

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.03.2015

Delivered on : 02.06.2015

CORAM
THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

A.S.No.915 of 2010
and
M.P.No.1 of 2010

Narasimman (deceased) by his Legal Representatives

1. N.Vasanthi

2. N.Kalaivani

3. N.Rajesh Kumar

4. N.Pandurangan

.. Appellants

(cause title accepted vide Order
dated 22.11.2010 in M.P.No.1 of 2010 in
A.S.S.R.NO.90726/10)

-Vs-

R.Santhakumari

.. Respondent/Defendant

Appeal filed under Section 96 of the Civil Procedure Code and Order 41 Rule 1 of CPC against the judgment and decree of the learned Additional District and Sessions Judge, Fast Track Court No.III, Ranipet, Vellore District dated 21.04.2010 made in O.S.No.18 of 2007.

For Appellants : Mr.V.R.Karthikeyan

For Respondent : Mr.T.P.Prabakaran

JUDGMENT

This appeal suit has been preferred against the decree of the trial court, namely Additional District and Sessions Judge, Fast Track Court No.III, Ranipet dated 21.04.2010 dismissing O.S.No.18 of 2007 filed for the relief of specific performance on the basis of an agreement for sale dated 25.11.1999. One Narasimman and the 4th appellant Pandurangan filed the above said suit for the relief of specific performance against Santhakumari, the respondent herein. After the disposal of the suit, the said Narasimman, who figured as the first plaintiff passed away. His legal representatives (appellants 1 to 3) and Pandurangan (4th respondent/2nd defendant) have preferred the present appeal.

2. The original suit was filed contending that the respondent herein/defendant agreeing to sell the suit property for a sum of Rs.7,00,000/-, received a sum of Rs.50,000/- as advance and executed an agreement for sale dated 25.11.1999; that one Veera

Raghavalu Reddy filed a suit in respect of the suit property as O.S.No.787/1982, which was dismissed and the dismissal was confirmed by the High Court in A.S.No.37/1994; that despite the fact that the plaintiffs were ready and willing to perform their part of the obligations under the agreement and issued notices on 21.10.2000 and 6.11.2002 to the respondent/defendant calling upon her to come and execute the sale deed in favour of the plaintiffs on receiving the balance sale consideration of Rs.6,50,000/-, the respondent/defendant failed to comply with the demand made in the notices and also failed to issue any reply and that therefore, the plaintiffs were constrained to file the suit for specific performance.

3. The suit was resisted by the respondent/defendant based on her contention that she never executed any sale agreement, much less an agreement on 25.11.1999 in favour of the plaintiffs agreeing to sell the suit properties; that she did not receive any amount from the plaintiffs as advance; that the agreement is a forged, concocted and fraudulent document created by the plaintiffs with ulterior motive of grabbing the property of the respondent/defendant, taking advantage of her helpless condition; that the suit property was worth more than Rs.25,00,000/- and there was no necessity for the respondent/defendant to sell the same for a paltry sum of Rs.7,00,000/-; there was also a civil litigation pending on the file of the Sub Court, Ranipet in A.S.No.37/1994 and that absolutely there was no chance for the plaintiffs to enter into an agreement for purchasing the same from the respondent/defendant. It was contended further that when she was facing a number of vexatious litigations after the demise of her husband, the plaintiffs volunteered to help the respondent/defendant, lent a sum of Rs.50,000/- in the year 1999 and got the signature of the respondent/defendant in blank papers and blank stamp papers at that point of time; that the suit came to be filed fraudulently making use of the same; that the plaintiffs were never ready and willing to perform their part of the agreement as alleged by them and that the suit should be dismissed. It was also contended therein that though the agreement incorporated a stipulation that the sale transaction should be completed on or before 28.02.2000, the plaintiffs did not approach the respondent/defendant and tender the balance sale price and seek execution of the sale deed; that on the other hand, on the last day of limitation, they filed the suit without sufficient court fee, got it returned and re-presented the same after five years; that the plaintiffs did not have the capacity at all to pay the balance sale price and the same was the reason why they filed the suit with insufficient court fee, got it returned and re-presented with necessary court fee nearly after five years from the date of original presentation of the plaint; that such a presentation could not be taken as proper presentation of the plaint so as to avoid the bar of limitation and that therefore, the suit should be dismissed. Since the plaintiff filed a suit for permanent injunction restraining the defendant from executing any sale deed in respect of the suit property in favour of third parties in

O.S.No.115/2001 on the file of the District Munsif Court, Sholingur and the same was withdrawn by the plaintiff, the present suit for specific performance would stand barred by the law under Order 2 Rule 2 CPC.

