

(2012) 09 DEL CK 0376

In the Delhi High Court

Case No : CM (M) 1179 of 2008 and CM No. 14754 of 2008

Nirmal Sareen and Others

APPELLANT

Vs

Nilam Kumari Kapur and Others

RESPONDENT

Date of Decision : 13-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 2(3), 10
Constitution of India, 1950 — Article 2, 2(3), 227

Citation : (2012) 9 AD 608

Hon'ble Judges : M.L. Mehta, J

Bench : Single Bench

Advocate : Anant Garg, for the Appellant; Ashok Mathur, Advocate for R-1, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Mehta, J.—This petition under Article 227 of the Constitution is directed against the order dated 27.08.08 of Additional District Judge whereby an application filed by the petitioners u/s 10 read with Order 2 Rule 2 CPC, was dismissed. For appreciating the controversy, brief narration of the facts seems necessary, which are these:

The respondent/ plaintiff and S.P. Kapoor jointly purchased, in equal share, suit premises bearing No. D-9, Kalindi Colony, New Delhi, vide registered sale deed dated 03.02.1971. Subsequently, by oral partition, they partitioned the said property. Thereafter, the terms and conditions of oral partition were reduced in writing by way of memorandum dated 03.09.1990. One of the clauses of the memorandum provided that in the event of either of the parties proposing to sell his/her share of the said property, said party shall give the first option of purchase to other party at market price. Sometime in the year 1990, Shri S.P. Kapoor gave the plaintiff, option to purchase a portion of his share, comprising of complete first floor and servant quarter on the second floor along with undivided rights in the land to the extent of 25 per cent of the plot. The respondent/

plaintiff failed to exercise the option, whereupon, late Shri Kapoor on or about 03.09.1990 agreed to sell the aforesaid portion to the petitioner Nirmal Sareen. Shri Kapoor expired sometime in September, 1990, after having left a Will dated 24.08.1988, appointing Mr. S.P. Malhotra and Ram Prakash Kapor (arrayed as defendants) as Executors thereof. Thereafter, Smt. Lalita Kapoor wife of deceased Shri S.P. Kapoor, while intending to sell barsati and the servant quarter on the terrace floor, gave an option of purchase of this portion, to the respondent, vide her letter dated 12.11.1991. The option was to be exercised within 15 days of this letter. The respondent, though, had denied having received the aforesaid letter, but, it was maintained by Ms Lalita Kapoor having sent the same. So far there is not much controversy involved.

2. The controversy arises from an undated letter, whereby Ms. Lalita Kapor again gave the offer to the respondent to purchase her remaining rights and shares in the aforesaid property comprising of Barsati hall and two toilets on the second floor and tools room on the ground floor, next to the garage, for a total sum of Rs.12 lakh. This offer, which was given by defendant No. 1 Ms Lalita Kapoor, was subject to the condition of cancellation of the documents, which she had executed in respect of these portions, with petitioners and defendant Sunil Malhotra as also the broker-defendant Mr. Dewan Kapoor. This was further subject to the condition that the option was to be exercised by the respondent/plaintiff before 31.05.1992. Thereafter, the son of the respondent met Ms. Lalita Kapoor at Pune, and was delivered a revised offer dated 13.03.1992, in supersession of the aforesaid undated letter. Vide this revised offer, the period of exercise of the option of purchase was limited to 15.04.1992. The specific terms of offer would be dealt with in the later part of this order. These offers, communicated vide the aforesaid un-dated letter and letter dated 13.03.1992, are the bones of contentions between the parties. The respondent's case is that she had accepted the offer on 26.03.1992, and also gave Rs. 10,000/- as token money to Ms Lalita Kapoor and, since she and other LRs of late Sh. S.P. Kapoor were in the process of creating interest in favour of the petitioners, she filed a suit for declaration and injunction on 10.04.1992, being renumbered Suit No. 695/06/1992. During the pendency of the said suit the respondent filed second suit, being re-numbered Suit No.688/06/94 on 14.12.1994, for declaration, injunction and specific performance.

3. The controversy that has arisen is the filing of the second suit by the respondent during the pendency of the first suit. It was in this background that the petitioners filed an application u/s 10 read with Order 2 Rule 2 CPC alleging non-maintainability of the subsequent suit.

