

**SUPREME COURT OF AZAD JAMMU AND KASHMIR**

[Appellate Jurisdiction]

**PRESENT:**

**Raja Saeed Akram Khan, J.**

**Ghulam Mustafa Mughal, J.**

Civil Appeal No.229 of 2018

(PLA filed on 10.09.2018)

1. Muhammad Khaliq s/o Bagh Ali, r/o Qala Kotha, village Khambal, Tehsil and District Mirpur.
2. Muhammad Imran s/o Muhammad Khaliq, caste Jatt, r/o Qala Kotha, village Khambal, Tehsil and District Mirpur.

....APPELLANTS

**VERSUS**

1. Muhammad Meherban,
2. Muhammad Sultan,
3. Muhammad Suleman, sons,
4. Razia Bi,
5. Shafqat Bi,
6. Khadija Bi, daughters,
7. Fatima Bi widow of Muhammad Sadiq, deceased, represented by respondents No.1 to 6, all residents of Dhoke Qala Kotha, village Khambal, Tehsil and District Mirpur.

.....RESPONDENTS

8. Muhammad Siddique s/o Bagh Ali, r/o Dhoke Qala Kotha, Tehsil and District Mirpur.

....PROFORMA-RESPONDENT

(On appeal from the judgment and decree of the High Court dated 11.07.2018 in Civil Appeal No.21 of 2016)

FOR THE APPELLANTS: Mr. Qamar Zaman Mirza,  
Advocate.

FOR THE RESPONDENTS: Ch. Muhammad Afzal,  
Advocate.

*Date of hearing:* 25.02.2020

**JUDGMENT:**

**Ghulam Mustafa Mughal, J.**— The captioned appeal by leave of the Court has been directed against the judgment and decree dated 11.07.2018, passed by the Azad Jammu & Kashmir High Court in Civil Appeal No.21 of 2016.

2. The precise facts forming the background of the captioned appeal are that Muhammad Sadiq, predecessor-in-interest of the respondents, herein, brought a suit for specific performance of contract in respect of the land comprising *khasra* No.484, measuring 14 *marla*, situated in village Bhalot, Tehsil Mirpur, against Muhammad Khaliq, defendant/appellant, herein, in the Court of District Judge Mirpur on 02.03.2017. It was averred that there was a dispute between the plaintiff

and the defendant regarding the land comprising *khasra* Nos. 170, 486, 487 and 488 and a suit was filed by Muhammad Khaliq, defendant, against Muhammad Sadiq in the Court of Senior Civil Judge Mirpur on 08.03.1997, which was dismissed on 13.04.2007. It was further averred that against the judgment and decree recorded by the learned Senior Civil Judge Mirpur, an appeal was filed by Muhammad Khaliq before the District Judge Mirpur which also met the same fate and was dismissed vide judgment dated 24.09.2007. It was further averred that the second appeal was filed before the learned High Court and during pendency of the same, a compromise was effected between the parties, as a result whereof, the appeal was withdrawn by Muhammad Khaliq. It was further averred that subsequently, the land for which the suit was filed, except *khasra* No. 484, was acquired for upraising of Mangla Dam and the plaintiff has now no concern with that, however, on the basis of comprise dated 30.03.2009, effected during pendency of the appeal before the High Court in the earlier round of

litigation, it was agreed that the land comprising *khasra* No.484, measuring 14 *marla* was sold to the plaintiff, Muhammad Sadiq, in lieu of Rs.6,50,000/- which were paid through cheque, hence, the plaintiff is entitled to the decree of specific performance on the basis of agreement to sell. It was further claimed that the defendant did not honour his commitment and has refused to execute the sale-deed in favour of the plaintiff. The suit was resisted by the defendant by filing written statement, wherein, it was stated that the plaintiff has no cause of action and the suit is liable to be rejected under Order VII, rule 11, CPC. The learned trial Court framed issues in light of the pleadings of the parties and asked them to lead evidence pro and contra. At the conclusion of the proceedings, the learned trial Court vide judgment and decree dated 03.02.2016, decreed the suit directing the defendant to execute the sale-deed in favour of the plaintiff as was agreed. The judgment and decree dated 03.02.2016, recorded by the learned District Judge was challenged by way of appeal before the Azad Jammu & Kashmir High

Court on 09.02.2016. The learned High Court after hearing the parties through the impugned judgment and decree dated 11.07.2018, has dismissed the appeal.

