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ALKA GUPTA

v.

NARENDER KUMAR GUPTA

(Civil Appeal No. 8321 of 2010)

B

SEPTEMBER 27, 2010

[R.V. RAVEENDRAN AND H.L. GOKHALE, JJ.]

CODE OF CIVIL PROCEDURE, 1908:

C *O.2, r.2 – HELD: A suit cannot be dismissed as barred by O. 2 r.2 in the absence of plea by defendant to that effect and in the absence of an issue thereon – Besides, in the instant case, cause of action for the second suit being completely different from the cause of action for the first suit,* D *the bar under O.2, r.2 was not attracted.*

s.11, Explanations III and IV – Res-judicata – Principles explained – Constructive res judicata – HELD: Plea of res judicata must be clearly established, more particularly, where the bar is sought on the basis of constructive res-judicata – E *In the instant case, High Court has not stated as to what was the ground of attack that the plaintiff ought to have raised but failed to raise in the first suit – The second suit is not barred by constructive res judicata.*

F *s.11 and O.2, r.2 – Concepts of and difference between – Explained.*

O. 15, r.3 – Suit – Dismissal of – HELD: A suit cannot be dismissed without trial merely because the court feels G *dissatisfied with the conduct of the plaintiff – In the instant case, High Court recorded factual findings on inference from plaintiff's conduct and branded her as an unscrupulous person who abused process of court, without there being a trial and without affording an opportunity to her to explain her conduct*

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– Such a procedure is opposed to all principles of natural justice embodied in CPC – At all events, alleged weakness of plaintiff's case or her unscrupulousness are not grounds for dismissal of suit without trial – There is also no basis for levying costs of Rs.50,000/- It has been repeatedly stated that in dealing with civil suits, courts will have to follow the provisions of CPC – Principles of natural justice – Costs – Practice and Procedure.

The plaintiff-appellant and the defendant-respondent, as per the deed dated 5.4.2000, were the only partners of a coaching institute under the name and style of "Takshila Institute" in premises at Paschim Vihar. On 29.6.2004, the appellant executed an agreement to sell her undivided half share in a premises at Rohini - Sector 8 and 50% share of M/s Takshila Institute which was run in the premises at Rohini - Sector 8, with all rights, titles, interest, goodwill etc. to the respondent, for a total consideration of Rs.21,50,000/- and received Rs.7,50,000/ - as advance. The appellant filed a suit (Suit No. 16/2006) against the respondent in the District Court, Delhi for recovery of Rs.12 lakhs, alleging that in pursuance of the agreement dated 29.6.2004 she had executed a sale deed in regard to the immovable p' >perty for Rs. 2 lakhs and the respondent promised to pay the balance of Rs. 12 lakhs in regard to other rights and interest agreed to be sold under the agreement. That suit was decreed.

Thereafter, the appellant filed another suit (O.S. No. 302/2007) against the respondent, in the Delhi High Court, for rendition of accounts for the period 5.4.2000 to 31.7.2000 in regard to the partnership firm of "Takshila Institute" at Paschim Vihar, and her share of profit in that business, pleading that the said partnership was at will and it was dissolved on 31.7.2004 when the respondent had filed a suit for injunction against the appellant and others.

A **The respondent resisted the suit on the grounds, inter alia, that the suit was barred by res judicate, and was liable to be dismissed for material suppression of facts. It was contended that by virtue of agreement of sale dated 29.6.2004, the partnership under the deed dated**
B **5.4.2000 was dissolved and the claims of the appellant were settled. Issues were framed treating the first issue of res judicata as the preliminary issue. The trial bench (single Judge of the High Court) held that the suit was liable to be dismissed summarily and accordingly**
C **dismissed the suit with cost of Rs.50,000/-, inter alia, holding that (i) the suit was barred by O.2, r.2 CPC, (ii) the suit was barred by constructive res judicata and (iii) the appellant was an unscrupulous person, she had abused the process of court by filing the suit based on**
D **falsehoods. The appellate bench of the High Court affirmed the decision of the single Judge to the effect that the suit was barred by O.2, r.2 CPC holding that appellant had settled her claims under the agreement of sale dated 29.6.2004. Aggrieved, the plaintiff filed the appeal.**

