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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment Pronounced on: 07.01.2025***

\+ **RFA 30/2020**

REHAU POLYMERS PVT LTD .....Appellant

versus

MANTRALAYA IMPEX PVT LTD & ORS .....Respondents

Advocates who appeared in this case:

For the Appellant : Mr. Shohit Chaudhry, Mr. Manoj Kumar Goel, Mr. Shiv Bahadur Chetrya, Mr. Chinnhal Singh Chauhan and Mr. V.P. Nahar, Advs.

For the Respondents : None.

CORAM:
HON'BLE MS. JUSTICE TARA VITASTA GANJU

JUDGMENT

TARA VITASTA GANJU, J.:

1. The present Appeal arises out of an order/judgment dated 17.07.2019 passed by the learned Additional District Judge, Tis Hazari Court, Delhi in Civil Suit No. 437/2018 [hereinafter referred to as "Impugned Order"]. By the Impugned Order the Learned Trial Court has rejected the plaint filed by the Appellant/Plaintiff under Order VII Rule 11 of the Code of Civil Procedure, 1908 [hereinafter referred to as "CPC"].

2. Briefly the facts are that the Appellant entered into an Agreement with the Respondents on 11.02.2009 for transfer of the right to

process the Appellant's uPVC window sections into structural elements [hereinafter referred to as "the Agreement"]. The Agreement was executed by the Respondent No. 4/Vandana on behalf of Respondent No.3/Mantralaya Impex a proprietorship firm. Although, the Agreement set out that it is between the Appellant and a party named as Mantralaya Impex Pvt. Ltd., it is the case of the Appellant that Mantralaya Impex was only incorporated as a private limited company on 23.01.2015, six years after the Agreement was signed.

2.1 The Agreement was for a duration of three years extendible automatically unless terminated by a six months' notice at the end of the respective year. The Agreement also sets out in Clause 10 that Indian Law shall apply and the local Courts at Delhi shall have exclusive jurisdiction to try disputes, irrespective of the amount in dispute.

3. The Appellant terminated the Agreement by a written communication dated 21.04.2015 setting out that Clause 3 of the Agreement was breached by the Respondent No.1 and that the Respondent No.1 was purchasing uPVC profiles from other suppliers during the tenure of the Agreement. This was followed by a legal notice addressed on behalf of the Appellant to the Respondents seeking encashment and release of a letter of credit dated 09.04.2015 [hereinafter referred to as "LOC"] opened at HDFC Bank, Chennai for an amount of Rs. 13,27,968/-.

4. It was further contended that the Appellant had duly supplied the

goods in terms of the purchase order dated 07.04.2015 which was received by the Respondents on 15.04.2015 at its offices in Chennai, however, the Respondents had refused to honour the LOC.

5. The Appellant filed a suit on 21.08.2015 under the provisions of Order XXXVII of the CPC claiming a sum of Rs. 13,27,968/- from the Respondent No.1 in terms of the LOC by the Appellant. The suit was filed before the Jt. Civil Judge Senior Division Khed-Rajgurunagar, Pune [hereinafter referred to as "Pune Court"] against Respondent No.1 titled ***"Rehau Polymers Pvt. Ltd. v. Mantralaya Impex Pvt. Ltd."*** [hereinafter referred to as "Pune Suit"]. An application for leave to defend was filed by the Respondent No.1. Conditional Leave to defend was granted by the Pune Court by its order dated 15.11.2016, subject to the payment of Rs. 6,00,000/- to be deposited by Respondent No.1 within three months.

6. Subsequently, the Appellant filed a *pursis* for withdrawal of the suit seeking liberty to file a fresh suit before the appropriate Court having jurisdiction to try the said suit. The Respondent No.1 filed an application seeking withdrawal of the amount of Rs. 6,00,000/- deposited with the Pune Court and a no objection was given by Respondent No.1 for withdrawal of the suit. In addition, the Appellant gave its no objection for the withdrawal of Rs. 6,00,000/- deposited by the Respondent No.1.

6.1 By its order dated 07.03.2018, the Pune Court permitted the Appellant to withdraw the suit with liberty to file a fresh suit and

passed directions for refund of the Court fee to the plaintiff/Appellant and the amount deposited to be returned to the Respondent No.1.

