of the plaint under Order 7 Rule (11) CPC is a drastic power conferred upon the Court to terminate a civil action at the threshold. Therefore, the condition precedent to the exercise of the power are stringent.

5. Perusal of the record tends to show that plaintiff appellant herein had pleaded in the subsequent suit that he got knowledge of the revocation of Power of Attorney after the defendant respondent herein filed written statement to the earlier suit and same gave rise to the cause of action. The said plea of the plaintiff appellant herein had to be considered at the stage of considering the application filed by the defendant respondent herein under Order 7 Rule (11) CPC as the plea of date of knowledge was a triable issue thus, the suit ought not to have been thrown out at the threshold. The trial Court ought not to have picked up a few sentences here and there from the plaint and on the basis of the same declared that the plaintiff had the knowledge of revocation of Power of Attorney and rejected the plaint based on such inferential reading.

A reference in this regard to the judgement of the Apex Court passed in case titled as “**Chhotanben and Another Vs. Kiribhai Jalkrushnabhai Thakkar, reported in 2018 (6) SCC 422**”, would be relevant herein wherein the Apex Court has held as under:-

“What is relevant for answering the matter in issue in the context of the application under Order 7 Rule 11(d) CPC, is to examine the averments in the plaint. The plaint is required to be read as a whole. The defence available to the defendants or the plea taken by them in the written statement or any application filed by them, cannot be the basis to decide the application under Order 7 Rule 11(d). Only the averments in the plaint are germane.”

A further reference to the judgement of the Apex Court passed in case titled as “**Gurbux Singh V. Bhooralal reported in AIR 1964 SC 1810**” dealing with the provisions of Order 2 Rule (2) CPC would

be also appropriate and advantageous being relevant and germane herein wherein at para 6 following has been held:

6. In order that a plea of a bar under O. 2. R. 2(3), 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. 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 O. 2. R. 2, Civil Procedure Code 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.

The aforesaid position and principle of law has also been reiterated and followed by the Apex Court in case titled as **“Jayantilal Chimanlal Patel Vs. Vedilal Purushotam Patel being Appeal No. 3056-3057 of 2017.”**

A plain reading of the aforesaid judgments of the Apex Court makes it clear beyond any doubt that bar to the maintainability the subsequent suit under Order 2 Rule (2) CPC will be attracted only when the first suit would have been based on the same cause of action as the second suit, and that filing of the earlier suit and proving it as per law is imperative to sustain a plea under Order 2 Rule (2) CPC. Thus, the only escapable conclusion drawn from above is that the suit cannot be thrown out at the threshold while invoking the provisions of Order 2 Rule (2) CPC, as has been done in the instant case.

6. Viewed thus what has been observed, considered and analyzed hereinabove, the impugned judgement/order dated 04.03.2006 passed by the Court of 1st Additional District Judge, Srinagar, is not legally sustainable. Resultantly the appeal succeeds and accordingly is **allowed**, as a corollary whereof the impugned judgement/order dated 04.03.2006 is set-aside and matter is restored on the files of the trial Court with a direction to the trial Court to proceed in the matter in accordance with law. Trial Court shall summon the parties before proceeding further in the matter.
7. Disposed of.

SRINAGAR
22.09.2023
Ishaq