E **Allowing the appeal, the Court**

HELD: 1.1 *A suit cannot be dismissed as barred by O.2, r.2 of the Code of Civil Procedure, 1908 in the absence of a plea by the defendant to that effect and in the absence of an*
F *issue thereon.* **The object of O.2, r.2 of the Code is two-fold. The first is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. The second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The**
G **effect of O.2, r.2 is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not, however, bar a second suit**

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based on a different and distinct cause of action. Further, unless the defendant pleads the bar under O.2, r.2 and an issue is framed thereon, and the plaintiff is afforded an opportunity, the court can not examine or reject a suit on that ground. In the instant case, the respondent did not contend that the suit was barred by O.2, r.2, nor was an issue on that question framed. But the High Court (both the trial bench and the appellate bench) have erroneously assumed that a plea of res judicata would include a plea of bar under O.2, r. 2 CPC. Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas O.2, r.2 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 Or.2, r.2, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable. [para 7-9] [767-F; 768-E-F; 769-D-G]

Gurbux Singh v. Bhoora Lal 1964 SCR 831 = AIR 1964 SC 1810 – relied on.

1.2. The cause of actior for the second suit being completely different from the cause of action for the first suit, the bar under O.2, r.2 of the Code was not attracted. The cause of action for the first suit was non-payment of price under the agreement of sale dated 29.6.2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved partnership constituted under deed dated 5.4.2000. The two causes of action are distinct and different. The agreement dated 29.6.2004 was not an agreement relating to dissolution of the firm constituted under the deed of partnership dated 5.4.2000, or settlement of the accounts of the said partnership. The agreement of sale made it clear that it

A related to sale of the undivided 50% share in the property of Rohiin - sector 8 in which the business was being run and 50% share of the business that was being run in that premises. The second suit was for rendition of accounts in pursuance of the dissolution of the firm of "Takshila
B Institute" constituted under the deed of partnership dated 5.4.2000, carrying on business at Paschim Vihar and for payment of the amounts due on dissolution of the said firm. The pleadings in the two suits make it clear that both parties proceeded on the basis that the partnership
C between the appellant and the respondent under the deed dated 5.4.2000 was only in regard to the business run under the name and style of "Takshila Insittue" at Paschim Vihar and that the property at Rohini - Sector 8 with the business carried therein under the name of "M/
D S Takshila Institute", was not a part of the partnership business under deed dated 5.4.2000. Order 2, r. 2 of the Code would come into play only when both suits are based on the same cause of action and the plaintiff fails to seek all the reliefs based on or arising from the cause
E of action in the first suit without leave of the court. Merely because the agreement of sale related to an immovable property at Rohini - Sector 8 and the business run therein under the name of "M/s Takshila Institute" and the second suit referred to a partnership in regard to the
F business run at Paschim Vihar New Delhi, also under the similar name of "Takshila Institute", it cannot be assumed that the two suits relate to the same cause of action. Further, while considering whether a second suit by a party is barred by O.2, r.2, all that is required to be
G seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of plaintiff are not relevant for deciding

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whether the second suit is barred by O.2, r.2. [para 10-12] [771-B; 769-G-F; 770-A-F; 771-B-E]

2.1. The second suit was not barred by constructive res judicata. Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly, where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res judicata, nor had the plaintiff an opportunity to meet the case based on such plea. But, both the trial bench as also the appellate bench without assigning any reasons, proceeded on the basis that the suit was barred by principle of constructive res judicata. [para 13] [771-F-H; 772-A-C]

2.2 The Code deals with res judicata in section 11, with eight Explanations. The principle of constructive res judicata emerges from Explanation IV when read with Explanation III, both of which explain the concept of "matter directly and substantially in issue". Constructive res judicata deals with grounds of attack and defence which ought to have been raised; but not raised, whereas O.2, r.2 relates to reliefs which ought to have been claimed on the same cause of action but not claimed. In the instant case, the High Court has not stated what was the ground of attack that the plaintiff 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. [para14-15] [772-C-D; 773-E-F; 774-A-B; G-H]

Direct Recruit Class II Engineering Officers' Association

A *v. State of Maharashtra* **1990 (2) SCR 900 =1990(2) SCC 715;** *Forward Construction Co. v. Prabhat Mandal* **1985 (3) Suppl. SCR 766 = 1986 (1) SCC 100 - relied on.**