7. On 12.04.2018, the Appellant filed a suit before Additional District Judge (West), Tis Hazari Courts, Delhi which was numbered as CS No. 437/2018 [hereinafter referred to as "Delhi Suit"] for the recovery of a sum of Rs.22,45,071/- (Rupees Twenty-Two Lakhs Forty Five Thousand and Seventy One) along with interest @18% per annum till the date of realization. The Appellant also added Respondent No 2 to 5 to the array of parties in the Delhi Suit stating that the Respondent No.1 to 4 are inter connected and their constituents/employees have constantly represented each other interchangeably and Respondent No. 5 is the Bank which issued the LOC.

8. Two written statements were filed in the Delhi Suit, one on behalf of Respondent Nos. 1 and 2, while the second on behalf of Respondent Nos. 3 and 4. The Respondent Nos. 1 to 4 also filed an Application under Order VII Rule 11 of the CPC stating that the Appellant had filed Pune Suit for recovery only against Respondent No.1 i.e. Mantralaya Impex Pvt. Ltd. and the Pune Suit was withdrawn citing formal defect of *"lack of jurisdiction"* of the Courts at Pune. However, Appellant had amended the memo of parties to include Respondent No 2 to 5 which were absent from the memo of parties in the Pune Suit, which is not permissible.

8.1 It was further stated by Respondent Nos. 1 to 4 that when a liberty

to file a fresh suit upon same cause of action is granted under Order XXIII Rule 1(3) of the CPC, the Plaintiff cannot amend the suit to fill in the lacuna and improve upon its case to change the entire nature of the suit.

8.2 In addition, it was contended that the suit is barred under the provisions of Order II Rule 2 (2) of the CPC. The plea in relation to the provisions of Order II Rule 2 (2) of the CPC was taken by Respondent Nos. 1 to 4, however, it is the contention of the Appellant that the same was not pressed at the time of arguments before the learned Trial Court. In any event, the Impugned Order does not address this plea.

9. A reply was filed by the Appellant to the Application under Order VII Rule 11 of the CPC stating that the plaint is not barred by the provisions under Order II Rule 2 of the CPC or under Order XXIII Rule 1 (3) of the CPC which would require the suit to be rejected under Order VII Rule 11(d) of the CPC. It was contended on behalf of the Appellant that it is the same plaint which has been filed seeking recovery of the amounts due under the LOC, however, since after the filing of the Pune Suit, there were certain developments in the matter. The memo of parties thus needed to be revised and changed before the learned Trial Court in Delhi. It was further contended that Respondent Nos. 1 to 4 are interconnected entities/individuals.

10. The learned Trial Court passed the Impugned Order holding that the Appellant cannot be allowed to implead parties (Respondent Nos. 2

to 5) which were not there in the original suit instituted in Pune and that such amendments to the plaint which was filed in the Pune Suit cannot be made. In addition, the learned Trial Court held that once the liberty is sought under Order XXIII Rule 1 and 2 of the CPC and granted by the concerned Court, the Appellant was not within his rights to make amendments in the body of the plaint either. Hence, the learned Trial Court rejected the plaint under Order VII Rule 11 of the CPC.

11. This led to the filing of the present Appeal. Notice in the present Appeal was issued by a Coordinate Bench of this Court on 17.01.2020 and several attempts were made to serve the Respondents. Since, none appeared for the Respondents, the Respondents were proceeded with *ex parte* by this Court on 28.08.2024.

12. The Appellant has raised the following contentions before this Court:

(i) In the first instance, the learned Counsel for the Appellant has contended that Respondent No.1 was only incorporated on 23.01.2015 and thereafter it changed its name to Ecube Windoors Private Limited, Respondent No.2 herein. The Master Data as available with the office of the Registrar of Companies, Chennai shows that the Directors of the Respondent No.2 company are Respondent No.4 and one Mr. Arjun Srinivasan. Respondent No.3 is a sole proprietorship of Respondent No.4. Respondent No. 4 is the executant of the Agreement with the Appellant, as sole

proprietor of Respondent No.3. Thus, it is contended that the Respondent Nos.1 to 4 are all inter related and basically the same party.

(ii) Learned Counsel for the Appellant contends that the Delhi Suit was filed by impleading all the Respondents to avoid multiplicity of proceedings and as a matter of abundant caution specific averments were made in the plaint to specify how the Respondent Nos. 1 to 4 were interconnected. While the Court has power to strike out or add parties, it is settled position of law that misjoinder or non-joinder of parties would not lead to a suit being barred.

(iii) The Appellant contended that the suit could not have been said to be barred under Order II Rule 2 (2) of the CPC as the relief sought for by the Appellant in the Pune Suit and the Delhi Suit is identical.