4. The learned ADJ held that the matter in issue in the subsequent suit is not directly and substantially in issue in the previous suit, being different and thus, is not hit by the provision of Order 2 Rule 2 CPC. In arriving at this finding he reasoned as under:

The cause of action of filing the second suit has arisen after 30.04.1992. The

defendant no. 1 informed the plaintiff that in the event, the said documents could not be cancelled on or before 30.04.1992 the defendant no. 1 was willing to sell the remaining share/rights of the said property other than those covered by Mortgage Deed dated 27.12.1991, General Power of Attorney dt. 27.12.1991 and lease agreement dt. 26.12.1991 to the plaintiff for a sum of Rs.1 lacs. The plaintiff by a letter dt. 26th March, 1992 communicated the acceptance of the aforesaid offer to the defendant no. 1 and remitted a sum of Rs.10,000/- as token money towards sale consideration. When the defendant no. 1 failed to execute Sale Deed in favour of the plaintiff in terms of the aforesaid letter then the plaintiff filed the Second suit also incorporating some of the prayers made in the first suit. The relief of Specific Performance as prayed in the second suit has not been made as on the date of filing of the first suit, the cause of action for seeking the said prayer had not arise, meaning-therby that cause of action for filing the second suit had not arisen on the date of the filing of the first suit as it had arisen only after 30.04.1992 when the defendant has failed to execute the sale deed in favour of the plaintiff in terms of the aforesaid letter to the fact that in the event of the said document dated 30.04.1992 the defendant no. 1 was willing to sell the remaining share/right of the said property other than those covered by Mortgage Deed dt. 27.12.1991, General Power of Attorney dated 27.12.1991 and lease agreement dated 26.12.1991 to the plaintiff for a sum of Rs. One lac. The plaintiff had written a letter dated 26.03.1992 to the defendant no. 1 and remitted a sum of Rs.10,000/- as taken money towards the consideration.

5. This order of the ADJ is under challenge in the instant petition. The main contention of learned counsel for the petitioners is, the same that was raised before the learned ADJ, that the filing of the subsequent suit was barred under the provision of Order 2 Rule 2 CPC, in as much as the additional relief of specific performance, claimed by the respondent in the subsequent suit, was available with her at the time of filing of the first suit, and she having not chosen to avail the same, is precluded from availing subsequently. The learned counsel relies upon the judgments of this Court in Kamal Kishore Saboo Vs. Nawabzada Humayun Kamal Hasan Khan, 2001 II AD (DELHI) 635 and N.V. Srinivasa Murthy and Others Vs. Mariyamma (dead) by Proposed LRs. and Others, .

6. Before proceeding further, I may note that in the case of Kamal Kishore Saboo (supra) the facts were entirely different. In the first suit that was filed it was averred that the defendant was not adhering to the terms of the agreement to sell and was not performing his part of the contract and also that he was trying to sell the properties to some other party. Despite all this, the plaintiff had filed the suit for permanent injunction only. It was in these facts, that it was held that the cause of action for seeking relief of specific performance had already ripen at the time of filing of this suit, the second suit being based on the same facts and averments, was barred under Order 2 Rule 2 (3) CPC. In the case of N.V. Srinivasa Murthy and Others (supra) also the facts were entirely different. The cause of action on which the subsequent suit was filed was found to be available

at the time of filing of the first suit.

7. In the instant case, the offer of option that was given by defendant Lalita Kapoor to the respondent/ plaintiff, vide the undated letter was for the purchase of her remaining rights and shares, as stated above for a sum of Rs.12 lakh, subject to cancellation of the documents which she had executed with the petitioners and other defendants. It was also stipulated that if these conditions are not fulfilled by 30.04.1992, then she offers to sell all her remaining rights/ shares to the respondent/ plaintiff for a consideration of Rs.1 lakh, other than her rights and shares covered by the documents executed by her with the petitioners and other defendants, such as Mortgage Deed dated 27.12.1991 as executed with defendant Suman Malhotra, Power of Attorney dated 27.12.1991 in favour of defendant/ broker Mr. Dewan Kapoor, Lease Agreement dated 26.12.1991 with petitioner/ defendant Baldev Sareen. As noted, the period of exercising option in writing by the respondent was before 31.05.1992. Thereafter, undisputedly, this offer was superseded by the offer dated 31.03.1992, which was given by defendant Lalita Kapoor to the son of respondent/ plaintiff. Vide this, she has maintained her offer of selling the aforesaid portions for a total sum of Rs.12.00 lakhs, subject to cancellation of the documents. In addition to the aforesaid documents, one more document i.e. Agreement to Sell between Lalita Kapoor and Sarins was also mentioned. This letter also did not contain the offer of Rs.1 lakh for remaining rights, in the event of the documents having not cancelled up till 30.04.1992, as was mentioned in the un-dated letter. As is noted above, the period of exercising option vide this letter of 13.03.1992 was before 15.04.1992.