Greenhalgh v. Mallard **1947 (2) All ER 257 – referred**
B **to.**

3.1. A suit cannot be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance
C **with law and the provisions of the Code, and not on the whims of the court. There are no short-cuts in the trial of suits, unless they are provided by law. The Code enumerates the circumstances in which a civil suit can be dismissed without trial. It also provides for expeditious**
D **disposal in a summary manner. But where the summons have been issued for settlement of issues, and the suit is listed for consideration of a preliminary issue, the court, without a trial, cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim,**
E **the strength and validity and contents of documents, and on that basis dismiss a suit. A suit cannot be short-circuited by deciding issues of fact merely on pleadings and documents produced, without a trial. [para 16-19] [775-A-D; 776-E; 777-D-E]**
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3.3 In the instant case, the single Judge has adjudicated and decided questions of fact and rendered a judgment, without the evidence tested by cross-examination. The reasonings, findings, assumptions and
G **conclusions of the trial bench leading to the dismissal of the suit while hearing a preliminary issue relating to res judicata, demonstrate assumption of a jurisdiction not vested in it and also acting in the exercise of its jurisdiction illegally and with material irregularity. The**
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observation of the single Judge that "the facts of this case do not require any opportunity for leading evidence to be given to the plaintiff" violates O. 15, r. 3 of the Code. Where summons have been issued for settlement of issues and where issues have been settled, unless the parties agree, the court cannot deny the right of parties to lead evidence. To render a final decision by denying such opportunity would be highhanded, arbitrary and illegal. Even the Division Bench committed the same error. The High Court recorded factual findings on inferences from the plaintiff's conduct and without holding a trial and without affording an opportunity to the plaintiff to explain her conduct, branded her as an unscrupulous person who abuses the process of court and as a person who utters falsehoods and manipulates documents. Such a procedure is opposed to all principles of natural justice embodied in the Code. At all events, the alleged weaknesses of the case of the plaintiff or her unscrupulousness are not grounds for dismissal of suit without trial. [Para 19-21] [777-E-F; 780-G-H; 781-A-B]

3.4 There is also no basis for levying the costs of Rs.50, 000/-. The Supreme Court has repeatedly stated that in dealing with civil suits, courts will have to follow the provisions of the Code in levying costs. [para 22] [782-F-G]

3.5 The order of the Division Bench of the High Court affirming the order of the single Judge was set aside and the suit restored to the file of the High Court with a direction to decide the same in accordance with law, after giving due opportunity to the parties to lead evidence. [para 24] [783-B-C]

Case Law Reference:

1964 SCR 831	relied on	para 9

A	**1947 (2) All ER 257**	**referred to**	**para 15**
	1990 (2) SCR 900	**relied on**	**para 15**
	1985 (3) Suppl. SCR 766	**relied on**	**para 15**

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8321 of 2010.

From the Judgment & Order dated 07.09.2009 of the High Court of Delhi at New Delhi in R.F.A. (OS) 60 of 2009.

C Aman Lekhi, Meenakshi Lekhi, Sachin Jain, Madhur Jain, Sanjai Kumar Pathak for the Appellant.

P.C. Agarwal, Aditya K. Dubey, Varun Thakur, Ramesh Babu M.R., Ambuj for the Respondent.

D The order of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Leave granted. Heard. For convenience the appellant and respondent will also be referred to by their ranks in the suit, as 'plaintiff' and 'defendant' E respectively.

2. The appellant and respondent entered into a partnership as per deed dated 5.4.2000 to run an Institute for preparing students for competitive examinations, under the name and style of 'Takshila Institute', at No.F-19, LSC, Bhera Enclave, F Paschim Vihar, New Delhi.

3. On 29.6.2004, the appellant entered into an "agreement to sell" (Bayana Agreement) under which she agreed to sell the property described as follows:

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> "An undivided half share, second floor (without roof rights) of built up property bearing No.8, Pocket & Block C9, Sector-8, Rohini, Delhi – 110 085, built on a plot of land area measuring 158.98 Sq.m and 50% share of M/s

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Takshila Institute established in the above said property which is hereby agreed to be sold includes all rights, titles, interests, goodwill, electricity equipment, furniture, fixtures including passages, easements facilities privileges etc., which attached thereto or connected therewith."