(iv) Learned Counsel for the Appellant sought to rely upon the order dated 15.11.2016 passed in Pune Suit to submit that the learned Civil Judge at Pune while granting leave to defend had given a finding that Respondent No.1 had access to confidential information of other parties to submit that thus the inter-relation between the parties was clear from the very beginning and the Court was of the view that until the evidences of the parties are brought on record, it cannot be said that the there is no written contract in absence of implied terms therein or not concluded contract. The relevant extract of the order 15.11.2016 is reproduced below:

> *"9. Taking into consideration all these aspects along with pleadings and documents placed on record, it apparently shows*

that defendant is separate entity. ***But still the question remains that as to how the defendant has accessed to the confidential information like pan card, certificate of registration of others. Moreover, it appears that no objection was raised in respect of title of agreement as M/s Mantralaya Impex Pvt. Ltd. at that time. No doubt the plaintiff has placed on record a written agreement dated 11-02-2009 apart from purchase order, invoice emails etc. In my view unless and until the evidence of the parties are recorded it can not be said that there is no written contract in absence of implied terms therein or not concluded contract. …****"*

[Emphasis Supplied]

(v) Relying on the judgment of a Coordinate Bench of this Court in ***Nutan Tyagi v. Nirmala Dabas***[1] it was contended by the learned Counsel for the Appellant that where a suit is withdrawn with permission to bring a fresh suit, the effect of such withdrawal is to leave matters in the position as they would have stood if no such suit had been instituted.

(vi) In addition, while relying on Order XXIII Rule 1(3) of the CPC and judgment passed by a Division Bench of this Court in ***N.D. Tiwari v. Rohit Shekhar & Ors.***[2], it was contended by the learned Counsel for the Appellant that in the context of Order XXIII Rule 1(3) of the CPC, what is permitted to be withdrawn and subsequently instituted, is a fresh suit in respect of the same subject matter. It was held in ***N.D. Tiwari*** case that the term *"subject matter"* is of a wider amplitude than the term *"cause of action"* and thus, the Delhi Suit could not have been dismissed under Order VII Rule 11 of the CPC and the Impugned Order suffers from infirmities.

[1] 2016: DHC: 5159: 2016 SCC OnLine Del 4056
[2] 2010: DHC: 5482

(vii) Lastly, the learned Counsel for the Appellant submits that the Court has jurisdiction to grant permission to withdraw the suit with liberty to file a fresh one on the same cause of action where it is satisfied that the formal defect pointed out by the parties may result in dismissal of the suit. Given the existence of an exclusive jurisdiction clause, the suit was withdrawn from the Court at Pune and filed in Delhi. In this regard, learned Counsel places reliance on the judgement in the case of ***Pritam Singh & Ors. v. Bachan Singh & Ors.***[3] which states that the Court has jurisdiction to grant permission to withdraw the suit with liberty to file a fresh one on the same cause of action where it is satisfied that the formal defect pointed out by the parties may result in dismissal of the suit. Reliance has been placed on paragraph 4 of the said judgement which is reproduced below:

> *"4. After hearing learned counsel for the parties, I am of the opinion that the contention of the learned counsel has no merit. This court in Kanhyia Lal and anr. v. Nathu and ors., 1989 96 P.L.R 449 held that the provisions of Order 6 Rule 17 of the Code have to be read as not to make Order 23 Rule 1 redundant, If the sweeping contention of the petitioners to the effect that where a suit can be amended, the permission to withdraw the suit cannot be granted, is accepted, it would render Order 23 Rule 1 of the Code of Civil Procedure obsolete.* ***The court has jurisdiction to grant permission to withdraw the suit with liberty to file a fresh one on the same cause of action where it is satisfied that the formal defect pointed out by the parties may result in dismissal of the suit. It was further held that the court can also grant permission to withdraw the suit for other sufficient grounds where justice and equity demand.*** *In the reported case, the plaintiffs had filed a suit for mandatory injunction based on title. The defendants contended that the suit for injunction and declaration simplicitor was not maintainable as they are not in possession of the premises. Since the relief of possession had not been claimed, the application was moved to withdraw the suit with liberty to file a fresh one on*

[3] (1999) 121(1) PLR 137

the same cause of action. The permission was granted."

[Emphasis supplied]

Analysis

13. It is settled law that in order to examine the Application under Order VII Rule 11 of the CPC, the Court is required to enquire into the Plaint and the documents attached with the Plaint. The defence of the defendants cannot be looked into and nor can any of the documents filed by them.

