Pramod Kumar vs Zalak Singh . on 10 May, 2019

Equivalent citations: AIR 2019 SUPREME COURT 2465, 2019 (6) SCC 621, AIRONLINE 2019 SC 298, 2019 (5) ABR 69, (2019) 128 CUT LT 701, (2019) 203 ALLINDCAS 40, (2019) 2 ALL RENTCAS 322, (2019) 2 CLR 163 (SC), (2019) 2 KER LT 910, (2019) 2 WLC(SC)CVL 326, (2019) 3 CIVILCOURTC 480, (2019) 3 PAT LJR 75, (2019) 3 RAJ LW 2661, (2019) 3 RECCIVR 160, (2019) 4 ANDHLD 198, (2019) 4 CAL HN 50, (2019) 4 CALLT 65, (2019) 4 ICC 278, (2019) 8 SCALE 288, AIR 2019 SC (CIV) 1977, (2019) 2 CURCC 365 (2019) 261 DLT 79, (2019) 261 DLT 79

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Bench: K.M. Joseph, Ashok Bhushan

Reportab

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs. 1055 of 2019

PRAMOD KUMAR & ANR. Appellant(s)

VERSUS

ZALAK SINGH & ORS. Respondent(s)

J U D G M E N T

K.M. JOSEPH, J.

1. This appeal by special leave is directed against the judgment and order dated 31.08.2012 passed by the High Court in Second Appeal No. 5 of 1995. By the impugned judgment, the High Court has set aside the concurrent findings of the Courts below resulting in dismissal of the suit filed by the respondents (plaintiffs) on the ground that the suit was barred by Order II Rule 2 of the Code of Civil Procedure, 1908 (hereinafter referred to 'the CPC') as also constructive res judicata. The High Court has remanded the matter to the First Appellate Court to decide on merits. Reason:

2. One Tikaram was the husband of respondent No.4 and the father of respondent Nos. 1 to 3. He was holding 8.22 acres of land in Khasra No.189 at Village Gondia in his name. On 21.01.1959, he sold the land to the extent of 3.20 acres out of the total 8.22 acres to the appellants and thereafter,

on 11.02.1959, he sold the remaining portion of 4.82 acres of land, which was the balance out of 8.22 acres, also to the appellants. Tikaram passed away on 15.07.1959.

2. The respondents filed a suit (bearing Civil Suit No. 131 of 1963) for setting aside the Sale Deed dated 21.01.1959 and for other reliefs. The allegation made by the respondents in the suit was that the land was a joint family ancestral property and he had sold it for immoral purposes and in a manner prejudicial to the interest of joint family. He was addicted to drink and there was no necessity to sell the property.

3. On 31.01.1969, the Trial Court dismissed the said suit holding that Tikaram was the owner of the property due to the partition effected in the year 1957. Hence, he had the right to sell the suit land. The appellants were bona fide purchasers.

4. Aggrieved by the decree of the Trial Court, the respondents filed an appeal (bearing Civil Appeal NO. 22 of 1969) on 10.02.1971.

5. The respondents again filed the present suit (bearing Civil Suit No. 34 of 1971) challenging the Sale Deed dated 11.02.1959 and seeking other reliefs. It is the said suit which came to be dismissed both by the Trial Court and the First Appellate Court. The Trial Court answered the issues including whether the Suit is barred under Order II Rule 2 and also affected by constructive res judicata. It found that the suit is liable to be dismissed on the ground of Order II Rule 2 and constructive res judicata. The dismissal by the Appellate Court was essentially on the basis of the provisions of Order II Rule 2 of the CPC as also constructive res judicata on the score that the second alienation dated 21.02.1959 ought to have been the subject matter of the earlier suit. The Appellate Court, in fact, found that the Trial Court was right in answering the other points. It is to be noted that the judgment of the Trial Court in the first suit came to be reversed in the civil appeal and the same has become final.