3. Mr. Qamar Zaman Mirza, the learned Advocate appearing for the appellants argued that the judgment passed by the learned District Judge as well as the impugned judgment of the learned High Court is illegal and violative of law as the suit filed for specific performance of contract was barred by order II, rule 2, CPC, hence, was liable to be dismissed. The learned Advocate further argued that the learned District Judge as well as the High Court, without attending the true and correct position of law, has granted the decree for specific performance of the contract illegally. The learned Advocate while stating the background of the controversy, submitted that earlier a suit was filed by Muhammad Khaliq, appellant, herein, on 08.03.1997, before the learned Senior Civil Judge Mirpur for declaration-cum-perpetual injunction and possession, against Muhammad Sadiq, which was dismissed by the

learned Senior Civil Judge Mirpur vide judgment and decree dated 13.04.2007. The learned Advocate further argued that the legality and correctness of the judgment and decree dated 13.04.2007, was challenged by Muhammad Khaliq, appellant, herein, through appeal before the learned District Judge Mirpur on 19.04.2007, which also met the same fate and was dismissed vide judgment and decree dated 04.09.2007. The learned Advocate further argued that the second appeal was filed against the judgment and decree dated 04.09.2007, passed by the learned District Judge Mirpur, before the Azad Jammu & Kashmir High Court. He added that during pendency of the appeal the parties reached a compromise and an affidavit was executed by the appellant, herein, in favour of Muhammad Sadiq, the predecessor-in-interest of the respondents, herein, whereby, he agreed to transfer the land comprising *khasra* No.484 in lieu of Rs.6,50,000/- and the stated amount was allegedly received by the appellant, herein. The learned Advocate further argued that on the basis of the affidavit dated

12.03.2009, posing the same as an agreement to sell, a suit was filed by Muhammad Sadiq before the learned Additional District Judge Dadyal Camp Mirpur on 14.04.2009, which was dismissed by the learned Additional District Judge Dadyal Camp Mirpur vide judgment dated 12.01.2011 on the ground that on the basis of an agreement to sell, the plaintiff cannot be declared as owner of the land comprising *khasra* No.484, measuring 14 *marla*. The learned Advocate submitted that thereafter Muhammad Sadiq filed another suit for specific performance of contract on 24.02.2013, on the basis of affidavit dated 12.03.2009, in the Court of District Judge Mirpur which was decreed vide judgment and decree dated 03.02.2016. The learned Advocate further submitted that the legality and correctness of the judgment and decree dated 03.02.2016, was challenged by the appellant, herein, before the Azad Jammu & Kashmir High Court by way of appeal which has been dismissed by the learned High Court through the impugned judgment. The learned Advocate further

submitted that the learned High Court has failed to attend the legal proposition involved in the matter in its true perspective as subsequent suit was barred by Order II, rule 2, read with explanation iv of section 11, CPC. The learned Advocate further submitted that same relief could not be pleaded and incorporated as was done in the previous suit filed on the basis of affidavit dated 12.03.2009. In support of his submissions, the learned Advocate has placed reliance on the cases reported as *Ch. Liaqat Ali vs. Mirza Abdul Aziz and 3 others* [2001 SCR 146], *Muhammad Siddique & 6 others vs. Abdul Aziz Ratalvi & 7 others* [2015 SCR 705] and *Raja Muhammad Akram Khan vs. Azad Government & others* [2006 SCR 214].

In the first case, referred to hereinabove, it was observed that mere execution of an agreement to sell does not bestow any title until and unless further steps are taken in pursuance of the same.

In *Muhammad Siddique's* case, referred to by the learned counsel for the appellants, the facts were totally different,



whereas, in *Raja Muhammad Akram Khan's* case, the proposition laid down in *Ch. Liaqat Ali's* case, was reiterated.

