

# The Case of Two Applications in the Same Subject Matter when the first one is still pending

Civil Procedure Code, 1908 (“CPC”)

## Order 2 Rule 2

**2. Suit to include the whole claim.-** (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

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.

This Court in **Gurbux Singh v. BhooraLal [AIR 1964 SC 1810]** held :

"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 latter suit is based there would be no scope for the application of the bar."

Unless the defendant pleads the bar under Order 2 Rule 2 of the Code and an issue is framed focusing the parties on that bar to the suit, obviously the court cannot examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or

demonstrate that the second suit was based on a different cause of action. In this case, the respondent did not contend that the suit was barred by Order 2 Rule 2 of the Code. No issue was framed as to whether the suit was barred by Order 2 Rule 2 of the Code. But the High Court (both the trial bench and appellate bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order 2 Rule 2 of the Code. Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order 2 Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Order 2 Rule 2 of the Code, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable.

### **Constructive Res Judicata**

Explanation IV to Section 11 of the CPC provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if was not actually set up as a ground of attack or defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2 Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed. The principle underlying Explanation IV to Section 11 becomes clear from *Greenhalgh v. Mallard* [1947 (2) All ER 257] thus:

"...it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. Emphasis supplied in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra* [1990 (2) SCC 715], a Constitution Bench of this Court reiterated the principle of constructive res judicata after referring to *Forward Construction Co. v. Prabhat Mandal* [1986 (1) SCC 100] thus: "an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence."

In this case the High Court has not stated what was the ground of attack that plaintiff-appellant ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata. The second suit is not barred by constructive res judicata.

### **Applicability of CPC to Arbitration Proceedings**

There have been cases in the past where in the interest of justice, the procedure given in CPC has been applied to arbitration proceedings as well:

1. Section 21 of CPC is not specifically made applicable to proceedings under Arbitration Act but there is no express prohibition, thus are applicable to Arbitration proceedings:

ITI Ltd vs M/s Siemens Public Communications Network Ltd; Om SakthiRenergies vs Megatech Control Ltd

2. As the application of Civil Procedure Code is not excluded to a civil proceeding arising out of the act, it is not excluded to a civil proceeding under the Arbitration and Conciliation Act, 1973: Symphony Services Corporation Pvt Ltd vs SudipBhattacharjee
3. In the absence of any specific provision contained in the Arbitration agreement, by necessary implication, the procedure of CPC has been made applicable to the proceedings: INCOMM Tele Ltd vs BSNL

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