6. The High Court, however, reversing the orders of both the courts found that Order II Rule 2 will not be a bar. For Order II Rule 2, the cause of action in the first suit and the cause of action in the second suit must be identical. In this case, there were two alienations by the Tikaram giving rise to two cause of actions. It is also found that constructive res judicata will not apply.

7. We have heard learned counsel for the parties and perused the record.

8. Learned counsel for the appellants contended that the High Court has clearly erred in coming to the conclusion that Order II Rule 2 was not a bar. Order II Rule 2 is indeed attracted. He took us through the pleadings in the two suits and contended that the cause of action in the second suit is identical with the cause of action in the first suit. As on the date of the institution of the first suit, the second alienation was very much available to be impugned and it is not open to the respondents to split the cause of action in separate suits and seek relief which is precisely what has been done by the respondents in this case. He relied upon the judgment of this Court in Coffee Board v. Ramesh Exports Private Limited1 and A.B.C. Laminart Pvt. Ltd. & Anr. v. A.P. Agencies, Salem2.

9. Learned counsel for the respondents drew our attention to Order VII Rule 1. He points out that the cause of action in both the suits are different. He also drew our attention to Article 109 of the Limitation Act, 1963, which reads as follows:

109.		
By a Hindu governed by Mitakshara law to set aside his father's alienation of ancestral property.	Twelve years	When the alienee takes possession of the property.

10. He would contend that the period of limitation as far as the second sale deed is 1 (2014) 6 SCC 424 2 (1989) 2 SCC 163 different from the period of limitation as far as the first sale deed is concerned. The period of limitation as far as the second alienation is concerned will expire only on the expiry of 12 years from the date of taking of possession by the alienee. He further relied on the judgment of this Court in Alka Gupta v. Narender Gupta3.

11. The first question, which we are called upon to decide, is whether the High Court was right in holding that the bar, under Order II Rule 2, will not apply in the facts of this case.

12. Before, we advert to the decisions on the point it would be profitable to refer to the pleadings in two suits.

13. In Civil Suit No. 131 of 1963, we notice the following pleadings. The respondents (plaintiffs) are Hindus governed by Mitakshara School of Law as administered by Benaras School. Tikaram's father died when Tikaram was a minor. During the minority of Tikaram, the property was managed by his mother. On becoming major, Tikaram fell into bad and immoral habits and grew into a drunkard. 3 (2010) 10 SCC 141 He was also addicted to other vices. He indulged in wasteful habits and therefore sold his joint family ancestral property for immoral purposes and in a manner prejudicial to the interest of the joint family. On the intervention of relations, a partition was entered into on 11.01.1957, which was duly registered.

14. At the time of partition, plaintiff No.2 though begotten was born afterwards on 02.06.1957 and as such he could not and was not made a party to the above partition. Plaintiff No. 3 was born on 26.08.1959 and therefore he had interest in the suit property. At the time of partition, in Khasra No. 189 an area of 8.22 acres was not included in the share of either deceased Tikaram or plaintiff No.1 but was kept joint thereafter. We may notice the following:

> "(g) That in or about the month of September, 1958, plaintiffs knew that Tikaram wanted to sale their lands and hence they published a general prohibitory notice in the issue dated 14th September, 1958 of the Hindu Daily "NAVBHARAT" which has wide circulation at Gondia and the surrounding area warning public in general not to accept any transfer of land from deceased Tikaram. That subsequently the plaintiffs learnt that the defendants intended to enter into a contract of sale with deceased

> Tikaram in respect of the suit land and hence they served the defendants with a written notice dated 4.1.1959 asking them to desist from purchasing land mentioned in para 1(e) above.
>
> 3.That, however, despite warning and notices the defendants purchased a portion of Kh.No. 189 admeasuring 3.20 acres, as particularly described in the plaintiff map by letters Pa, Pha, Ba, Bha, Ma and in red colour, for the alleged consideration of Rs.8,000/- vide registered sale deed dated 21.1.1959."