3. Conversely, Ch. Muhammad Afzal, the learned Advocate appearing for the respondents argued that as the previous suit was filed for declaration and the subsequent one was filed for specific performance of contract, hence, both the suits have different and distinct cause of action, so far as, the nature and relief is concerned, therefore, neither Order II, rule 2 nor section 11 (iv) of the Code of Civil Procedure was attracted in the present case. The learned Advocate further argued that as in the earlier judgment dated 12.01.2011, the learned District Judge while deciding issue No.3 has observed that the plaintiff has proved the execution of affidavit/agreement to sell and can obtain relief by filing a suit for specific performance of contract. He added that in light of these observations of the Court, the suit for specific performance of the contract was filed by the plaintiff. The learned Advocate further argued that as per settled law, a

person who has acted upon the observation of the Court bonafidely even otherwise cannot be penalized, specially so, when the defendant/appellant, herein, was bound to honour his commitment made vide affidavit dated 12.03.2009. The learned Advocate submitted that as the judgments of the Courts below are concurrent on the point, therefore, interference by this Court is not warranted under law.

4. We have heard the learned counsel for the parties and have gone through the entire record of the case. The moot point involved in the present case is, as to whether, after dismissal of the previous suit filed by the plaintiff, Muhammad Sadiq, on 12.01.2011, the subsequent suit for specific performance of the contract filed by him was maintainable in view of the provisions contained in Order II, rule 2, CPC? In order to appreciate the controversy, the aforesaid provision of law is reproduced hereunder for ready reference: -

“2. *Suit to include the whole claim.* (1)  
Every suit shall include the whole 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.

*Explanation.* For the purpose of this rule an obligation and collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

A perusal of the above would show that the plaintiff is bound to join the interconnected cause of actions in one suit because splitting of the claim arising out of one and the same cause of action is prohibited on the principle that a party cannot be vexed twice for the same cause because the policy of law is to avoid the multiplicity of the suits. However, the question of applicability of Order II, rule 2, CPC, depends upon facts of each case. Law is well settled that if previous suit was dismissed being not

maintainable then the subsequent suit cannot be held as barred by law on account of Order II, rule 2, CPC. In the present case, the previous suit for declaration on the basis of affidavit dated 13.03.2009, was held not maintainable by the trial Court on the ground that declaration cannot be granted on the basis of an agreement to sell. While deciding issue No.3 in the previous suit, the learned trial Court held that the plaintiff may file a suit for specific performance of contract. The subsequent suit was filed by the plaintiff in light of the observation of the trial Court. After going through the relevant law on the subject, we are of the view that the subsequent suit was not barred because the previous suit was for declaration and the same was rightly held not maintainable by the learned trial Court because that declaration on the basis of an agreement to sell could not be granted. In this view of the matter, it cannot be said that the subsequent suit was barred by law. In the case reported as *Khalique Ahmed vs. Tahir Saeed* [1998 CLC 1973], the plaintiff, therein, filed a suit for permanent injunction against the vendee to

refrain him from transferring the land but thereafter withdrew the suit and filed a separate suit for specific performance of contract. The objection regarding the bar contained in Order II, rule 2, CPC, was raised. It was held by the Court that the provisions of Order II, rule 2, CPC, are not attracted in the circumstances of the case as previous suit of the plaintiff was dismissed being not maintainable. The same view was taken in the case reported as *Pirzada Amir Hassan and others vs. Mrs. Shamim Shah Nawaz and others* [1984 CLC 3080]. In the cited case, in para No.9 of the report it was observed as under:-

“9. The next contention of the learned counsel for the appellants is based upon the construction of rule 2 of Order II of the Code of Civil Procedure. It is argued that during the pendency of the suit for mandatory injunction a separate suit for specific performance was not maintainable and that the proper course for respondent No.1 was to amend the plaint in the earlier suit as to include the relief of specific performance as well. It is also argued that the second suit, that is, the one for specific performance of the agreement was barred by the provisions of rule 2 (2) (ibid). In our opinion this contention is entirely misconceived. Sub-rules (1) and (2) of rule 2 deal with the situation where more than one relief is available to a plaintiff in respect of the same cause of action.

These sub-rules have no application to the suits based upon entirely different cause of actions. No doubt both the suits filed by respondent No.1 were based upon the same agreement to sell but no labour is required to discover that the causes of action in them were distinct and separate. As pointed out under the agreement to sell the sale was to be completed after the appellants had obtained a permanent transfer deed in respect of the land in dispute. Even though they had received a fairly substantial amount by way of earnest money yet they were not taking any steps to carry out their obligation in obtaining a permanent transfer deed. It was this inactivity of the appellants that formed the cause of action in the suit for mandatory injunction. In the second suit, that is, the one for specific performance of agreement, the cause of action was the alleged failure of the appellants to complete the sale even though they had obtained the permanent rights the cause of action for the second suit arose after the institution of the first said. Thus, as the causes of action in the two suits were not only entirely different but arose at different points of time respondent No.1 could competently institute two separate suits. The provisions of rule 2 of Order II were therefore inapplicable here.”