14. As stated above, Respondent Nos. 1 to 4 filed a joint Application for rejection of the plaint under Order VII Rule 11 of the CPC. It was stated in the said Application that the plaint could only be altered to the extent of liberty sought under Order XXIII Rule 1(3) of the CPC and cannot be amended by the Appellant to improve or to fill up the lacuna in its case. The Respondents stated that the memo of parties added new parties (Respondent Nos. 2 to 5) and that the Appellant was merely trying to improve upon the gaps in the previous suit (Pune Suit). It was further stated that the prayers in the Delhi Suit were completely changed**.** Thus, it was contended by the Respondents No. 1 to 4 that by inserting of new parties in the subsequent suit and altering pleadings, it changed the nature of the suit under the garb of *"lack of jurisdiction"* and is barred by law as set out under Order XXIII Rule 1(3) of the CPC.

15. The Application for rejection of the plaint also set out that the claims as raised by the Appellant in the Delhi Suit were never raised in the Pune Suit and hence, in terms of the provisions of Order II Rule 2(2)

of the CPC, the said claims would be relinquished or omitted and could not be raised at a subsequent stage by the Appellant.

16. An examination of the Impugned Order shows that the learned Trial Court while relying on a judgment of the Bombay High Court in ***Tarachand Bapuchand v. Gaibihaji Ahmed Bagwan***[4] has found that the failure to implead parties in respect of a claim is not to be regarded as a formal defect. Thus, it has been held by the learned Trial Court that the liberty to file a fresh suit allowed by the orders of the Court at Pune, could not include the amendment to the memo of parties and that the suit is barred under the provisions of Order XXIII Rule 1(3) of the CPC, resulting in dismissal of the plaint.

17. The primary contention of the Appellant in the present Appeal has been that the Pune Suit was withdrawn in view of the *"exclusive jurisdiction clause"* in the Agreement. The Respondent No.1 gave its no objection to the withdrawal of the Pune Suit and by order dated 07.03.2018, the Pune Suit was withdrawn with liberty to file a fresh suit. The Delhi Suit was thereafter filed impleading all the Respondents to avoid multiplicity of proceedings and specific averments were also set out explaining the relationship between the Respondents.

18. The Respondents on the other hand have contended that the Appellant was not permitted to add parties to the suit and the addition of the parties could not be considered as a formal defect, thus the plaint is barred by law.

[4] AIR 1956 Bombay 632

19. At this stage, it is necessary to set out certain undisputed facts. The Agreement was executed on 11.02.2009. The Agreement in its recitals states that it has been executed between the Appellant and M/s Mantralaya Private Limited (Respondent No. 1). However, the signature clause at the end of the Agreement bears the signature of Respondent No. 4 along with a stamp of Respondent No.3.

19.1 The Company Master Data record as available with the Office of the Registrar of Companies, which was placed on record by the Appellant, shows that the date of incorporation of Respondent No.1 as 13.09.2013. Thus, at the time of signing of the Agreement, Respondent No.1 was not in existence. The Master Data also reflects that there are two Directors of Respondent No.1 and that Respondent No. 1 changed its name to Respondent No.2 as Ecube Windoors Private Limited. Respondent No.4 shown as one of the Directors of Respondent No. 2 .

19.2 Along with the plaint, the Appellant filed three (3) applications: under Order X Rules 1 and 2 of the CPC; Order XII Rule 6 of the CPC and Section 151 of the CPC.

19.3 The Application under Order X Rule 1 and 2 of the CPC was filed seeking examination of Respondent No.4, and was stated to be filed to determine the entity on whose behalf the Agreement was signed. It was averred therein that the role of Respondent No. 4 in Respondent Nos. 1 to 3 companies is required to be determined. It was set out by the Appellant in this Application, that Respondent Nos. 1 and 4 are inter-connected and their constituents/employees

have represented each other interchangeably to the Appellant. It was further stated that the Respondents No.1 to 4 are attempting to escape liability and unjustly gain an advantage by creating multiple entities/parties. Paragraph 4 and 5 of the said Application are set out below:

> *"4.* ***The Defendant nos. 1 to 4 are inter-connected and their constituents/employees have constantly represented each other to the Plaintiff interchangeably, both in writing and oral representations.*** *The Defendant nos. 1 to 4 and/or their constituents have already attempted to gain unjust advantage in related proceedings before the District Court, Pune.*
>
> *5. In view of the above, it is prayed that the present case is a fit case* ***wherein the examination of the Defendant No. 4 would be required in order to determine the entity on whose behalf the Fabricator Agreement dated 11.02.2009*** *was signed by her and to determine the role of Defendant no. 4 in the Defendant 1 to 3 Companies."*
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> [Emphasis supplied]