Clause 13 of the said agreement clarified that the property agreed to be sold included the goodwill of the firm M/s Takshila Institute, having its office at C-9/8, Sector 8, Rohini, Delhi-85 in which the first party is also the partner of 50% and included all rights, interest, claims, title, fittings, furniture, fixtures and all equipment.

4. Under the said agreement, the total consideration agreed was Rs.21,50,000/- and the appellant received Rs.750,000/- as advance. The appellant claimed that in pursuance of the said agreement, she executed a sale deed in regard to the immovable property for Rs.200,000/- and that the respondent promised to pay the balance of Rs.12 lakhs in regard to the other rights and interest agreed to be sold under agreement of sale dated 29.6.2004. She filed Suit No.16/2006 in the District Court, Delhi for recovery of Rs.12 lakhs under the said agreement dated 29.6.2004, alleging that respondent had paid in all Rs.9.5 lakhs towards the agreed price. The said Suit No.16/2006 was decreed in favour of the appellant on 25.11.2006, directing respondent to pay Rs.12 lakhs with interest at 7% per annum with effect from 30.8.2004.

5. Thereafter the appellant filed another suit - C.S. (O.S.)No.302/2007 – in the Delhi High Court against the respondent, for rendition of accounts for the period 5.4.2000 to 31.7.2004, in regard to the partnership firm of Takshila Institute constituted under deed of partnership dated 5.4.2000. In that suit, the appellant alleged that the said partnership was at will and it was dissolved by implication on 31.7.2004, when respondent filed Suit No. 438/2004 against the appellant (and others) for an injunction. She also sought a decree against the respondent for her share of profits in the said partnership and

A for a decree for Rs.25.28 lakhs or higher amount in regard to the share of plaintiff with interest thereon. The said suit was resisted by the respondent. Three preliminary grounds of objections were raised in regard to the maintainability of the suit: (a) that the suit was barred by res judicata; (b) that the suit
B was barred under Section 69 of the Partnership Act, 1932, as it related to an unregistered partnership; and (c) that the suit was liable to be dismissed for material suppression of facts and approaching the court with unclean hands. It was alleged that parties were close relatives and appellant being a
C government servant, was only a sleeping partner. It was contended that by the agreement of sale dated 29.6.2004, the partnership under deed dated 5.4.2000 was dissolved and all claims of appellant were settled.

6. The issues in the said suit were framed on 17.1.2008
D with a direction that the first issue, extracted below, be treated as a preliminary issue:

> "Whether the suit is barred by the principle of res judicata as issue raised in the Suit has been directly and
E substantially been adjudicated between the plaintiff and the defendant in suit no.16/2006 titled as Alka Gupta vs. Narender Kumar Gupta vide an order dated 25.11.2006 by a competent court?

F By order dated 13.3.2009, the trial bench (learned Single Judge of the High Court) held that the suit was liable to be dismissed summarily on the following grounds: (i) The appellant had abused the process of court; (ii) the appellant was an unscrupulous person and the suit was based on falsehoods; (iii) the partnership dated 5.4.2000 was illegal and
G unenforceable as appellant was a government servant; (iv) the suit was barred by Order 2 Rule 2 of the Code of Civil Procedure ('Code' for short); and (v) the suit was barred by principle of constructive res judicata. The suit was accordingly dismissed with costs of Rupees Fifty Thousand. In the preamble
H to the said order, the trial court observed that on 12.1.2009,

when arguments were on the preliminary issue, it was clarified that arguments were being heard not only on the said preliminary issue, but also the question as to why independent of section 11 and Order 2 Rule 2 of the Code, the suit should not be dismissed summarily on the ground of re-litigation and abuse of process of court. It is further stated that on 16.1.2009, the statement of plaintiff (appellant herein) was recorded and arguments on various aspects were heard on 16.1.2009 and 21.1.2009. A B

7. Feeling aggrieved, the appellant filed an appeal. An appellate bench of the High Court, by the impugned judgment dated 7.9.2009, dismissed the appeal. The appellant bench affirmed the decision of the trial bench. It however held that as it was agreeing with the learned Single Judge that the suit was barred by Order 2 Rule 2 of the Code and that the appellant had settled all her claims with the respondent under the Bayana Agreement dated 29.6.2004, it was not necessary to decide upon the question as to whether the partnership deed dated 5.4.2000 could be enforced in a court or not. The said order is challenged in this appeal by special leave. For the reasons following, we are of the view that the orders of the learned Single Judge and the Division Bench which ignore several basic principles of Code of Civil Procedure cannot be sustained. C D E

I. A suit cannot be dismissed as barred by Order 2 Rule 2 of the Code in the absence of a plea by the defendant to that effect and in the absence of an issue thereon. F

8. We may extract Order 2 Rules 1 and 2 of the Code for ready reference: G

> "1. **Frame of suit:** Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. H

A 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.

