

VURIMI PULLARAO S/O SATYANARAYANA

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v.

VEMARI VYANKATA RADHARANI W/O  
DHANKOTESHWARRAO & ANR

(Civil Appeal No. 9065 of 2019)

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NOVEMBER 27, 2019

[DR. DHANANJAYA Y CHANDRACHUD AND  
AJAY RASTOGI, JJ.]

*Code of Civil Procedure, 1908:*

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*Order 2 Rule 2 – Relinquishment of part of claim – Bar under Order 2 Rule 2 – When attracted – On facts, plaintiff-appellant filed suit for injunction restraining defendant-respondent from obstructing their possession – Six months later, plaintiff filed suit for specific performance of agreement to sell the property – Dismissal of earlier suit for injunction for default – Trial court dismissed the suit for specific performance holding that the plaintiff had omitted to sue for specific performance of the agreement although the cause of action had accrued in favour of the plaintiff at the time when the earlier suit for injunction was instituted; and that the plaintiff had failed to seek the leave of the Court, when the suit for injunction was instituted, to file a subsequent suit on the same cause of action seeking performance – Concurrent findings by the courts below that the suit is barred under order 2 rule 2 – Interference with – Held: In order to attract the applicability of the bar enunciated under Order 2 Rule 2, the cause of action on which the subsequent claim is founded ought to have arisen to the plaintiff when enforcement of the first claim was sought before the Court – In the instant case, the earlier suit for injunction contained a recital of the agreement to sell; the price fixed; the payment of earnest money; the demand for performance and the failure of the defendant to perform the contract – Indeed, the plaintiff also asserted that she was going to institute a suit for specific performance of the agreement – Cause of action for the suit for specific performance had arisen when the plaintiff had notice of the denial by the defendant to perform the contract – There was a complete identity of the cause of action between the earlier suit and the cause of*

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- A *action for the subsequent suit – This is a relief for which the plaintiff was entitled to sue when the earlier suit for injunction was instituted, however the plaintiff omitted to sue for specific performance – Having omitted the claim for relief without the leave of the court, the bar under Order 2 Rule 2(3) would stand attracted.*
- B *Order 2 Rule 2(1) – Principle under – Held: Order 2 Rule 2(1) adopts the principle that the law does not countenance a multiplicity of litigation – Hence, a plaintiff who is entitled to assert a claim for relief on the basis of a cause of action must include the whole of the claim – However, it is open to the plaintiff to relinquish any portion of the claim in order to bring the suit within the jurisdiction of the court – Plaintiff who omits to sue in respect of or intentionally relinquishes any portion of the claim, shall not afterwards be entitled to sue in respect of the portion omitted or relinquished – Order 2 Rule 2(3) stipulates that a person who is entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs – However, a plaintiff who omits to sue for all the reliefs, without the leave of the Court, shall not afterwards sue for any relief so omitted – Leave of the Court will obviate the consequence which arises under Order 2 Rule 2(3).*

#### **Disposing of the appeals, the Court**

- E **HELD: 1.1 Order 2 Rule 2(1) CPC is premised on the foundation that the whole of the claim which a plaintiff CPC is entitled to make in respect of a cause of action must be included. However, it is open to the plaintiff to relinquish any portion of the claim in order to bring the suit within the jurisdiction of the Court. Order 2 Rule 2(1) adopts the principle that the law does not countenance a multiplicity of litigation. Hence, a plaintiff who is entitled to assert a claim for relief on the basis of a cause of action must include the whole of the claim. A plaintiff who omits to sue in respect of or intentionally relinquishes any portion of the claim, shall not afterwards be entitled to sue in respect of the portion omitted or relinquished. This is the mandate of Order 2 Rule 2(2). Order 2 Rule 2(3) stipulates that a person who is entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs. However, a plaintiff who omits to sue for all the reliefs, without the leave of the Court, shall not afterwards sue for any relief so omitted. The leave of**
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**the Court will obviate the consequence which arises under Order 2 Rule 2(3). In the absence of leave being sought and granted, a plaintiff who has omitted to sue for any of the reliefs to which they were entitled to sue in respect of the same cause of action would be barred from subsequently suing for the relief which has been omitted in the first instance. But equally, it is necessary to note that Order 2 Rule 2(2) does not postulate the grant of leave. In other words, a plaintiff who has omitted to sue or has intentionally relinquished any portion of the claim within the meaning of Order 2 Rule 2(2), shall not afterwards be entitled to sue in respect of the portion so omitted or relinquished.**