4. Based on the pleadings of the parties, the trial court framed four issues, which are not happily worded. The crux of the issues is produced as under:

1. Is the suit barred by limitation?

2. Is the suit barred by Order II Rule 2(3) CPC in view of the plaintiffs earlier suit O.S.No.115/2011 instituted on the file of the Court of District Munsif, Sholingur and dismissed as withdrawn by an order dated 25.10.2007?

3. Whether the suit agreement for sale is enforceable against the defendant and whether the plaintiff is entitled to the relief of specific performance?

4. What are the reliefs to which the plaintiffs are entitled?

5. The parties went for trial and in the trial, three witnesses were examined as PWS.1 to 3 and eight documents were marked as Exs.A1 to A8 on the side of the plaintiffs, whereas the defendant figured as the sole witness (DW1) on her side and no document was marked on her side.

6. The learned trial judge, on an appreciation of evidence, held that the suit was not barred by limitation. However, the learned trial judge held that the present suit filed for specific performance was barred under Order II Rule 2 of CPC holding that the plaintiffs were not entitled to the relief of specific performance and dismissed the suit without cost by decree dated 21.04.2010. The said decree is challenged by the appellants herein (the legal heirs of deceased first plaintiff and the second plaintiff) on various grounds set out in the memorandum of grounds of appeal.

7. The points that arise for determination in this appeal suit are as follows:

1. Is it true that Ex.A1-Agreement for sale was executed by the defendant agreeing to sell the suit property for a sum of Rs.7,00,000/- on receipt of a sum of Rs.50,000/- as advance on 25.11.1999?

2. Whether the appellants/plaintiffs have complied with the conditions stipulated in Section 16(c) of the Specific Relief Act, 1963 and proved

their readiness and willingness to perform their part of the obligations under the suit sale agreement?

3. Whether the suit is barred by Order II Rule 2(3) of CPC?

4. Whether the appellants/plaintiffs are entitled to the relief of specific performance or any other relief?

8. The arguments advanced by Mr.V.R.Karthikeyan, learned counsel for the appellants and by Mr.T.P.Prabhakaran, learned counsel for the respondent were heard. The materials available on record were also perused and taken into consideration.

Point No.1:-

9. There is no dispute regarding the fact that the suit property belongs to the respondent/defendant. The plaintiffs filed the suit based on an unregistered sale agreement dated 25.11.1999 allegedly executed by the respondent/defendant in favour of the plaintiffs. The defendant denied having executed the above said suit agreement for sale. The disputed agreement for sale was produced and marked before the trial court as Ex.A1. Besides contending that the said document was not executed by her and no amount was received as advance as recited in the said document, the defendant also contended that when she was facing a number vexatious suits after the demise of her husband, the plaintiffs volunteered to help her and paid a sum of Rs.50,000/- and that at that point of time they obtained her signature in blank papers and blank stamp papers with which the suit agreement for sale could have been created.

10. When the defendant disputes the execution of the agreement for sale and passing of consideration, the plaintiffs have to prove it by adducing sufficient evidence. In this regard, the deceased first plaintiff was examined as PW1 and two other persons by name M.Ravi and G.Ramachandran were examined as PW2 and PW3. PW1 in his chief examination in the form of proof affidavit has admitted that before the filing of the present suit for specific performance, he filed a suit for permanent injunction restraining the defendant from selling the suit property to any other person disregarding the suit agreement for sale. It is his admission that while filing the said former suit, namely O.S.No.115/2001 on the file of District Munsif Court, Sholingur, he did not seek any leave to file a separate suit for specific performance. It is his further admission that at the time of filing of the present suit for specific performance, a case was pending between Veeraraghavalu Reddiar and the defendant in respect of the suit property; that knowing fully well the pendency of such suit, he filed the present suit for specific performance without making payment of proper court fee and paying a court fee of Rs.10 alone on the belief that he could compromise the dispute and that the

<https://hcservices.pcrajitsg.gov.in/hcservices/> presented with proper court fee only after a lapse of

five years from the date of original presentation of the plaint. He has also admitted that the suit was numbered only in the year 2007.