B (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.

C (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 D omitted."

The object of Order 2 Rule 2 of the Code is two-fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from E splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of F action.

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

G "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; H

(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 can not 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.

II. The cause of action for the second suit being completely different from the cause of action for the first suit, the bar under order 2 Rule 2 of the Code was not attracted.

10. The first suit was for recovery of balance price under

A an agreement of sale. The agreement dated 29.6.2004 was not an agreement relating to dissolution of the firm constituted under deed of partnership dated 5.4.2000, or settlement of the accounts of the said partnership. The agreement of sale made it clear that it related to sale of the undivided half share in the B second floor at Rohini, 50% (property bearing No.8, Pocket & Block C-9, Sector-8, Rohini, Delhi-110085) and 50% share of the business that was being run in that premises, that is premises at Rohini. The second suit was for rendition of accounts in pursuance of the dissolution of the firm of Takshila C Institute constituted under deed of partnership dated 5.4.2000, carrying on business at Bhera Enclave, Paschim Vihar, Delhi-110087 and for payment of the amounts due on dissolution of the said firm.

11. The pleadings in the two suits make it clear that both D parties proceeded on the basis that the partnership between appellant and respondent under deed dated 5.4.2000 was only in regard to the business run under the name and style of 'Takshila Insittue' at Bhera Enclave, Paschim Vihar, Delhi–110087. The appellant proceeded on the basis that the property E at Rohini and the business carried therein under the name of Takshila Institute, was not a part of the partnership business under deed dated 5.4.2000. Even the respondent in his written statement in the first suit asserted that the partnership dated 5.4.2000 between appellant and respondent did not extend to F Takshila Institute at Rohini or other places. In fact appellant clearly contended that respondent was carrying on business under the same name of Takshila Institute at Janakpuri, Ashok Vihar and Kalu Sarai in Delhi and also at Dehradun and Palampur, but they were not partnership businesses. The G respondent in his written statement asserted that he alone was carrying on business at those places under the name of Takshila Institute. Therefore, the court could not, before trial, assume that the sale of appellant's share in the immovable property at Rohini and the goodwill and assets of the business carried on at H Rohini under the name of Takshila Institute should be taken as

relinquishment or retirement or settlement of share in regard to the partnership business of Paschim Vihar Takshila Institute.

12. The cause of action for the first suit was non-payment of price under the agreement of sale dated 29.6.2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved partnership constituted under deed dated 5.4.2000. The two causes of action are distinct and different. Order 2 Rule 2 of the Code would come into play only when both suits are based on the same cause of action and the plaintiff had failed to seek all the reliefs based on or arising from the cause of action in the first suit without leave of the court. Merely because the agreement of sale related to an immovable property at Rohini and the business run therein under the name of 'Takshila Institute' and the second suit referred to a partnership in regard to business run at Pachhim Vihar, New Delhi, also under the same name of Takshila Institute, it cannot be assumed that the two suits relate to the same cause of action. Further, while considering whether a second suit by a party is barred by Order 2 Rule 2 of the Code, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of plaintiff are not relevant for deciding whether the second suit is barred by Order 2 Rule 2 of the Code.

III. The second suit was not barred by constructive res judicata.

13. The learned trial bench passed the order on 13.3.2009 on the preliminary issue (Issue No.1) relating to res judicata. But there is absolutely no discussion in the order of the learned Single Judge in regard to the bar of res judicata except the following observation at the end of the order: "Of course it cannot be said that the present suit is barred by res judicata inasmuch as the said claims were not decided in that case. But the principle of constructive res judicata is applicable." This was not interfered by the appellate bench. Both proceeded on the

A basis that the suit was not barred by res judicata, but barred by principle of constructive res judicata without assigning any reasons. Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is B on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res judicata, nor had the appellant C plaintiff an opportunity to meet the case based on such plea.