15. It is the further case that the property was the ancestral joint family property and the alienation was not one for necessity or for conferring benefits upon the estate or for payment of antecedent debt. It is liable to be set aside. Plaintiff Nos. 1 to 3 have interest in the land by birth and plaintiff No. 4 (the widow of Tikaram) had a share with them. The payment of consideration is fictitious and it never passed. Being without consideration, the alienations were not valid and not binding on the plaintiffs and thus liable to be set aside for this reason. Thereafter, there were certain further allegations with which we are not concerned.

16. The reliefs sought by the plaintiffs in the plaint were to declare the sale deed as not binding on the interest of plaintiff No. 4 and for delivery of possession to her or in the alternative a decree for setting aside the sale deed dated 21.01.1957 and for delivery of possession to the plaintiff, enquiry as to mesne profits and for mandatory injunction to demolish certain constructions.

17. Let us now look at the pleadings in the second suit viz. Civil Suit No. 34 of 1971.

18. Herein also, the plaintiffs and the defendants are the same. It is stated inter alia as follows:

> The Bhumidhari land Kh. No. 189 area 8.22 acres situated in village Gondia is the ancestral property of plaintiff Nos. 1, 2 and 3.
>
> Plaintiff No. 4 is the mother of plaintiff Nos.
>
> 1 to 3. The plaintiffs are Hindu and are governed by Mitakshara Law as administered by Benaras School. The same allegations were raised about Tikaram having fallen into immoral habits and growing into an incorrigible drunkard and selling joint family ancestral lands for immoral purposes. It also referred to partition dated 11.01.1957. There were also allegations relating to Kh. No. 189 wherein 8.22 acres of land was not included either in the share of deceased Tikaram or plaintiff No.1 but was kept joint. It is relevant to extract para 3 of the second plaint which is to the following effect:-
>
> "That, however, despite warning and notices the defendants purchased a portion of Kh. NO. 189 from the deceased father of the plaintiffs admeasuring 3.20 acres vide sale deed dated 21.01.1959. The plaintiffs have filed C.S. No. 131 of 1963 against the defendants for setting aside the said sale. The suit having been dismissed by the trial

> court the plaintiffs have filed Civil Appeal No. 22/69 against the said judgment and decree which is now pending in the Court of the Assistant Judge, at Bhandara 4(a). That Tikaram the deceased father of the plaintiffs again on 11.02.1959 sold an area of 4.82 acres out of suit Kh. No. 189 to the plaintiffs under the same circumstances stated above and as described in the plaintiff map by letters Ka, Kha, Ga, Gha, Cha, Chha, Ja, Ta, Tha, Da, Na and Pa and in red colour, for the alleged consideration of Rs.4000/- vide registered sale deed dated 11.2.1959 and the same is sought to be set aside in this suit."

19. It is further stated that the land is to be treated as an ancestral joint family property and the alienation being not one for necessity or for conferring benefits upon the estate or for payment of antecedent debt and it is liable to be set aside.

20. Having referred to the pleadings, let us examine what the High Court has held. The High Court holds that all successive claims, arising under the same obligation, shall be deemed to constitute one cause of action. It further finds that the crux of the matter is, there are two alienations of separate areas of the land on different dates, and although they are in favour of the same parties, it would give rise to more than one cause of action. It was further found that by restricting to first suit to the first alienation, it could not be found that plaintiff has split-up the claims or split-up the remedies. The execution of the second sale deed in favour of the same party gives rise to distinctive and separate cause of action. The High Court further proceeds to refer to the illustrations in Order II Rule 2 CPC, which reads as follows:

> "A lets a house to B at a yearly rent of Rs. 1200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907".

21. Thereafter, the High Court proceeds to take a case where A owns two houses and he let them to B. A suit is filed in respect of arrears of rent in respect of one house, though arrears were there in respect of the other house also. The High Court takes the view that it is the choice of the plaintiff either to unite or not to unite both the causes of action and the second suit would not be barred.