11. Late M.Narasimhan and N.Pandurangan were the plaintiffs in the original suit O.S.No.18/2007 tried by the then learned Additional District Judge (Fast Track Court), Ranipet. The suit had come to be filed against the respondent Santhakumari on the basis of an agreement for sale dated 25.11.1999 allegedly executed by her in favour of the above said persons agreeing to sell the suit property for a sum of Rs.7,00,000/- and received a sum of Rs.50,000/- out of the same as advance. The prayer made in the plaint is for the grant of a decree directing the respondent herein/defendant to execute and register a sale deed in favour of the plaintiffs and to deliver vacant possession of the suit property to them.

12. The respondent herein/defendant denied having executed any such agreement for sale dated 25.11.1999 or on any other date in favour of the plaintiffs agreeing to sell the property for a sum of Rs.7,00,000/-. It was also contended by the respondent herein/defendant that no amount was received by her as advance; that when she was facing a number of vexatious litigations after the demise of her husband, the plaintiffs themselves volunteered to provide her a fund of Rs.50,000/- and got her signature in blank stamp papers and blank papers and that the same could have been used for the fabrication and creation of the agreement in question. It was also her contention that the suit property was worth Rs.25.00 Lakhs and she could not have agreed to sell the property for a meager sum of Rs.7,00,000/-. Though the respondent/defendant, in her written statement, might have stated that her signatures were obtained in blank papers and blank stamp papers and the same could have been used for the creation of the suit sale agreement, there is no admission of execution of the suit sale agreement. The admission regarding the signatures found in the suit sale agreement is also not unequivocal. There is no clear admission that the signatures found in the suit sale agreement are the signatures of the respondent/plaintiff. Under the said circumstances, the burden of proving execution of the suit sale agreement by the respondent herein/defendant in favour of the plaintiffs in the original suit stood cast heavily on the plaintiffs.

13. In order to prove the execution of agreement, plaintiffs produced the original unregistered agreement as Ex.A1, copy of the notices issued to the respondent/defendant as Exs.A2 and A3 and the reply notice sent by the respondent/defendant on 24.10.2000 as Ex.A7. Besides the above, the plaintiffs had also instituted a previous suit for injunction in O.S.No.115/2001 on the file of District Munsif Court, Sholingur. A copy of the plaint and a copy of the written statement filed in the said suit have been produced as Exs.A6 and A8. In Ex.A2-Notice dated 21.10.2000, besides contending that a sum of Rs.50,000/- was paid as advance on the date of agreement, the plaintiffs had also chosen to admit that

the defendant. In paragraph 3 of the said notice it has been stated as follows:

"3. My client further states that you have borrowed the following sums and executed documents as follows:

Sl. No.	Date	Amount	Mode of payment
1	10.3.99	Rs.5,000/-	demand promissory note payable with interest at 24% p.a. in favour of my client No.1
2	6.10.99	Rs.10,000/-	D.P.N. payable with interest 36% p.a. in favour of my client No.1
3	10.5.99	Rs.25,000/-	demand promissory note payable with interest at 36% p.a. in favour of client No.2
4	15.3.99	Rs.50,000/-	unregistered mortgage payable with interest at 24% p.a. in favour of my client No.1 in respect of schedule mentioned property

"Client No.1" refers to the first plaintiff Narasimhan and "client No.2" refers to N.Pandurangan, the second plaintiff.

14. For the said notice dated 21.10.2000, the respondent/defendant issued a reply notice on 24.10.2000 under Ex.A7. In the said reply notice, the respondent/defendant had denied having executed the suit sale agreement, the promissory notes and the unregistered mortgage referred to in the notice. On the other hand, she contended that her signatures had been obtained on blank stamp papers and the said claims in the notice were made for gaining wrongful enrichment. Thereafter, the plaintiffs chose to file O.S.No.115/2001 on the file of District Munsif, Sholingur praying for a bare injunction against the respondent herein not to alienate the suit property in favour of third parties. The copy of the plaint filed therein is Ex.A6 and the copy of the written statement filed by the respondent herein/defendant in the said suit is Ex.A8. In the said written statement also the respondent herein/defendant had denied having agreed to sell the suit property to the plaintiffs, receipt of Rs.50,000/- as advance and execution of an unregistered agreement for sale on 25.11.1999. In the present suit also, the respondent/defendant has taken a similar plea and she had been consistent in her stand ever since the receipt of pre-suit notice. In fact, after the receipt of reply notice dated 24.10.2000 marked as Ex.A7, the plaintiffs chose to issue a fresh notice omitting the reference made in Ex.A2 to the loan transactions and restricting the contents of the notice to the sale agreement dated 25.11.1999 alone. This was done perhaps on the realisation of the mistake committed by them in revealing the fact that there had been loan transactions between the plaintiffs and the defendant prior to the alleged execution of the suit sale agreement. The said notice came to be issued on 6.11.2002 and the

present suit for specific performance came to be filed on 22.11.2002 itself, without making payment of necessary court fee. As the plaint was presented with a court fee of Rs.10/- alone, the plaint was returned to be re-presented along with necessary court fee after five years i.e. in 2007.