14. Res judicata means 'a thing adjudicated' that is an issue that is finally settled by judicial decision. The Code deals with res judicata in section 11, relevant portion of which is extracted below (excluding Explanations I to VIII):

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> "11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom E they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court"

F Section 11 of the Code, on an analysis requires the following essential requirements to be fulfilled, to apply the bar of res judicata to any suit or issue:

(i) The matter must be directly and substantially in issue in the former suit and in the later suit.

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(ii) The prior suit should be between the same parties or persons claiming under them.

(iii) Parties should have litigated under the same title in the earlier suit.

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(iv) The matter in issue in the subsequent suit must have been heard and finally decided in the first suit. A

(v) The court trying the former suit must have been competent to try particular issue in question. B

To define and clarify the principle contained in Section 11 of the Code, eight Explanations have been provided. Explanation I states that the expression 'former suit' refers to a suit which had been decided prior to the suit in question whether or not it C was instituted prior thereto. Explanation II states that the competence of a court shall be determined irrespective of whether any provisions as to a right of appeal from the decision of such court. Explanation III states that the matter directly and substantially in issue in the former suit, must have been alleged D by one party or either denied or admitted expressly or impliedly by the other party. Explanation IV provides that any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The E principle of constructive res judicata emerges from Explanation IV when read with Explanatic III both of which explain the concept of "matter directly and substantially in issue".

15. Explanation III clarifies that a matter is directly and substantially in issue, when it is alleged by one party and denied F or admitted (expressly or impliedly) by the other. Explanation IV 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 G 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 H

A 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
B 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
C 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.*

D (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
E 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
F 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."

G 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.

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IV.A suit cannot be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff.

16. Code of Civil Procedure is nothing but an exhaustive compilation-cum-enumeration of the principles of natural justice with reference to a proceeding in a court of law. The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court. There are no short-cuts in the trial of suits, unless they are provided by law. A civil suit has to be decided after framing issues and trial permitting the parties to lead evidence on the issues, except in cases where the Code or any other law makes an exception or provides any exemption.

17. The Code enumerates the circumstances in which a civil suit can be dismissed without trial. We may refer to them (not exhaustive):

(a) Dismissal as a consequence of rejection of plaint under Order 7 Rule 11 of the Code in the following grounds : (i) where it does not disclose a cause of action; (ii) where the relief in the plaint is undervalued and plaintiff fails to correct the valuation within the time fixed; (iii) where the court fee paid is insufficient and plaintiff fails to make good the deficit within the time fixed by court: (iv) where the suit appears from the statement in the plaint to be barred by law; (v) where it is not filed in duplicate and where the plaintiff fails to comply with the provisions of Order 7 Rule 9 of the Code.

(b)Dismissal under Order 9 Rule 2 or Rule 3 or Rule 5 or Rule 8 for non-service of summary or non-appearance or failure to apply for fresh summons.

(c)Dismissal under Order 11 Rule 21 for non-compliance with

A an order to answer interrogatories, or for discovery or inspection of documents.

(d) Dismissal under Order 14 Rule 2(2) where issues both of law and fact arise in the same suit and the court is of opinion
B that the case or any part thereof may be disposed of on an issue of law only and it tries such issue relating to jurisdiction of the court or a bar to a suit created by any law for the time being in force first and dismisses the suit if the decision on such preliminary issue warrants the same.

C (e) Dismissal under Order 15 Rule 1 of the Code when at the first hearing of the suit it appears that the parties are not at issue on any question of law or fact.

(f) Dismissal under Order 15 Rule 4 of the Code for failure to
D produce evidence.

(g) Dismissal under Order 23 Rules 1 and 3 of the Code when a suit is withdrawn or settled out of court.

18. The following provisions provide for expeditious
E disposal in a summary manner :

(i) Order V Rule 5 of the Code requires the court to determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final
F disposal of the suit (and the summons shall have to contain a direction accordingly). In suits to be heard by a court of small causes, the summons shall be for the final disposal of the suit.

(ii) Order 15 Rule 3 of the Code provides where the parties
G are at issue on some question of law or of fact, and issues have been framed by the court as hereinbefore provided, if the court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the

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suit, and that no injustice will result from proceeding with the suit forthwith, the court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit. (But where the summons has been issued for the settlement of issues only, such a summary course could be adopted only where the parties or their pleaders are present and none of them objects to such a course).