(underlining is ours)

So far as, the case in hand is concerned, we are of the view that the earlier suit, though, was filed on the basis of the same agreement to sell but was on a different cause of action claiming the title of the land. As the suit was held not maintainable under section 42 of the Specific Relief Act, therefore, the subsequent suit for specific

performance of contract was not barred. Our this view finds further support from the case reported as *Ghulam Nabi & others vs. Seth Muhammad Yaqub and others* [PLD 1983 SC 344], wherein, the Apex Court of Pakistan at page 349 of the report has held as under:-

“7. Learned counsel for the appellant has argued against the maintainability of the suit on the basis of the provision of Order II, rule 2, C.P.C. The rule enjoins that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and bars, except with the leave of the Court, any subsequent suit in respect of any portion of his claim which the plaintiff omits or intentionally relinquishes in the first suit. The object of the rule is to avoid splitting of claims and to prevent multiplicity of suits and is based on the principle that the defendant should not be vexed twice for the same cause. The argument of learned counsel proceeds on the assumption that both the suits brought by Seth Muhammad Yaqoob having been on the same cause of action and the relief by way of specific performance of the contract having not been included in the first suit, the second suit for the specific performance was hit by the provision of this rule. But it has not been shown that the rule applies even where the relief claimed in the first suit had been incompetent or the suit itself had been barred by section 56 (1) of the Specific Relief Act. A relief of injunction as claimed in the first suit could not be granted in a matter of breach of contract and specific performance being the proper and equally efficacious relief, the first suit was hit by the provision of section 56 (1) of the Specific Relief Act.....”

(underlining is ours)

In the referred case, the Supreme Court of Pakistan has followed the judgment rendered in the case reported as *Sardari Mal v. Hirade Nath* [AIR 1925 Lah. 459], wherein, it was observed as under:-

“I do not think it necessary to decide whether or not the cause of action in the two suits is the same, for it is quite clear that a suit for a permanent injunction did not lie. The plaintiff was not entitled to come to the Courts for such a relief in respect of the present cause of action. This is quite clear from the provision of section 56 (i) of the Specific Relief Act, which provides that ‘an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust’. The usual mode of proceeding on breach of a contract for the sale of lands is to bring a suit for specific performance of the contract. The plaintiff, therefore, was not entitled to two reliefs in respect of the breach of a contract, one by way of injunction and the other by specific performance. He was entitled only to the one relief, namely, a suit for specific performance, in which he could have added a claim for compensation. Order II, rule, 2 therefore, is not bar to the present suit.”

Similarly, in a case reported as *Kunjan Nair Sivaraman Nair vs. Narayanan Nair and others* [AIR 2004 Supreme Court 1761], at page 1765 of the report, the Apex Court of India has observed as under:-



“20. In Deva Ram’s case (supra) it was held that where the previous suit was for recovery for loan which was dismissed on the ground that the document on the basis of which the suit was filed was not a sale deed but agreement for sale, subsequent suit for recovery of possession on the basis of title was not hit by Order II, Rule 2 as the cause of action in the two suits were not identical or one and the same.

The same view was taken in *Muhammad Mansha’s* case [2000 CLC 1226]. Thus, it stands concluded that the suit filed by the plaintiff for specific performance of contract was not barred. It has been contended by Ch. Muhammad Afzal, Advocate that both the Courts below have concurrently held that the appellant, herein, has executed the agreement to sell and has received the consideration amount but despite of that has failed to honour his commitment. This being question of fact cannot be attended at this stage. The case law referred to and relied upon by the learned counsel for the appellant have distinguishable facts and the rule of law laid down therein is not applicable to the facts of the case in hand. The judgment passed by the learned District Judge and the

impugned judgment of the learned High Court are well reasoned and hardly require interference by this Court.

The upshot of the above discussion is that finding no force in this appeal, the same is hereby dismissed. No order as to costs.

Mirpur  
26.02.2020

**JUDGE**

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**JUDGE**

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