15. The first plaintiff who figured as PW1, in his proof affidavit accepted as evidence in chief examination, has stated that on 25.11.1999, the defendant agreed to sell the suit property to the plaintiffs for a sum of Rs.7,00,000/-, received a sum of Rs.50,000/- as advance and executed Ex.A1-unregistered sale agreement. It is also his statement that at the time of execution of the sale agreement, the respondent herein/defendant handed over the original patta pass book and that the same has been produced by him and marked as Ex.A4. In the chief examination, he did not say anything about the loan transaction between the plaintiffs and the defendant. However, during cross-examination he did admit that the defendant was facing civil cases for which he helped her by providing funds and that he had obtained signatures in promissory notes and also stamp papers. Nothing was stated as to the place wherein Ex.A1-Agreement was executed and the persons who were present at the time of execution of Ex.A1-Agreement. However, one Ravi was examined as PW2 on the side of the plaintiffs to depose that he was a witness for the execution of the suit sale agreement and for the payment of Rs.50,000/- as advance. The scribe, who prepared Ex.A1 was examined as PW3.

16. It is the testimony of PW3 that the plaintiffs were doing Real Estate business and he used to help them. Though PW3 was examined as the scribe of Ex.A1, he is said to have prepared the draft with which Ex.A1 was prepared as a typed document. According to PW2's evidence, the agreement was prepared at the residence of PW3 - Ramachandra Mudaliyar and it was typed by one Sarala. The said Sarala was not examined as a witness on the side of the plaintiffs. The draft allegedly prepared by PW3 - Ramachandra Mudaliyar also has not been produced. One E.V.Govindarajan, who figured as the second attester of the agreement also was not examined as a witness on the side of the plaintiffs. It is not the evidence of PW2 that the draft prepared by PW3 was handed over to PW1 (1st plaintiff), who went out with the draft and returned back after getting Ex.A1 typed. From his evidence in the cross examination, it is obvious that he was a court-bird having conducted several cases as a party for about 30 years, besides being an advocate clerk. A comparative study of the testimonies of PWs.1 and 3 will show a gradual improvement from the evidence of PW1 made stage by stage. PW1 did not state the place wherein the agreement was prepared and signed by parties. He did not give the names of the witnesses. Though he has referred to PW3 as the person who drafted the agreement, he has not stated anything about the person who typed Ex.A1 and the witnesses, who attested Ex.A1.

17. Out of the two persons, who were said to have attested the suit agreement produced as Ex.A1, one alone was examined as PW2. Though PW2 has stated that the draft agreement was prepared at

the residence of PW3 and the same was typed, it is his statement that one Sarala was the Typist who typed the agreement and she also signed the document. However, it is his evidence that after the parties to the documents affixed their signatures, he affixed his signature as the first attester, followed by the second attester E.V.Govindaraj and thereafter the scribe and then the Typist affixed their signatures. These particulars are not found in the evidence of PW1. Whether the Typist was available at the residence of PW3 or the Typist had an office somewhere else away from the residence of PW3, has not been clarified by PW2. It is also not the evidence of PW2 that the draft was given to the first plaintiff, who took it to the Typist, got it typed and brought back to the residence of PW3 for execution by the parties to the documents.

18. Though PW3 would state in his testimony that the draft prepared by him was handed over to PW1 (1st plaintiff) who took it to the Typist and brought back the typed document, he did not say anything about the signature made by the Typist. PW3 did not even speak about the presence of the Typist Sarala at the time of execution of the document. On the other hand, he simply stated that the Typist Sarala had signed the document. It has not been made clear as to when such a signature was made by Sarala. A comparative consideration of the evidence of PWs.1 to 3 will make it clear that the evidence adduced on the side of the plaintiffs regarding the execution of Ex.A1-Agreement and payment of Rs.50,000/- as advance on the date of agreement, are full of contradictions besides showing gradual improvement from the evidence of PWs1 to 3.