(iii) Order 37 Rule 1 read with Rules 2& 3 of the relating to summary suits.

19. But where the summons have been issued for settlement of issues, and a suit is listed for consideration of a preliminary issue, the court cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. A suit cannot be shortcircuited by deciding issues of fact merely on pleadings and documents produced without a trial. In this case, the learned Single Judge has adjudicated and decided questions of fact and rendered a judgment, without evidence tested by cross-examination. We extract below some of the reasonings, findings, assumptions and conclusions of the learned Single Judge leading to the dismissal of the suit when hearing a preliminary issue relating to res judicata, thereby demonstrating assumption of a jurisdiction not vested in it and also acting in the exercise of its jurisdiction illegally and with material irregularity:

"What emerges from the aforesaid is that the plaintiff at the time of inception of the partnership and till date is a government teacher and under the terms of her employment was not entitled to enter into the partnership and was not entitled to earn any profits therefrom. Not only under the terms of her employment, *the plaintiff before the*

A *Service Tax Authorities also represented that she had only academic interest. It can only mean that she had no profit interest in the partnership.* Though the plaintiff has denied that she has filed the clearance certificate aforesaid with the government school in which she is
B employed but the purpose of plaintiff obtaining the said clearance certificate from the defendant can only be to use the same in the event of any complaint of breach of terms of employment being made against her.

C xxx xxx xxx

The question which arises for adjudication is whether a litigant can be permitted to take a stand in the court, diametrically opposite to the stand of that litigant elsewhere. Can there be different stands before the
D government as employer and before the Taxation Authorities and before the court. Should the courts permit such stand to be taken in the course of judicial proceedings and should the courts come to the rescue of such a litigant in recovering dues which that litigant elsewhere has
E represented are not due to her.

The aforesaid circumstances leave no manner of doubt that the plaintiff in contravention of the terms of her employment was carrying on business as a partner with the defendant. The question is of enforcement of such a
F *partnership and or the terms thereof by the court.*

xxx xxx xxx

In the present case the condition in the term of the
G employment of the plaintiff as a government teacher, admittedly prohibit her from carrying on any business activity or other vocation for profits. Such condition has been imposed to ensure that the teachers of the government school devote their full energy and time to
H developing the young minds, rather than treating the

government service as a mere source of income and utilizing their time and skill in earning/making money elsewhere. The plaintiff by entering into the agreement of partnership with the defendant had clearly violated her terms of employment and this Court cannot come to her assistance to enable her to earn profits which she otherwise is not entitled. The plaintiff has admitted to having not shown any profits whatsoever in her Income Tax return. It is inconceivable that the plaintiff who has claimed to be in partnership since the year 1999 or 2000 would not have earned any profits from the partnership and/or if would not have earned would have sat quietly for four years. The plaintiff cannot be permitted to take different stands before different fora. The condition/term of employment prohibiting the plaintiff from entering into partnership is found to be in public interest and the action of the plaintiff of breaching/violating the same is found to be immoral and opposed to public policy. The breach is not found to be trivial or venial. Further, the conduct of the plaintiff thereafter also, as noted above is found to be of subterfuge and plaintiff has been found to be misstating facts. The plaintiff is found to be an unscrupulous person and her case is found to be based on falsehood. This Court refuses to come to the aid of plaintiff and her case is liable to be dismissed summarily.

That even on the facts of this case, I have no doubt that the plaintiff has abused the process of the court. The plaintiff in the Bayana Agreement aforesaid had clearly agreed to the sum of Rs. 21.50 lacs towards her share in the partnership firm inclusive of the value of the Rohini property where the partnership business was being carried on. As far as the Paschim Vihar property is concerned, the issue with respect whereto was raised, the same also finds mention in the said Bayana Agreement and the receipt. The conduct of the plaintiff also shows that all accounts had

A been settled and no accounts remained to be taken and for which purpose the suit had been filed. Had the accounts not been settled, the question of the plaintiff instructing the bank to delete her name from the account in the name of the firm and of receiving the original Bayana Agreement
B and of obtaining the clearance certificate aforesaid would not have arisen. The case set up by the plaintiff is contrary to all the admitted documents.

xxx xxx xxx

C I find the present case to be clear beyond all reasonable doubts. The Bayana Agreement and Receipt admittedly executed by plaintiff and the averments of plaintiff in plaint in earlier suit instituted by plaintiff, permit of no controversy. The consideration mentioned therein was in settlement of
D all claims of plaintiff with respect to her share in partnership. The contemporaneous conduct of plaintiff, of statement on 13th August, 2004 in suit No. 438/2004 instituted by defendant; of taking clearance certificate dated 13th August, 2004 from defendant, of having her name as
E signatory deleted from the bank account of firm are also in consonance with said documents. The facts of this case do not require any opportunity for leading evidence to be given to the plaintiff. This Court cannot put a case contrary to such documents and conduct to be put to trial. The
F explanations now given during arguments do not form the basis of suit and pleadings."