22. In the case of Mohammad Khalil Khan v. Mehbub Ali Mian4, the earlier suit related to the property at Oudh. The parties belonged to the Sunni sect and the properties belonged to one Rani Barkatunnissa who owned properties at Shahjahanpur 4 AIR (36) 1949 Privy Council 78 and Oudh. The first suit did not include the property at Shahjahanpur. The Court proceeded to uphold the views taken by the Courts in India and maintained the finding that second suit, in relation to the property at Shahjahanpur, was barred by virtue of Order II Rule 2. It would be profitable to refer to paragraphs 45 and 46 as they throw light upon what constitutes cause of action:

> "45. Shortly stated O.2, R.2, Civil P.C., enacts that if a plaintiff fails to sue for the whole of the claim which he is entitled to make in respect of a cause of action in the first suit, then he is precluded from suing in a second suit in respect of the portion so omitted. As pointed out in Moonshee Buzloor Ruheem v. Shumsunnissa Begum,

(1867) 11 M.I.A. 551.

The correct test in all cases of this kind is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit....

The object of the rule is clearly to avoid splitting up of claims and to prevent multiplicity of suits".

46. "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." I agree with the definition given by the Master of Rolls of a cause of action, and that it includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to maintain his action. Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set out in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

23. The Privy Council proceeded to summarize the principles in paragraph 61, which reads as follows:

> "61. The principles laid down in the cases thus far discussed may be thus summarized:
>
> (1) The correct test in cases falling under O.2 R.2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit. (2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.
>
> (3) If the evidence to support the two claims is different, then the causes of action are also different.
>
> (4) The causes of action in the two suits may be considered to be the same if in substance they are identical. (5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers..... to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

24. Still further, in paragraph 63, the Court has proceeded to conclude as follows:

> "63. The plaintiffs' cause of action to recover the properties consists of those facts which would entitle them to establish their title to the properties. These facts are the same with respect to both properties, these being, that Rani Barkatunnissa was the owner of the properties; that she died on 13th February, 1927, that she was a Sunni by

faith and that they are her heirs under the Muhammadan law.

Having regard to the conduct of the parties their Lordships take the view that the course of dealing by the parties in respect of both properties was the same and the denial of the plaintiffs' title to the Oudh property and the possession of the Shahjahanpur property by the defendants obtained as a result of that denial formed part of the same transaction. On this question, the learned Judges of the High court have expressed their opinion in two places in their judgment as follows:

"In the case before us the trespass on title or slander of title in the case so far as the Oudh suit was concerned was not distinct and different either in point of time or in point of character from the trespass on possession in the case of the Shahjahanpur property..." Again, it is stated as follows:

"Here in the present case we find that the two trespasses, one on the Shahjahanpur property and the other on the Oudh property were similar in character and formed part of the same transaction and the evidence to prove the facts which it was necessary for the plaintiffs to prove... was the same and the bundle of essential facts was also the same."

25. At this juncture, we may advert to Order II Rule 2, which reads as follows:

"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."

26. Order II Rule 2(1) provides that a plaintiff is to include the whole of the claim, which he is entitled to make, in respect of the cause of action. However, it is open to him to relinquish any portion of the claim. Order II Rule 2 provides for the consequences of relinquishment of a part of a claim and also the consequences of omitting a part of the claim. It declares that if a plaintiff omits to sue or relinquishes intentionally any portion of his claim, he shall be barred from suing on that portion so omitted or relinquished. Order II Rule 2(3), however, deals with the effect of omission to sue for all or any of the reliefs in respect of the same cause of action. The consequences of such omission will be to precluded plaintiff from suing for any relief which is so omitted. The only

exception is when he obtains leave of the Court. In a recent judgment of this Court, the distinction between Order II Rule 2(1) and Order II Rule 2(3) has been succinctly brought out in Virgo Industries (Eng.) (P) Ltd. v. Venturetech Solutions (P) Ltd.5,. This Court, inter alia, has held as follows:

> "Order 2 Rule 1 CPC requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 CPC contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order 2 Rule 2 makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. Leave of the Court is contemplated by Order 2 Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the court had been obtained. It is clear from a conjoint reading of the provisions of 5 (2013) 1 SCC 625 Order 2 Rules 2(2) and (3)that the aforesaid two sub-rules of Order 2 Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit proved that at the time of omission to claim the particular relief he had obtained leave of the court in the first suit.