[Para 11][1137-A-E]

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**1.2 In order to attract the applicability of the bar enunciated under Order 2 Rule 2, the cause of action on which the subsequent claim is founded ought to have arisen to the plaintiff when enforcement of the first claim was sought before the Court.**

[Para 12][1138-C]

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**1.3 In the instant case, the earlier suit for injunction was instituted on 30 October 1996. Paragraph 2 of the plaint in the suit for injunction contained a recital of the agreement to sell; the price fixed for the bargain between the parties; the payment of earnest money; the handing over of possession; the demand for performance and the failure of the defendant to perform the contract. Indeed, the plaintiff also asserted that she was going to institute a suit for specific performance of the agreement dated 26 October 1995. Under the agreement dated 26 October 1995, time for completion of the sale was reserved until 25 October 1996. Notice of performance was issued on 11 October 1996 to which the defendant had replied on 13 October 1996. The cause of action for the suit for specific performance had arisen when the plaintiff had notice of the denial by the defendant to perform the contract. On 30 October 1996 when the suit for injunction was instituted, the plaintiff was entitled to sue for specific performance. There was a complete identity of the cause of action between the earlier suit and the cause of action for the subsequent suit. Yet, as the record indicates, the plaintiff omitted to sue for specific performance. This is a relief for which the plaintiff was entitled to sue when the earlier suit for injunction was instituted.**

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- A Having omitted the claim for relief without the leave of the Court, the bar under Order 2 Rule 2(3) would stand attracted. [Para 13][1139-F-H; 1140-A-C]
- 1.4 The first appellate court, in the judgment which it delivered upon remand took note of the fact that the defendant had by its application prayed for summoning the original record of the earlier suit for injunction for proving the plaint. The plaintiff opposed that plea with the assertion that a certified copy of the document could be placed on record instead of summoning the original record. The Civil Judge, Senior Division, accordingly rejected the application on the ground that since the certified copy was filed on the record, it was unnecessary to call for the original record. The defendant had moved another application in the nature of a notice to admit the certified copy of plaint in the earlier suit. This came to be allowed by the trial court. The first appellate court noted that there was no objection from the plaintiff whereupon the certified copy of the plaint was marked as Exhibit. In this background, the first appellate court was clearly justified in coming to the conclusion that this is not a case where the plaintiff was deprived of an opportunity to explain the pleadings in the earlier suit. The finding that there was no prejudice to the plaintiff cannot be faulted. The parties were all along aware of the pleadings, the nature of the objection to the maintainability of the subsequent suit on the ground of the bar under Order 2 Rule 2 and the fact that the plaint in the earlier suit was brought on the record. Indeed, it was at the behest of the plaintiff that a certified copy of the plaint in the earlier suit was allowed to be brought on the record and marked as Exhibit 137. In the circumstances, the bar under Order 2 Rule 2 is attracted. The plaintiff was entitled to sue for specific performance when the earlier suit for injunction was instituted but omitted to do so. There was an identity of the cause of action in the earlier suit and the subsequent suit. The earlier suit was founded on the plea of the plaintiff that it was in pursuance of the agreement to sell dated 26 October 1995 that he had been placed in possession of the property. Yet, without seeking the leave of the Court, the plaintiff omitted to sue for specific performance and rested content with the prayer for permanent injunction. In these circumstances, the finding arrived at by all the three courts that the subsequent suit filed is barred

under Order 2 Rule 2 does not warrant any interference in this A appeal. [Para 15][1141-C-H; 1142-A-B]

1.5 Admittedly, the plaintiff has paid over an amount of Rs 1,50,000 to the defendant at the time of execution of the agreement on 26 October 1995. Apart from this, the plaintiff deposited the balance of the consideration of Rs 30,000 before the first appellate court on 3 February 2012. The amount which has been deposited by the plaintiff with the defendant must be directed to refunded together with interest at the rate of nine per cent per annum. Apart from this, the plaintiff would be entitled to a refund of Rs 30,000 which was deposited with the trial court on 3 February 2012 together with accrued interest, if any, thereon. In the event that the defendant fails to refund the said amount within a period of two months from the date of receipt of a certified copy of this order, it would be open to the plaintiff to move this Court for appropriate directions. The directions are issued in exercise of the jurisdiction under Article 142, maintaining the judgment of the High Court. [Para 17, 18][1142-C-F] B C D