19.4 Two Replies were filed to this Application. One joint Reply was filed by Respondent Nos. 1 and 2 and a separate Reply by Respondent Nos. 4 on behalf of Respondent Nos. 3 and 4. Both Replies were verbatim to each other and contained an admission that Respondent No. 4 is the proprietor of Respondent No. 3. Respondent Nos. 1, 2 and 4 however averred that Respondent No. 4 is the proprietor of Respondent No. 3 company and one of the Directors of Respondent Nos. 1 and 2. It was further contended in these Replies that it was thus not necessary to examine Respondent No. 4.

19.5 Clearly, therefore, there was no dispute with regard to the transaction and the fact that the parties were interconnected and

related to each other.

20. The Appellant also filed an Application under Order XII Rule 6 of the CPC for judgment on admissions based on an email dated 31.03.2018 by Respondent Nos. 1 to 4 wherein it was stated that the following were admitted by the Respondents as extracted below:

> *"2. Vide email dated 31.03.2018, sent to the Plaintiff, the Defendant nos. 1 to 4, inter-alia, admitted-*
>
> *a. the factum of issuance of Purchase Order No. MIG0008 dated 07.04.2015 to the Plaintiff Company;*
>
> *b. the factum of issuance of Letter of Credit bearing\ No.004LC03150990001 dated 09.04.2015;*
>
> *c. the factum of supply of goods by the Plaintiff to the Defendant nos. 1 to 4;*
>
> *d. their liability to the tune of Rs.7,00,000/- (Rupees Seven Lakhs)."*

20.1 Two separate Replies were filed to this Application, one by Respondent Nos. 1 and 2 and other by Respondent No. 4. The Replies were verbatim with each other and stated that there was no admission on the liability to the extent of Rs. 7 lakhs, but it was merely a *"without prejudice"* settlement proposal.

21. The Application under Order VII Rule 11(d) of the CPC for rejection of the Plant was jointly filed by the Respondent Nos. 1 to 4 before the learned Trial Court. The Application states that that the suit is barred on of account of the fact that there was an addition of parties and that the Appellant has added several paragraphs to the Plaint to try and fill up the lacuna in its case.

21.1 The application was supported by two Affidavits, one by a Mr.

Arjun Srinivasan as authorised signatory for Respondent No. 2 and one by Respondent No. 4 – Vandana Srinivasan for self and as sole proprietor of Respondent No. 3. The Affidavits also reveal that Ms. Vandana Srinivasan is the mother of Mr. Arjun Srinivasan.

22. As can be seen from the aforegoing, the Appellant had stated in the plaint as well in the Applications filed along with the plaint that Respondent Nos. 1 to 4 are interconnected. The Respondent No.1 to 4 have not denied executing the Agreement or the transaction between the parties, therein. There cannot be any dispute that the Respondent No.1 to 4 had themselves masked their identity at the time of the execution of the Agreement. It is also not disputed that Respondent No. 3 has executed the Agreement and that pursuant to the Agreement, transactions between the parties took place for several years and that the Appellant terminated the Agreement.

22.1 A cursory examination of the Agreement shows that the Agreement is on the letter head of REHAU United Polymer Solutions, it has in its footer the name REHAU Polymers Pvt. Ltd. (the Appellant). The Agreement also refers to M/s Mantralaya Impex Pvt. Ltd. (Respondent No.1) as its party in the recitals. However, the Agreement is executed by Respondent No. 4 as the proprietor of Respondent No.3 at the end of the Agreement.

23. The Courts at Pune allowed the Application under Order XXIII Rule 1(3) of the CPC being satisfied that there was a formal defect in the Plaint and permitted the Appellant to withdraw the Pune Suit. The plea of formal defect could not have been taken by the

Respondent for the Delhi Suit.