(emphasis supplied)

The observation of the learned Single Judge that "the facts
G of this case do not require any opportunity for leading evidence to be given to the plaintiff" violates Order 15 Rule 3 of the Code. Where summons have been issued for settlement of issues and where issues have been settled, unless the parties agree, the court cannot deny the right

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of parties to lead evidence. To render a final decision by denying such opportunity would be highhanded, arbitrary and illegal. A

20. Even the division bench committed the same error. We extract below para 14 of the impugned order which shows that the decision was based on assumption without basis and in the absence of evidence freely referring to and relying upon unexhibited documents : B

"This is not the case of the plaintiff/appellant that the firm was maintaining separate accounts, one for the business being run by it in Rohini and the other for the business being run in Paschim Vihar. Ordinarily, when there is a Settlement between the partners of the firm whereby they agree to part ways, the Settlement effected between them would cover accounts of the entire business being run by them in partnership and it would not be confined only to one part of the business. This is more so when the document executed between the parties at the time of parting ways and setting the disputes does not reserve any right in favour of the outgoing partner, to receive any further payment from the partner who retains the business of the erstwhile firm. *In none of the documents executed between the parties, there is an averment that the accounts of business being run in Paschim Vihar had not been settled or that the plaintiff/appellant would not, in addition to the sum referred in the document, also be entitled to share of the profit earned by the firm from its business in Paschim Vihar.* Vide endorsement made on the receipt dated 29.6.2004, the husband of the appellant recorded that Paschim Vihar Institute Deed would be settled in the name of Dr.Rashmi Gupta for the consideration of Rs.15 lakhs. *This is yet another proof of the fact that the matter relating to Paschim Vihar Institute had also been finally settled between the parties.* During the course of arguments before us, it was contended by C D E F G H

A learned counsel for the appellant that the endorsement was made by the husband of the appellant without authority from her. Since we noticed a gentleman giving instructions to the learned counsel for the appellant, during the course of the hearing before us, we asked her as to who the B gentleman was and we were told that he was none other than the husband of the appellant. *This leaves no doubt in our mind that the husband of the appellant was acting on authority from her when he made endorsements on the Bayana Agreement and Receipt dated 29.6.2004.* C The shifting stands taken before him have been noted in detail, by the learned Single Judge.

(emphasis supplied)

21. The High Court recorded factual findings on inferences D from the plaintiff's (appellant) conduct and branded her as an unscrupulous person who abuses the process of court and as a person who utters falsehoods and manipulates documents without there being a trial and without there being an opportunity to the plaintiff to explain her conduct. To say the least, such a E procedure is opposed to all principles of natural justice embodied in the Code of Civil Procedure. At all events, the alleged weakness of the case of the plaintiff or unscrupulousness of plaintiff are not grounds for dismissal without trial.

F 22. We also fail to understand how costs of Rs.50,000/- could be levied. This Court has repeatedly stated that in dealing with civil suits, courts will have to follow the provisions of Code of Civil Procedure in levying costs.

G 23. This order should not be construed as a finding on the conduct of the appellant one way or the other. We have examined the matter only for the limited purpose of finding out whether the High Court had proceeded in accordance with law and the provisions of Code of Civil Procedure. If on evidence,

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the conduct of the plaintiff or the defendant is found to be unscrupulous or unbecoming, it is open to the court at that stage to decide upon the consequences that should be visited upon her or him. A

24. We therefore allow this appeal, set aside the order of the Division Bench of the High Court dated 7.9.2009 affirming the order dated 13.3.2009 of the learned Single Judge and restore the suit to the file of the High Court with a direction to decide the same in accordance with law, after giving due opportunity to the parties to lead evidence. B C

R.P. Appeal allowed.