2. As regards, C.A. No. 9066 of 2019 (SLP(C)No. 122210/2017), it is directed that the defendant shall refund to the plaintiff the amount of Rs 1,40,000 together with interest at the rate of nine per cent per annum within two months from the date of receipt of a certified copy. The plaintiff is also entitled to refund of an amount of Rs 30,000 deposited in the trial court together with accrued interest, if any, thereon. The plaintiff would be at liberty to apply before this Court for appropriate directions if the amount is not paid by the defendant within a period of two months from today. [Para 19][1142-G-H; 1143-A-B] E F

*Gurbux Singh v. Bhooralal AIR (1964) SC 1810 : [1964] 7 SCR 831 – Distinguished.*

*Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited (2013) 1 SCC 625 : [2012] 7 SCR 933; Pramod Kumar v. Zalak Singh (2019) 6 SCC 621; Mohd. Khalil Khan v. Mahbub Ali Mian (1948) SCC onLine PC 44 (1947–48) 75 IA 121 – referred to.* G

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- | A | <u>Case Law Reference</u>   |   |
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|   | <p>[1964] 7 SCR 831      <b>distinguished</b></p> <p>[2012] 7 SCR 933      <b>referred to</b></p> <p>(1947–48) 75 IA 121      <b>referred to</b></p>  | <p><b>Para 8</b></p> <p><b>Para 9</b></p> <p><b>Para 12</b></p> |
| B | <p>CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9065 of 2019.</p> <p>From the Judgment and Order dated 06.01.2017 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Second Appeal No. 352 of 2015.</p>   |   |
| C | <p>With</p> <p>Civil Appeal No. 9066 of 2019.</p> <p>Shashibhushan P. Adgaonkar, Adv. for the Appellant.</p>  |   |
| D | <p>Satyajit A. Desai, Ms. Anagha S. Desai, Shobhit Dwivedi, Advs. for the Respondents.</p>  |   |
|   | <p>The Judgment of the Court was delivered by</p> <p><b>DR DHANANJAYA Y CHANDRACHUD, J.</b></p>   |   |
| E | <p>1. Leave granted.</p> <p><b><u>Civil Appeal No 9065 of 2019 (@ SLP (C) No 11811/2017)</u></b></p>  |   |
| F | <p>2. This appeal arises from the judgment of a learned Single Judge dated 6 January, 2017 at the Nagpur Bench of the High Court of Judicature at Bombay in a Second Appeal. The High Court came to the conclusion that the suit for specific performance instituted by the appellant was barred by Order 2 Rule 2 of the Code of Civil Procedure, 1908<sup>1</sup> since the appellant had instituted an earlier suit for injunction. The courts below have noticed that while instituting the earlier suit, it was in the contemplation of the appellant that a suit for specific performance of the agreement to sell would be instituted, in spite of which no leave of the</p> |   |
| G | <p>Court was sought under Order 2 Rule 2(3) of the CPC. This appeal thus arises from the concurrent findings which have been recorded by the Trial Court, the First Appellate Court and by the High Court in Second Appeal holding the suit to be barred.</p>   |   |

H <sup>1</sup> “CPC”

3. The facts on which the appeal arises are as follows (parties A will be referred to by their descriptions in the suit):

The subject of the dispute is agricultural land bearing Gat.No.111 admeasuring 3 H 05 R situated at Mauje Nayegaon, Taluka Nandura, District Buldhana. On 26 October 1995, the original defendant entered into an agreement to sell in favour of the original plaintiff in respect of the suit land for a total consideration of Rs 1,80,000. At the time of the agreement to sell, an amount of Rs 1,50,000 was paid by way of earnest to the defendant. The agreement stipulated that the sale deed would be executed by 25 October 1996 against the payment of the remaining consideration in the amount of Rs 30,000. On 11 October 1996, a notice was issued by the plaintiff to the defendant for performance of the contract. The plaintiff claims to have been present before the Sub-Registrar on 25 October 1996 for the registration of the sale deed. However, by a reply dated 13 October 1996, the defendant refused to execute the sale deed. In the meantime, it is alleged that on 16 October 1996, the defendant sought to obstruct the possession of the plaintiff over the suit land; the plaintiff claiming to have entered into possession in pursuance of the agreement to sell. A suit for injunction was instituted by the plaintiff, being Regular Civil Suit No 216 of 1997 before the Civil Judge, Junior Division, Malkapur. Paragraph 2 of the plaint in the earlier suit for injunction contained the following averments:

“The property mentioned in clause 1 of the plaint totally belongs to the defendant for which the defendant had entered into a bargain to sale with the plaintiff on 26.10.95 at a total price of Rs.1,80,000/- Against the said bargain the defendant had taken on the same day from the plaintiff a sum of Rs.1,50,000/- in cash and gave in writing the bargain letter in favour of the plaintiff. Regarding the remaining amount of Rs.30,000/- it was agreed by the defendant that the same would be paid at the time of execution of sale deed and thus the bargain letter was obtained in writing by the plaintiff from defendant. On 26.10.1995 itself the defendant had handed over possession of the agricultural land to the plaintiff. Since that time the agricultural property is in possession of the plaintiff. Since the date of 26.10.1995 till today all formalities in respect of this land such as cultivation and all agricultural processes are being done by the plaintiff. On the said farm the plaintiff had spent a lot of amount for the agricultural activities. Thereafter

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- A several times the plaintiff asked the defendant to execute the sale deed of the said land in favour of the plaintiff. The plaintiff is ready to behave as per the bargain. The plaintiff informed the defendant that by paying the remaining amount of Rs.30,000/- to the defendant the plaintiff is ready to get the sale deed of the said property; but the defendant kept on prevaricating. Hence as decided earlier between the plaintiff and on 11.10.96 the defendant the plaintiff asked by sending a notice to the defendant to execute the sale deed of the said farm on 15.10.96. That registered notice was received by the defendant on 11.10.96; but on 15.10.96 the defendant did not remain present in the office of Sub-Registrar Nandura and did not register the said sale deed in favour of plaintiff when the plaintiff was present there with a cash of Rs.30,000/- to be paid to the defendant. Hence for getting the fulfilment of the agreement took place between plaintiff and the defendant on 26.10.1995 the plaintiff will file a suit in the Court of Hon'ble Civil Judge Senior Division, Khamgaon.”
- D 4. The reliefs sought in the suit were a declaration that the plaintiff was in possession of the land and a permanent injunction restraining the defendant from obstructing the possession of the plaintiff. The suit for injunction was instituted on 30 October 1996. Admittedly, no leave of the Court was sought under Order 2 Rule 2(3) of the CPC in the earlier suit to institute a suit for specific performance subsequently.
- E 5. On 30 April 1997, the appellant-plaintiff instituted Special Suit No 61/1997 before the Civil Judge, Senior Division, Khamgaon seeking specific performance of the agreement to sell the property. The earlier suit for injunction was dismissed in default on 16 September 2005. The defendant contested the maintainability of the suit for specific performance raising the bar under Order 2 Rule 2 of the CPC. No issue was framed by the Trial Court with reference to the provisions of Order 2 Rule 2. Nonetheless, the Trial Court by its judgment dated 13 October 2005 came to the conclusion that the plaintiff had omitted to sue for
- F specific performance of the agreement although the cause of action had accrued in favour of the plaintiff at the time when the earlier suit for injunction (RCS No 216/1997) was instituted on 30 October 1996. Adverting to the certified copy of the plaint, which had been placed on the record, the learned trial judge noted that the plaint in the earlier suit made specific reference to the fact that the plaintiff would file a suit on
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the basis of the agreement to sell for claiming specific performance. A  
The trial judge observed that the plaintiff had failed to seek the leave of  
the Court, when the suit for injunction was instituted, to file a subsequent  
suit on the same cause of action seeking performance. Consequently,  
the suit for specific performance was dismissed. In appeal, the Adhoc  
District Judge-I, Khamgaon by a judgment dated 6 January 2012 came  
to the conclusion that the bar under Order 2 Rule 2 was not attracted. In  
coming to this conclusion, the First Appellate Court held that:

- (i) No specific issue had been framed by the Trial Court in this regard; C
- (ii) The pleadings in the earlier suit had not been proved to establish that the earlier suit and the subsequent suit were based on the same cause of action;
- (iii) No opportunity was furnished to the plaintiff to explain his pleadings in the plaint in the earlier suit; and
- (iv) The Trial Court ought to have framed a specific issue on the bar under Order 2 Rule 2. D