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 due satisfaction and for good and sufficient reasons."

27. Thus, in respect of omission to include a part of the claim or relinquishing a part of the claim flowing from a cause of action, the result is that the plaintiff is totally barred from instituting a suit later in respect of the claim so omitted or relinquished. However, if different reliefs could be sought for in one suit arising out of a cause of action, if leave is obtained from the Court, then a second suit, for a different relief than one claimed in the earlier suit, can be prayed for. There are three expressions which are found in Order II Rule 2. Firstly, there is reference to the word "cause of action", secondly the word "claim is alluded to"

and finally reference is made to "relief".

28. The defence, which is set up by the defendants, would be irrelevant to determine what cause of action means. The reliefs, which are sought by the plaintiffs, will not be determinative of what

constitutes cause of action. Cause of action, as explained by the Privy Council in Mohammad Khalil Khan case (supra), means the Media through which the plaintiff seeks to persuade the Court to grant him relief. It could, therefore, be said to be the factual and legal basis or premise upon which the Court is invited by the plaintiff to decide the case in his favour. It is also clear that the cause of action, in both the suits, must be identical. In order that it be identical, what matters, is the substance of the matter.

29. In Coffee Board case (supra), the respondent purchased coffee at the export auctions and exported them to certain countries. He filed two suits. The Coffee Board had provided for stamps system for exporting of coffee. Complaint of the plaintiff was that the defendants failed to supply the stamps but there was delay and it resulted in losses. This is what the Court held:

> "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;

2007 (11)| SCC 75). 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.

xxx xxx xxx

16. In the plaint in OS No. 3150 of 1985 being the earlier suit, it has been claimed by the respondent being the plaintiff therein that the appellant being the defendants failed to supply ICO stamps for 268.08 tonnes of coffee purchased by him for export between 11- 8-1982 and 8-9-1982, in spite of its assurances leading to delay in the shipment of the coffee resulting in losses to the plaintiff. On the basis of the same, the respondent claimed for the losses suffered by him along with damages. The respondent further averred that the cause of action for the suit arose on various dates when the respondent purchased coffee from the appellant in the auctions held by them on the assurance that the ICO stamps will be supplied by the appellant to them.

17. The cause of action in the above suit is the failure of ICO to supply stamps to the respondent in spite of its assurances. The respondent to ensure the success of his claim, was required to prove that on account of the omission of the appellant i.e failure to provide ICO stamps for the coffee purchased by them, the respondent suffered losses."

30. The Court went on further hold that plaintiff could only succeed only by proving failure by the appellant to provide stamps. The grounds of difference in the suit were found to be as regards the amount of coffee and the date when the same was purchased.

31. The respondents sought support from the judgment in Alka Gupta v. Narender Kumar Gupta6. The appellants and the respondents entered into a partnership to run an institute at place "P" in

New Delhi. Thereafter, an agreement was entered into to sell the undivided half share. The respondents paid only part of the sale consideration which led to the suit by the appellant for the balance amount. The suit was decreed. Thereafter, the appellant filed subsequent suit for rendition of accounts for the period from 05.04.2000, which was date on which the partnership deed was executed till 31.07.2004. According to the appellant, the partnership was one at will and was dissolved. This Court overturned the view of the High Court that the suit was barred by Order II Rule 2 and by the principles of constructive res judicata. The Court followed the judgment of this Court in Gurbux 6 (2010) 10 SCC 141 Singh v. Bhooralal7, and inter alia, held as follows:

> "A Division Bench upheld that decision on the grounds that the suit was barred by Order 2 Rule 2 CPC and that the appellant had settled all her claims with the respondent under the bayana agreement dated 29.06.2004. The present appeal was then filed by special leave.
>
> The cause of action for the first suit was non-payment of price under the agreement of sale dated 29.06.2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved partnership constituted under the deed dated 05.04.2000. Merely because the agreement of sale related to an immovable property at R and the business run therein under the name of "Takshila Institute" and the second suit referred to a partnership in regard to business run at P also under the same name of Takshila Institute, it could not be assumed that the two suits related to the same cause of action so as to attract Order 2 Rule 2 CPC."
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> 32. As regards the plea of res judicata, here is what the Court held as follows:-
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> "Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is on

7 AIR 1964 SC 1810 the basis of constructive res judicata.

The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In the present case, there was no plea of constructive res judicata, nor had the appellant-plaintiff an opportunity to meet the case based on such plea. Res judicata means "a thing adjudicated", that is, an issue that is finally settled by judicial decision. The principle of constructive res judicata emerges from Explanation IV to Section 11 CPC when read with Explanation III thereof both of which explain the concept of "matter directly and substantially in issue". In view thereof, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2 Rule 2 CPC relates to reliefs which ought to have been claimed on the same cause of action but not claimed."

33. In Union of India v. H.K. Dhruv8, the Court held, inter alia, as follows:

> "4. Having heard the learned Senior Counsel for the appellant as also the respondent appearing in person, we are satisfied that no fault can be found with the view taken by the High Court. In order to attract applicability of the 8 (2005) 10 SCC 218 bar enacted by Order 2 Rule 2 CPC, it is necessary that the cause of action on which the subsequent claim is founded should have arisen to the claimant when he sought for enforcement of the first claim before any court. On the facts found and as recorded in the judgment of the High Court and with which we find no reason to differ, the second demand raised by the respondent was not available to be made a a part of the claim raised in the first application.

The bar enacted by Order 2 Rule 2 CPC is clearly not attracted." (Emphasis supplied)

34. In S. Nazeer Ahmed v. State Bank of Mysore9, the appellant/defendant borrowed some money from the plaintiff's bank by hypothecating and by mortgaging two items. The money suit filed by the bank was decreed. The proceedings in execution was unsuccessful as the bus, which was hypothecated, could not be traced. The bank prayed to proceed against the mortgaged property in execution. It was resisted by the appellant by pointing out that there was no decree on the mortgage and the bank could only attach the properties and could not sell it straightaway. The said objection was upheld. Thereupon, the bank instituted the second 9 (2007) 11 SCC 75 suit for enforcement of the equitable mortgage. This Court proceeded to take a view that the cause of action in the second suit was different. The Court also further drew support from Order XXXIV Rule 14 and proceeded to hold as follows:

> "14. Applying the test so laid down, it is not possible to come to the conclusion that the suit to enforce the equitable mortgage is hit by Order 2 Rule 2 of the Code in view of the earlier suit for recovery of the mid term loan, especially in the context of Order 34 Rule 14 of the Code. The two causes of action are different, though they might have been parts of the same transaction. Even otherwise, Order 34 Rule 14 read with Rule 15 removes the bar if any that may be attracted by virtue of Order 2 Rule 2 of the Code. The decision of the Rangoon High Court in Pyu Municipality Vs. U. Tun Nyein (AIR 1933 Rangoon 158) relied on by learned counsel for the appellant does not enable him to successfully canvass for the position that the present suit was barred by Order 2 Rule 2 of the Code, as the said decision itself has pointed out the effect of Order 34 Rule 14 and in the light of what we have stated above."

> 35. Let us first consider the argument of the learned counsel for the respondent that under Article 109 of the Limitation Act, the period of limitation commences from the date of possession obtained by alienee, and therefore, the cause of action for the second suit, in respect of the sale deed dated 21.02.1959, would be different from the earlier suit, as in respect of the sale deed of an earlier date, it would have a different period of limitation. We are of the view that, that the period of limitation under Article 109 is different from the period of limitation in respect of the first sale deed,

> cannot operate so as to exclude the bar under Order II Rule 2. The principle underlying Order II Rule 2 is that no man can be vexed twice over the same cause of action. All claims and reliefs, which arise from a cause of action, must be comprehended in one single suit. Order II Rule 2 provides for the principle of repose. If this be the underlying object of Order II Rule 2, the fact that at the time when the first suit was filed even though the second alienation could be challenged and it stemmed from one single cause of action and not two different causes of action, the mere fact that a different period of limitation is provided, cannot stand in the way of the bar under Order II Rule 2.
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> 36. Now, let us consider the further argument of the learned counsel for the respondent based on Order VII Rule 1 CPC. Order VII Rule 1 provides for the particulars to be contained in a plaint.