23.1 The meaning of formal defect under Order XXIII Rule 1(3) of the CPC has been explained by the Supreme Court in the judgment of ***V. Rajendran & Anr. v. Annasamy Pandian Thr. LR Karthyayani Natchiar***[5]**.** The Supreme Court has held that a *"formal defect"* under Order XXIII Rule 1(3)(a) of the CPC refers to procedural deficiencies that do not affect the substantive merits of a case. These defects include issues such as insufficient court fees, improper valuation of the suit, misjoinder or non-joinder of parties, failure to issue statutory notices (like those required under Section 80 of the CPC), confusion in identifying the suit property, or the absence of a disclosed cause of action. The Court emphasized that this term must be interpreted broadly to include procedural shortcomings that hinder the proper conduct of the suit without impacting the core legal or factual claims. Importantly, while the plaintiff has the right to seek withdrawal of a suit on grounds of a formal defect, this right is not absolute and must not be exercised in a manner that prejudices the legitimate interests of the defendant or results in the misuse of judicial process. The Court must ensure that such defects genuinely justify the withdrawal of the suit and grant permission only after being convinced that the procedural irregularity warrants fresh litigation. The relevant extract of the ***V. Rajendran*** case reads as follows:

> "*10. In K.S. Bhoopathy v. Kokila [K.S. Bhoopathy v. Kokila, (2000) 5 SCC 458]*, ***it has been held that it is the duty of the Court to be satisfied about the existence of "formal defect" or "sufficient***

[5] (2017) 5 SCC 63

> ***grounds" before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action.*** *Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the "formal defect" or "sufficient grounds", such right cannot be considered to be so absolute as to permit or encourage abuse of process of court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant.* ***When an application is filed under Order 23 Rule 1(3) CPC, the Court must be satisfied about the "formal defect" or "sufficient grounds". "Formal defect" is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to disclose a cause of action, etc. "Formal defect" must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties."***
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> [Emphasis supplied]

24. Order XXIII Rule 1(3) of the CPC and its applicability has also been explained in the ***N.D. Tiwari*** case by a Division Bench of this Court. It has been held that liberty granted to a plaintiff is to allow such plaintiff to institute a fresh suit in respect of the subject matter of the previously instituted suit or part of the claims in such suit. It was held that the term *"subject matter"* is much wider than the term *"cause of action"* and thus, under Order XXIII Rule 1(3) of the CPC, what is permitted to be withdrawn and subsequently instituted, is a fresh suit in respect of the same subject matter. The relevant extract of the ***N.D. Tiwari*** case is reproduced below:

> *"8.* ***Thus in terms of Order XXIII Rule 3 liberty is granted to the Plaintiff to institute a fresh suit in respect of the subject matter of such suit or a part of the claim thereof. He would be further precluded from instituting any fresh suit in respect of such subject matter or such part of the claim as regards which no liberty is granted. In terms of Order II Rule 2 if the Plaintiff relinquishes a portion of his claim or omits to sue for one or***

> ***more of the reliefs in respect of same cause of action then it is precluded from bringing a fresh suit as regards the claim or the relief relinquished or omitted.*** *In the present case the Respondent No. 1 moved an Application under Order XXIII Rule 3 read with Section 151 CPC to withdraw the said suit with liberty to institute a fresh suit for the same cause of action incorporating the factum of notice issued under Article 361(4) of the Constitution of India. Vide Order dated 24th March, 2008 this Court allowing the Application observed as under:—*
>
> *xxx xxx xxx*
>
> *9.* ***Under Order XXIII Rule 1(3) CPC, what is permitted to be withdrawn and subsequently instituted, is a fresh suit in respect of the same subject matter. Undoubtedly the term "subject matter" is of a wider amplitude than the term "cause of action". The bar in terms of Order II Rule 2, if any, to file a fresh suit with fresh cause of action on the same subject matter would not apply in the present case..."***
>
> [Emphasis supplied]

25. The judgment in the ***N.D. Tiwari*** case squarely applies to the facts of the present case. The subject matter of the two suits is the same for the recovery of monies due to the Appellant under the same Agreement. Both prayers seek the recovery of money from the Respondent(s). It is apposite to extract the prayer clause in the Pune Suit and the Delhi Suit which is reproduced below:

> **Prayer in Pune Suit:**
> *"a. The Defendant be ordered and directed to pay an amount of Rs.13,27,968/-(Rs. Thirteen Lacs Twenty Seven Thousand Nine Hundred and Sixty Eight only) to the Plaintiff.*
>
> *b. The Plaintiff be awarded interest on the amount of Rs.13,27,968/- (Rs. Thirteen Lacs Twenty Seven Thousand Nine Hundred only) at the rate of 18% p.a. from 21.04.2015, till the actual date of recovery of the amount..."*
>
> **Prayer in the Delhi Suit:**
> *"a. Pass a decree for the recovery of a sum of Rs.22,45,071/- (Rupees Twenty Two Lakhs Forty Five Thousand and Seventy One only) along with interest @ 18% p. a. till the date of realization in*

favour of the Plaintiff to be paid by the Defendants, ***jointly or severally****;…"*

26. Thus, relying on the ***V. Rajendran*** case and ***N.D. Tiwari*** case, it cannot at this stage, be concluded that the plaint is barred under the provisions of Order XXIII Rule 1(3) of the CPC.