On merits, the first appellate court adverted to the findings of the Trial Court and came to the conclusion that the suit for specific performance was liable to be decreed. The appeal was accordingly allowed and a decree for specific performance was passed with a direction to the plaintiff to deposit the balance consideration of Rs 30,000 within a period of one month. The plaintiff claims to have deposited the balance consideration on 3 February 2012. E

6. A Second Appeal was instituted before the High Court against the decree for specific performance. By a judgment dated 2 April 2013, a learned Single Judge of the High Court observed that while dealing with the appeal the appellate court ought to have explored the possibility of remand, *inter alia*, in view of provisions of Order XLI Rule 23 of the CPC. The High Court set aside the judgment of the first appellate court and remanded the case back to it by consent of parties to decide the appeal afresh. F G

7. On remand, the District Judge-I, Malkapur framed as one of the points for consideration, whether the suit was barred by Order 2 Rule 2 of the CPC. The District Judge noted that the certified copy of the plaint in the earlier suit was on record and marked as Exhibit 137. H

- A The plaint contained a reference to the execution of the agreement to sell dated 26 April 2015; to the payment of earnest of Rs 1,50,000 and to the defendant having been called upon on 11 October 1996 to execute the sale deed. The District Judge did not accept the objection of the plaintiff that the plaint in the earlier suit had not been shown when the plaintiff was in the witness box for the purpose of adducing evidence.
- B The first appellate court in that context noted what had transpired during the course of the proceedings:

“It is material to note that by application dated 22.2.2005 vide Ex.-117 before the Trial Court the defendant has prayed for calling the original record of RCS No.216/1997 from the file of Nandura Court for proving the documents. The plaintiff has opposed that application with a say that certified copies of the documents can be placed on record instead of calling the original record. Accordingly, the learned Civil Judge, Sr.Dn., Khamgaon, has rejected the application on the ground that since certified copy can be filed on record, it is not necessary to call the original record. The record of the Trial Court further shows that one the same day i.e., on 22.2.2005, the defendant has moved another application vide Ex.118 in the nature of notice to admit the document i.e., the certified copy of plaint in RCS No.216/1997. That application came to be allowed by the learned Civil Judge, Sr. Dn., Khamgaon. It appears that in view of no objection from the plaintiff certified copy of the plaint in RCS no.216/1997 came to marked Ex.137. Therefore, now, plaintiff cannot say that opportunity was not given to him to explain his pleadings in RCS No.216/1997.
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- F The first appellate court noted that certified copy of the plaint in the earlier suit for injunction (Exhibit 94) was placed before the Trial Court and its production was allowed. It was held that in order to support the decree passed by the Trial Court it was not necessary for the respondent in the appeal to file a memorandum of cross objections challenging a particular finding rendered by the Trial Court. Ultimately, it
- G held that when the suit for injunction was instituted, it was open to the plaintiff to incorporate the relief of specific performance together with the relief of permanent injunction. The foundation for the relief of permanent injunction claimed in the earlier suit furnished a complete cause of action to sue for the relief of specific performance. All the essential ingredients on the basis of which the subsequent suit was
- H instituted existed on the date when the earlier suit had been filed. Since

the plaintiff omitted to seek the relief of specific performance which was available when the earlier suit for injunction was instituted, the Court inferred that the plaintiff had relinquished the claim for specific performance. Finally, the first appellate court also held that after exploring the possibility of remand, it had come to the conclusion that it was unnecessary to do so since the parties had proceeded fully to trial knowing their rival cases and had led evidence. In the circumstances, the absence of an issue did not (it was held) cause any prejudice, warranting a remand. The judgment of the first appellate court was upheld by the High Court in a Second Appeal on 6 January 2017. That is how the proceedings before this Court arise under Article 136 of the Constitution.