19. On the other hand, the respondent/defendant who figured as DW1 reiterated her defence plea made in the written statement and took a clear stand that she did not agree to sell the suit property for a sum of Rs.7,00,000/- to the plaintiffs. She also clearly denied her having signed any agreement, much less Ex.A1-agreement on 25.11.1999. However, during cross examination she has admitted that the signatures found in Ex.A1 are her signatures. It is also her admission that not only at the bottom of the documents but also on the margin, her signatures are found. However, she had taken a stand that those signatures were obtained on blank stamp papers and blank papers and such blank papers and stamp papers containing her signatures were used for creating Ex.A1-Agreement. When the signatures in the said document are admitted, the same alone cannot be taken as the admission of execution of the document. When a specific plea was taken by the defendant that while helping her by providing funds for the litigation, her signatures were obtained in blank papers and blank stamp papers and the same were used for creating Ex.A1-Agreement for sale, the plaintiffs ought to have led clear and cogent evidence to prove the execution of Ex.A1-Agreement dated 25.11.1999 and payment of Rs.50,000/- as advance.

20. As pointed out supra, the evidence adduced on the side of the plaintiffs, in this regard, when considered in the light of the evidence of DW1 and also the admission made by PW1 that he had

helped the respondent/defendant financially in the civil litigations regarding the same property against other persons and at that point of time he got signatures of the defendant in the Promissory notes and also stamp papers, will make it probable that the case of creation of the document with the help of the signatures obtained in the blank papers and blank stamp papers is sustainable on preponderance of probabilities.

21. It is also an admitted fact that, in the first notice issued by the plaintiffs, a copy of which has been marked as Ex.A2, the plaintiffs had revealed that there were loan transactions between the plaintiffs and the defendant, even prior to the alleged execution of the suit agreement for sale. As much as a sum of Rs.90,000/- was allegedly lent by the plaintiffs on promissory note and unregistered mortgage deed for exorbitant interest, namely 24% and 36% per annum. If at all such loan transactions had taken place prior to the execution of the agreement for sale, the same could have been referred to in the agreement for sale and the said amount could have been adjusted towards advance and part payment of sale consideration. Till date they have not chosen to file any suit for recovery of the said amounts mentioned in Ex.A2-notice. It is also an admitted fact that on the date of Ex.A1-agreement, a civil case was pending between the defendant and one Veeraraghavalu and in that litigation, the plaintiffs provided funds to the respondent/defendant. The very fact that the suit agreement is said to have been executed during the pendency of the said lis, knowing fully well that such a case was pending regarding the very same properties, will make it clear the defence case of the defendant and not the case of the plaintiffs in respect of the alleged execution of Ex.A1-Agreement for sale shall be more probable. Accordingly, Point No.1 is answered against the appellants and in favour of the respondent.

Point No.3:-

22. Even if it is assumed for the argument sake that the admission of the signatures found in Ex.A1-agreement shall cast the shifting of the burden and casting of the same on the defendant to disprove the execution of Ex.A1-Agreement for sale and the defendant failed to do so, in a suit for specific performance, the plaintiffs can succeed only if they are able to prove that they have either performed or have been always ready and willing to perform their part of the obligations under the agreement for sale. Section 16(c) of the Specific Relief Act says that specific performance shall not be granted, if the party suing for specific performance does not plead that either he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant and prove the same by evidence.

plaintiff as PW1 that they were ready and willing to perform their part of the contract under Ex.A1-suit sale agreement for sale, there is no other reliable evidence to prove such readiness and willingness on their part. In fact, the plaintiffs did not tender the balance amount of sale consideration under Ex.A1. During the pendency of the suit they did not deposit the balance amount of sale consideration into the court to show their bonafide and their readiness and willingness. They did not even make an averment in the plaint that they are prepared to either pay to the defendant or deposit into the court the balance amount of sale consideration as and when required by the court. They did not file lodgement schedule to remit the said amount to the credit of the suit. Ex.A1-suit sale agreement contains a recital to the effect that the sale transaction should be completed on or before 28.02.2000. When such a specific date is mentioned, the normal inference shall be that the parties intended time to be the essence of the contract. However the plaintiffs chose to issue a notice under Ex.A2 only on 21.10.2000. The said notice evoked a reply under Ex.A7 dated 24.10.2000, wherein the defendant refuted the contention of the plaintiffs made in Ex.A2-notice. The defendant, in unequivocal terms, denied execution of Ex.A1 - agreement for sale and also disowned the obligation to execute a sale deed in terms of Ex.A1.