27. Although the Impugned Order does not advert to plea of Order II Rule 2(2) of the CPC, this Court has examined this plea as well. The contention of the Respondents Nos. 1 to 4 (in its Application under Order VII Rule 11 CPC) that the Plaint is barred by the provisions of Order II Rule 2 of the CPC, is without merit. The bar would be applicable only when the plaintiff fails to seek liberty from the Court to file a fresh suit. In the present case liberty was sought by filing and Application/*Pursis* for withdrawal and granted by the Pune Court.

28. The Supreme Court in ***Gurinderpal v. Jagmittar Singh***[6] *has* explained the applicability of this provision. It has been held that the bar under Order II Rule 2 of the CPC applies only when a plaintiff fails to obtain express liberty to file a fresh suit. The liberty can also be inferred when the Court's order and the plaintiff's statement collectively indicate the intent to withdraw and file afresh. The Court also clarified that the provisions of Order II Rule 2 of the CPC must be strictly construed. The relevant extract of the ***Gurinderpal*** case is reproduced below:

"6. Having heard the learned counsel for the parties, we are satisfied that the judgment of the High Court as also of the first appellate court ***cannot be sustained to the extent to which the bar***

[6] (2004) 11 SCC 219

> ***enacted under Order 2 Rule 2 CPC has been applied. The provisions of Order 2 Rule 2 CPC bar the remedy of the plaintiff-appellant and, therefore, must be strictly construed****. The order of the trial court dated 15-6-1994 passed in the earlier suit, extracted and reproduced hereinabove, has to be read in the light of the statement of the plaintiff-appellant recorded by the court on that very date****. The plaintiff-appellant had clearly stated that he was seeking leave to withdraw the suit with the liberty of filing a fresh suit.*** *The trial court recorded that the suit was being dismissed as withdrawn "in view of the statement of the plaintiff". **A conjoint reading of the order of the court and the statement of the plaintiff, clearly suggests that the suit was dismissed as withdrawn because the plaintiff wanted to file a fresh suit, obviously wherein the plaintiff would seek the decree of specific performance and not of a mere injunction as was prayed for in the suit which was sought to be withdrawn. In the subsequent suit, the first appellate court was not right in forming an opinion that liberty to file the fresh suit was not given to the plaintiff in the order dated 15-6-1994. That finding of the first appellate court ought not to have been sustained by the High Court."***
>
> [Emphasis supplied]

29. The record shows that the Courts at Pune had examined the case and granted conditional leave to defend to the Respondents subject to deposit of a sum of Rs. 6 lakhs. The Order passed by the Pune Court allowing the withdrawal of the first suit dated 07.03.2018, also shows that the Pune Court granted the liberty to the Appellant to file afresh without any restrictions. It further sets out that an Application (*pursis*) for such withdrawal was filed. The Order dated 07.03.2018 being brief is extracted below:

> "*The plaintiff company wants to withdraw the suit with a liberty to file a fresh suit, so they have filed withdrawal pursis at Exh.40.* ***In view of the order thereon, the plaintiff company is permitted to withdraw the suit with a liberty to file a fresh suit and the suit is disposed off as withdrawn.*** *Court fee refunded as per rules to the plaintiff."*
>
> [Emphasis supplied]

30. Therefore, in the present case, clear and unequivocal permission was granted to the Appellant by the Pune Court to file a fresh suit. The suit was subsequently filed in Delhi. In these circumstances, the bar as set out in Order II Rule 2(2) of the CPC fails to apply to the plaint in the Delhi Suit.

31. The principles to be followed when an Application under Order VII Rule 11 of the CPC is filed have been set out by the Supreme Court in the case of ***Geetha D/o Late Krishna & Ors. v. Nanjundaswamy & Ors.***[7]**.** While relying on the principles enunciated in the case of ***Dahiben v. Arvindbhai Kalyanji Bhanusali***[8], it has been emphasised that this provision is in the nature of a summary provision where a case is decided without any evidence or trial. It has also been held that power conferred by the provision is a drastic one and can be invoked only if one of the specific grounds specified in Clauses (a) to (e) of Order VII Rule 11 of the CPC is established. The relevant paragraphs of the ***Geetha*** case are extracted below:

> *"6. Before considering the legality of the approach adopted by the High Court, it is necessary to consider Order VII Rule 11, CPC and the precedents on the subject. The relevant principles have been succinctly explained in a recent decision of this Court in Dahiben v. Arvindbhai Kalyanji Bhanusali, as follows:*
>
> > *"23.2.* ***The remedy under Order 7 Rule 11 is an independent and special remedy, wherein the Court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision.***

[7] 2023 SCC OnLine SC 1407
[8] (2020) 7 SCC 366

23.3. The underlying object of Order 7 Rule 11(a) is that if in a suit, no cause of action is disclosed, or the suit is barred by limitation under Rule 11(d), the court would not permit the plaintiff to unnecessarily protract the proceedings in the suit. In such a case, it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted.

23.4. In Azhar Hussain v. Rajiv Gandhi [Azhar Hussain v. Rajiv Gandhi, 1986 Supp SCC 315. Followed in Manvendrasinhji Ranjitsinhji Jadeja v. Vijaykunverba, 1998 SCC OnLine Guj 28 1: (1998) 2 GLH 823] this Court held that the whole purpose of conferment of powers under this provision is to ensure that a litigation which is meaningless, and bound to prove abortive, should not be permitted to waste judicial time of the court, in the following words: (SCC p. 324, para 12)

> *"12. ...The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless, and bound to prove abortive should not be permitted to occupy the time of the court, and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation, the court readily exercises the power to reject a plaint, if it does not disclose any cause of action."*

23.5. ***The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order 7 Rule 11 are required to be strictly adhered to.***

23.6. ***Under Order 7 Rule 11, a duty is cast on the court to determine whether the plaint discloses a cause of action by scrutinising the averments in the plaint [Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512], read in conjunction with the documents relied upon, or whether the suit is barred by any law.***

xxx xxx xxx

23.9. ***In exercise of power under this provision, the court would determine if the assertions made in the plaint are contrary to statutory law, or judicial dicta, for deciding whether a case for rejecting the plaint at the threshold is made out.***

> *23.10. At this stage, the pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and cannot be adverted to, or taken into consideration. [Sopan Sukhdeo Sable v. Charity Commr., (2004) 3 SCC 137]*
>
> *23.11.* ***The test for exercising the power under Order 7 Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. This test was laid down in Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I [Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512] which reads as : (SCC p. 562, para 139)***
>
> > *"139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed...."*
>
> [Emphasis supplied]

32. The powers under Order VII Rule 11 of the CPC are drastic in nature and have the effect of dismissal of a suit at the threshold. The power has to be exercised where the plaint fails to disclose any cause of action or is barred by law. The power has to be exercised strictly in terms Rules 11 (a) to (d) of Order VII of the CPC only. Unless the Court finds that the plaint is barred by any law, the said power cannot be exercised.

33. The pleas taken by the Respondents in the Application filed have been examined by the Court and been found to be devoid of any merit. The Respondent No.1 was only incorporated on 23.01.2015 and thereafter it changed its name to Respondent No.2. Thus

Respondent No. 1 ceased to exist. The filing of a suit in the name of an entity which doesn't exist would be an exercise in futility. The authorised representative of Respondent No.2 is one Mr. Arjun Srinivasan who is the son of Ms. Vandana Srinivasan. Ms Vandana Srinivasan is Respondent No.4 who is the sole proprietor of Respondent No.3. Respondent No. 4 is the executant of the Agreement with the Appellant, as sole proprietor of Respondent No.3. Clearly, therefore the contention of the Appellant that Respondent Nos.1 to 4 are all inter-related is correct. The prayers in both plaints as is set out above also shows that the relief is for recovery of monies pursuant to the Agreement. In these circumstances it cannot be said that by the addition of these parties, the nature or subject matter of the suit was being changed so as to fall within the provisions of Order XXIII Rule 1(3) of the CPC, to be barred by the provisions of Order VII Rule 11(d) of the CPC.

34. The pleas raised by Respondent Nos. 1 to 4 would thus have required to be examined by the adducing of evidence and could not have led to a dismissal of the suit at the threshold stage as has been done by the learned Trial Court.

35. In view of the aforegoing discussions, the Impugned Order is set aside. The parties are directed to appear before the learned District Judge on 21.01.2025. The District Judge shall also undertake an examination as to whether the suit is to be placed before the Commercial Division.

36. The parties shall act based on the digitally signed copy of the judgment.

TARA VITASTA GANJU, J

JANUARY 07, 2025/r/*ha*