8. Mr. Shashibhushan P. Adgaonkar, learned counsel appearing on behalf of the appellant submitted that in order to attract the bar under Order 2 Rule 2, an essential requirement is that there must be an identity between the cause of action which forms the basis of the earlier suit and the cause of action on which the claim in the later suit is based. Relying on the decision of the Constitution Bench in **Gurbux Singh v Bhooralal<sup>2</sup>**, it was urged that for the bar under Order 2 Rule 2 to be established, it is necessary for the defendant to file the pleadings in the previous suit in evidence so as to prove to the Court in the subsequent suit that there is an identity of the cause of action in the two suits. In the present case it was submitted that the defendant failed to do so. Learned Counsel urged that the plaint in the earlier suit was not shown to the plaintiff in the subsequent suit at the stage when the evidence was adduced, as a result of which the plaintiff was deprived of the opportunity to establish the absence of identity between the causes of action in the two suits. Moreover, it was submitted that the Trial Court proceeded to hold that the suit for specific performance was barred under Order 2 Rule 2 without framing a specific issue. Learned counsel submitted that the first appellate court could have framed an issue and sought a determination thereon by the Trial Court after allowing evidence to be adduced or it could have alternatively made the determination itself upon production of additional evidence under Order XLI Rule 27. Neither of these courses of action was adopted and hence it has been submitted that the bar under Order 2 Rule 2 does not stand attracted.

9. On the other hand, supporting the view which weighed with the Trial Court, the appellate court and the High Court, it has been urged by

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<sup>2</sup> AIR 1964 SC 1810

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- A Mr Satyajit A Desai, that the plaint in the earlier suit contains a clear reference to the agreement to sell, to the payment of consideration and to the notice of performance that was issued by the plaintiff. Not only this, para 2 of the plaint contained a specific recital of the fact that the plaintiff intended to institute a suit for specific performance before the Court of the Civil Judge, Senior Division, Khamgaon. Despite this, it was submitted that the plaintiff omitted to seek leave of the court under Order 2 Rule 2(3). This, it was submitted, must necessarily result in the bar under the provision being attracted. Learned counsel submitted that the distinction with the situation as it arose before the Constitution Bench in **Gurbux Singh** (*supra*) is that in the present case, the plaint in the earlier suit was duly marked as an Exhibit without any objection from the plaintiff. Learned counsel in that regard has also relied upon on the decisions of this Court in **Virgo Industries (Eng.) Private Limited v Venturetech Solutions Private Limited**<sup>3</sup> and **Pramod Kumar v Zalak Singh**<sup>4</sup>.
- D 10. Order 2 Rule 2 is extracted below:
- “**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 relief.**-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.
- G *Explanation.*-For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

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H <sup>3</sup>(2013) 1 SCC 625

H <sup>4</sup>(2019) 6 SCC 621

11. Order 2 Rule 2(1) is premised on the foundation that the whole of the claim which a plaintiff is entitled to make in respect of a cause of action must be included. However, it is open to the plaintiff to relinquish any portion of the claim in order to bring the suit within the jurisdiction of the Court. Order 2 Rule 2(1) adopts the principle that the law does not countenance a multiplicity of litigation. Hence, a plaintiff who is entitled to assert a claim for relief on the basis of a cause of action must include the whole of the claim. A plaintiff who omits to sue in respect of or intentionally relinquishes any portion of the claim, shall not afterwards be entitled to sue in respect of the portion omitted or relinquished. This is the mandate of Order 2 Rule 2(2). Order 2 Rule 2(3) stipulates that a person who is entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs. However, a plaintiff who omits to sue for all the reliefs, without the leave of the Court, shall not afterwards sue for any relief so omitted. The leave of the Court will obviate the consequence which arises under Order 2 Rule 2(3). In the absence of leave being sought and granted, a plaintiff who has omitted to sue for any of the reliefs to which they were entitled to sue in respect of the same cause of action would be barred from subsequently suing for the relief which has been omitted in the first instance. The grant of leave obviates the consequence under Order 2 Rule 2(3). But equally, it is necessary to note that Order 2 Rule 2(2) does not postulate the grant of leave. In other words, a plaintiff who has omitted to sue or has intentionally relinquished any portion of the claim within the meaning of Order 2 Rule 2(2), shall not afterwards be entitled to sue in respect of the portion so omitted or relinquished.

12. The rationale underlying in Order 2 Rule 2 has been dealt with in several judgments including in the decision of the Privy Council in **Mohd. Khalil Khan v Mahbub Ali Mian<sup>5</sup>**, the Privy Council held:

“(1) The correct test in cases falling under Order 2 Rule 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.

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<sup>5</sup>1948 SCC onLine PC 44 : (1947-48) 75 IA 121

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- A      (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.
- B      (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.”
- C      In order to attract the applicability of the bar enunciated under Order 2 Rule 2, the cause of action on which the subsequent claim is founded ought to have arisen to the plaintiff when enforcement of the first claim was sought before the Court.