8. This is beyond the domain of this Court in the instant proceedings to see as to whether the respondent/plaintiff was entitled to the relief of specific performance or not, as it is a triable issue as to whether the respondent/ plaintiff had accepted or not the offer vide her letter of 26.03.1992 and paid Rs.10,000/- as earnest money, and whether it was in response to the offer contained in undated letter or in response to the offer contained in letter dated 13.03.1992. This is a fact to be tried by the Trial Court.

9. When the first suit was filed on 10.04.1992 for declaration/ injunction, the respondent/ plaintiff did not have the cause of action for filing of suit of specific performance, inasmuch as the time of exercising option given vide letter dated 13.03.1992 being up to 15.04.1992, had not expired. The filing of the suit for specific performance on 10.04.1992 would have been pre-matured and suffered dismissal on this ground alone. Without further going into as to whether cause of action for filing of suit for specific performance did arise or not in favour of the respondent/plaintiff after 15.04.1992, it would suffice to say that both the suits had separate causes of actions, though they arose out of the same transaction. That being so, the subsequent suit could not be said to be barred by Section 10 CPC or hit by Order 2 Rule 2 CPC.

10. The law in this regard is well settled and reference can be made to the

decision of the Supreme Court in *Kunjan Nair Sivaraman Nair Vs. Narayanan Nair and Others*, wherein it was held thus:

Order 2 concerns framing of a suit and lays down the general principle that the plaintiff shall include whole of his claim in the framing of the suit which the plaintiff is entitled to make in respect of a cause of action; and if he does not do so then he is visited with the consequences indicated therein. In other words, it provides that all reliefs arising out of the same cause of action shall be set out in one and the same suit, and further prescribes the consequences if the plaintiff omits to do so. Order 2 Rule 2 centres round one and the same cause of action. The salutary principle behind Order 2 Rule 2 is that a defendant or defendants should not be vexed time and again for the same cause by splitting the claim and the reliefs for being indicted in successive litigations. It is, therefore, provided that the plaintiff-respondent must not abandon any part of the claim without the leave of the court and must claim the whole relief or entire bundle of reliefs available to him in respect of that very same cause of action. Otherwise, he will thereafter be precluded from so doing in any subsequent litigation that he may commence.

So far as Order 2 Rule 2(3) is concerned, before the second suit of the plaintiff/respondent can be held to be barred by the same, it must be shown that the earlier suit was based. The illustrations given under the rule clearly bring out this position. If the cause of action is the same in both the suits and if in the earlier suit the plaintiff-respondent had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had omitted to press into service, except with the leave of the court, in that suit cannot be subsequently prayed for. The rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. One great criterion, when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit, is whether the same evidence will maintain both actions.

11. In *Shri Inacio Martins, Deceased through LRs. Vs. Narayan Hari Naik and others*, , almost identical question arose. In that case, the plaintiff had prayed for protection of his possession by a prohibitory injunction. That prayer was refused. Subsequent suit was for recovery of possession. The Supreme Court held that in the former suit the only relief that the Court could have granted was in regard to the declaration sought for, which the Court could not have granted in view of the provisions of the Specific Relief Act. The cause of action for the first suit was based on the apprehension about likely forcible dispossession. The cause of action of the suit was not on the premise that he had, in fact, been illegally and forcefully dispossessed and needed the courts' assistance for restoration of possession. In that background this Court held that subsequent suit was based on a distinct cause of action, not found in or formed the subject matter of the former suit. The ratio of the decision has full application to the facts of the

instant case. In view of my above discussion, I do not see any infirmity or illegality in the impugned order of the ADJ. Consequently, the petition is dismissed.