It, inter alia, provides that the facts constituting the cause of action and when it arose, be pleaded. Apparently, the argument of the respondents is having regard to Article 109 of the Limitation Act, the cause of action as provided in Article 109, would commence from the date of the deed being 11.02.1959, and therefore, it has a different period of limitation as already noted. It indicates that cause of action, raised in the second suit, is not identical with a cause of action in the first suit. We are of the view that this argument proceeds on a misapprehension as to what constitutes the cause of action. Cause of action has been explained in many decisions. It is the bundle of facts, which if traversed, must be proved. However, as laid down by the Privy Council, it would be understood also to mean the media through which Court's intervention is sought by the plaintiff.

37. What is the legal basis/factual matrix premised on which the plaintiff seeks a decree?

38. In this case, we have noticed the pleadings. The case of the plaintiffs appears to be that the property is ancestral property. Their late father Tikaram was given to wasteful ways and addicted to drink and otherwise. He was given to selling properties. His well-wishers intervened and partition ensued. However, 8.22 acres falling in Kh.No.189 was kept out of the partition deed. He decided to sell 8.22 acres without there being any legal necessity and without any benefit to the joint family. The first part of the transaction, which consisted of two parts, pertained to sale deed dated 21.01.1959 and that was the subject matter of the first suit. At the time of filing of the said first suit, late predecessor-in-interest of the plaintiff, had also executed another sale deed which constituted the remaining portion which consisted of the 8.22 acres as already noticed. The suits contained virtually identical averments in regard to both the transactions. The first suit was filed in 1963 and the second suit filed in the year 1971.

39. We are of the view that in such circumstances, this is a case where the plaintiff ought to have included relief in the form of setting aside the second sale deed also. This is not a case where the second sale deed had not been executed when the plaintiff instituted the first suit. We are not, for a moment, declaring the effect of the sale deed having been executed subsequently to the institution of the suit as we do not have to pronounce on the effect of such a sale. We are only emphasizing that it was open to the respondent/plaintiff to seek relief in respect of the second sale executed by their

predecessor-in- interest and what is more important in favour of the same parties (defendants) who are the appellants before us.

40. The High Court has proceeded to reason based on Order II Rule 3. It is open to the plaintiff to combine causes of action. Order II Rule 3 reads as follows:

> "3. Joinder of causes of action (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.
>
> (2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit."

41. It is undoubtedly true that the law does not compel a litigant to combine one or more causes of action in a suit. It is open to a plaintiff, if he so wishes, however to combine more than one cause of action against same parties in one suit. However, it is undoubtedly true that the embargo in Order II Rule 2 will arise only if the claim, which is omitted or relinquished and the reliefs which are omitted and not claimed, arise from one cause of action. If there is more than one cause of action, Order II Rule 2 will not apply. It is undoubtedly also true that Order II Rule 2 manifests a technical rule as it has the effect of posing an obstacle in the path of a litigant ventilating his grievance in the Courts. But as already noted, there is an equally important principle that no person shall be vexed twice on the same cause of action.

42. That on the same cause of action, the plaintiffs having omitted to sue in respect of the sale deed in question, we would think that bar under Order II Rule 2 would apply. In this view of the matter we do not think it necessary to pronounce on the question relating to constructive res judicata. In the light of this, we allow the appeal and set aside the judgment of the High Court. Parties to bear their respective costs.

.....J. [ASHOK BHUSHAN] .....J. [K.M. JOSEPH] NEW DELHI;

MAY 10, 2019.