In **Virgo Industries (Eng.) Private Limited** (*supra*), the provisions of Order 2 Rule 2 came up for consideration before a two judge Bench of this Court. The Court observed:

- E      “10. 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.”

These principles have been reiterated in the more recent decision in **Pramod Kumar** (*supra*).

- G      13. In the present case, the earlier suit for injunction was instituted on 30 October 1996. Paragraph 2 of the plaint in the suit for injunction contained a recital of the agreement to sell dated 26 October 1995; the price fixed for the bargain between the parties; the payment of earnest money; the handing over of possession; the demand for performance and the failure of the defendant to perform the contract. Indeed, the plaintiff also asserted that she was going to institute a suit for specific performance of the agreement dated 26 October 1995. Under the agreement dated 26 October 1995, time for completion of the sale was reserved until 25 October 1996. Notice of performance was issued on H

11 October 1996 to which the defendant had replied on 13 October 1996. The cause of action for the suit for specific performance had arisen when the plaintiff had notice of the denial by the defendant to perform the contract. On 30 October 1996 when the suit for injunction was instituted, the plaintiff was entitled to sue for specific performance. There was a complete identity of the cause of action between the earlier suit (of which paragraph 2 of the plaint has been reproduced in the earlier part of the judgment) and the cause of action for the subsequent suit. Yet, as the record indicates, the plaintiff omitted to sue for specific performance. This is a relief for which the plaintiff was entitled to sue when the earlier suit for injunction was instituted. Having omitted the claim for relief without the leave of the Court, the bar under Order 2 Rule 2(3) would stand attracted.

14. But the case of the plaintiff in appeal is that in order that the bar under Order 2 Rule 2 be attracted, it is necessary that the plaint in the earlier suit must be proved in evidence. In the present case it was submitted that this was not done. The basis of above submission is the judgment of the Constitution Bench in **Gurbux Singh** (*supra*). Now it is necessary to analyse the facts which led to the decision of the Constitution Bench. The respondent had instituted a suit against the claimant for possession of certain property and for mesne profits. The allegation in the plaint was that the plaintiff was the absolute owner of the property of which the defendant was in wrongful possession and that despite a demand he had failed to vacate the property, thereby attracting the liability to pay mesne profits. The plaint contained a reference to a previous suit instituted by the plaintiff and his mother in which a claim had been made against the defendant for the recovery of mesne profits in regard to the same property. It was also stated that mesne profits had been decreed in the suit. In the written statement, the appellant-defendant raised a plea to the maintainability of the suit on the ground of the bar under Order 2 Rule 2. As an issue was struck it was argued as a preliminary issue. The Court recorded a finding that the suit was barred by the provisions of Order 2 Rule 2. The Court held that without the pleadings in the earlier suit being made a part of the record, the trial court decided the issue as a matter of deduction. Consequently, the District Judge held that the bar under Order 2 Rule 2 could not have been entertained without the plaint in the earlier suit being made a part of the record. However, the first appellate court also held that if the point did arise for consideration, it would have decided it in favour of the plaintiff and treated the cause of

- A action for a suit for mesne profit as distinct from a cause of action for the relief of possession of a property from a trespasser. However, on the first point that there was no material on the record to justify the plea of a bar under Order 2 Rule 2, the District Judge did not rest his decision on his view of the law as regards the construction of Order 2 Rule 2(3).
- B Accordingly, he set aside the dismissal of the suit and remanded it to the Trial Court for a decision on merits. The High Court dismissed the Second Appeal as a consequence of which proceedings came up before this Court. In that context, the Constitution Bench held:
- C “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.
- D 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.”
- E On the facts of the case, the Constitution Bench noted, that it was common ground that the pleadings in the earlier suit had not been filed by the appellant in the subsequent suit as evidence in support of the plea under Order 2 Rule 2. This Court observed that in the absence of the pleadings, the decision of the Trial judge was merely as a matter of opinion. This Court agreed with the view which had been taken by the
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District Judge who had noticed the deficiency in the case of the appellant: without the plaint in the previous suit being on the record, a plea of the bar under Order 2 Rule 2 was not maintainable. As a matter of fact, the High Court also noted that neither the plaint nor the written statement in the earlier suit had been filed and the only document which was available was the judgment in appeal. It was in this background that the Court observed that in the absence of the pleadings in the earlier suit, it was not possible to enter a finding on the identity of the cause of action.

15. The situation as it obtained in the case before the Constitution Bench is distinct from the events as they transpired in the present case. The first appellate court, in the judgment which it delivered upon remand took note of the fact that the defendant had by its application at Exhibit 117 prayed for summoning the original record of the earlier suit for injunction for proving the plaint. The plaintiff opposed that plea with the assertion that a certified copy of the document could be placed on record instead of summoning the original record. The Civil Judge, Senior Division, accordingly rejected the application on the ground that since the certified copy was filed on the record, it was unnecessary to call for the original record. The defendant had moved another application at Exhibit 118 in the nature of a notice to admit the certified copy of plaint in the earlier suit. This came to be allowed by the Trial Court. The first appellate court noted that there was no objection from the plaintiff whereupon the certified copy of the plaint was marked as Exhibit 137. In this background, the first appellate court was clearly justified in coming to the conclusion that this is not a case where the plaintiff was deprived of an opportunity to explain the pleadings in the earlier suit. The finding that there was no prejudice to the plaintiff cannot be faulted. The parties were all along aware of the pleadings, the nature of the objection to the maintainability of the subsequent suit on the ground of the bar under Order 2 Rule 2 and the fact that the plaint in the earlier suit was brought on the record. Indeed, it was at the behest of the plaintiff that a certified copy of the plaint in the earlier suit was allowed to be brought on the record and marked as Exhibit 137. In the circumstances, we are of the view that the bar under Order 2 Rule 2 is attracted. The plaintiff was entitled to sue for specific performance when the earlier suit for injunction was instituted but omitted to do so. There was an identity of the cause of action in the earlier suit and the subsequent suit. The earlier suit was founded on the plea of the plaintiff that it was in pursuance of the agreement to sell dated 26 October 1995 that he had been placed in

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- A possession of the property. Yet, without seeking the leave of the Court, the plaintiff omitted to sue for specific performance and rested content with the prayer for permanent injunction. In these circumstances, we agree with the finding which has been arrived at by all the three courts that the subsequent suit filed is barred under Order 2 Rule 2 does not warrant any interference in this appeal. The appeal would accordingly have to stand dismissed and we order accordingly.

16. However, there is one aspect of the case which, in our view, warrants a recourse to the power of this Court under Article 142 to render a complete justice between the parties.

- C 17. Admittedly, the plaintiff has paid over an amount of Rs 1,50,000 to the defendant at the time of execution of the agreement on 26 October 1995. Apart from this, the plaintiff deposited the balance of the consideration of Rs 30,000 before the first appellate court on 3 February 2012 (a copy of the receipt is marked as Annexure P-4 to the appeal).
- D We are of the view that the amount which has been deposited by the plaintiff with the defendant must be directed to refunded together with interest at the rate of nine per cent per annum. Apart from this, the plaintiff would be entitled to a refund of Rs 30,000 which was deposited with the Trial Court on 3 February 2012 together with accrued interest, if any, thereon. In the event that the defendant fails to refund the above amount within a period of two months from the date of receipt of a certified copy of this order, it would be open to the plaintiff to move this Court for appropriate directions.

18. Subject to the above directions which we have issued in exercise of our jurisdiction under Article 142, we dispose of the appeal, maintaining the judgment of the High Court.

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- G 19. The present appeal has been heard together with the accompanying Civil Appeal which has been decided by the above judgment. Learned counsel appearing on behalf of the contesting parties have agreed that the only point of distinction is that an amount of Rs 1,40,000 has been deposited as earnest money and an amount of Rs 30,000 was deposited before the Trial Court in pursuance of the order of the first appellate court decreeing the suit. We direct that the defendant shall refund to the plaintiff the amount of Rs 1,40,000 together with interest at the rate of nine per cent per annum within two months from
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the date of receipt of a certified copy. The plaintiff is also entitled to A refund of an amount of Rs 30,000 deposited in the Trial Court together with accrued interest, if any, thereon. The plaintiff would be at liberty to apply before this Court for appropriate directions if the amount is not paid by the defendant within a period of two months from today.

20. The appeal is accordingly disposed of.

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Nidhi Jain

Appeals disposed of.