24. When such is the case, if at all the plaintiffs were ready and willing to perform their part of the contract, they could have chosen to file the suit on or before 28.02.2000, but they have not done so. However, even assuming that the time was not the essence of the contract, on the refusal by defendant by way of reply notice, they ought to have filed the suit immediately. But the plaintiffs did not file the suit for specific performance within a reasonable time after the receipt of Ex.A7-reply notice. On the other hand, they chose to file a suit on the file of the District Munsif Court, Sholingur as O.S.No.115/2001 for a bare injunction against the respondent/defendant not to execute any sale deed in respect of the suit property in favour of third parties. The causes of action mentioned therein in the former suit were the alleged execution of agreement for sale on 25.11.1999, issuance of a registered notice, namely Ex.A2 dated 21.10.2000, and receipt of Ex.A7 reply notice refuting the averments made in Ex.A2 notice. In the said reply notice itself, refusal of the defendant to perform the obligations under the agreement was communicated to the plaintiffs. However without even referring to the same and suppressing the said reply notice, the above said former suit O.S.No.115/2001 came to be filed. While filing the former suit, the plaintiffs did not seek the leave of the court at the time of filing of the former suit to sue for the other reliefs, namely the relief of specific performance afterwards by a separate suit. In view of the same, the respondent herein/defendant has taken a specific plea that the present suit for specific performance is barred by Order II Rule 2(3) of CPC. In this regard, what the plaintiffs did was, to file the present suit for specific performance on 22.11.2002 defectively, without making payment of correct court fee and affixing court fee stamp only for a sum of

Rs.10/- as against Rs.52,500/- being the court fee payable, get the plaint returned, keep it under cold storage for five years, withdraw the former suit filed for bare injunction, namely O.S.No.115/2011 on the file of District Munsif Court, Sholingur by obtaining an order in I.A.No.439/2007 in the said suit O.S.No.115/2001 under Order 23 Rule 1(3) CPC and thereafter re-present the plaint in the present suit with proper court fee. Though the plaintiffs have chosen to produce a copy of the plaint in the former suit, a copy of written statement filed by the defendant in the former suit and a copy of the decree passed in the former suit, namely O.S.No.115/2001 as Exs.A6, A8 and A5 respectively, they have not chosen to produce the copy of the order passed in I.A.No.439/2007, based on which the said former suit came to be dismissed as withdrawn. Whether any liberty was granted to file a fresh suit after the withdrawal of the said former suit and if so, what kind of permission was granted is not found stated in the decree as evidenced by a copy of the said decree marked as Ex.A5. As rightly contended on behalf of the respondent/defendant, Order II Rule 2 CPC contemplates that the leave of the court should be obtained at the time of filing of such a suit to reserve the right to file a separate suit afterwards for some of the reliefs. When the plaintiffs filing the suit is entitled to more than one relief in respect of the same cause of action and files the suit for some of the relief alone, failure to get leave at the time of filing of the suit to file a separate suit for the other reliefs will absolutely bar the plaintiffs from filing any further suit for any or some of the reliefs alone subsequently.

25. Order 23 Rule 1(3) CPC deals with the permission to be granted by the court to the plaintiffs for making the very same claim in respect of the subject matter of the suit or such part of the claim by instituting a fresh suit. The scope of the permission granted under Order 23 Rule 1(3) CPC is limited to the scope of the claim made in the suit, which shall be permitted to be withdrawn under the said provision, if either of the conditions stipulated in clause (a) or (b) of sub clause (3) is proved to exist. The difference between the leave to be obtained under Order 2 Rule 2(3) CPC and the permission that may be granted under Order 23 Rule 1(3) can be better appreciated by reproducing the relevant provisions. Order 2 Rule 2 CPC reads as follows:

" R.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 ore relinquished.

<https://hcservices.ecourts.gov.in/hcservices/> (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 reliefs so omitted.

Explanation. - For the purpose 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.

Illustration - A lets a house to B at an yearly rent of Rs.1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

Order 23 Rule 1 reads as follows:

"R.1. Withdrawal of suit or abandonment of part of claim. - (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the court is satisfied-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff -

(a) abandons any suit or part of claim under

sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

26. Order II Rule 2 CPC deals with omission to sue for the whole of the claim arising out of the same cause of action and its consequence. It says that if the suit does not include the whole of the claim to which the plaintiff shall be entitled in respect of the said cause of action or omits to sue or relinquishes any portion of such claim, the plaintiff shall not thereafter sue in respect of the portion so omitted or relinquished. Sub rule (3) of Rule 2 of Order II CPC is to the effect that if the plaintiff filing the suit is entitled to more than one relief in respect of the same cause of action, then he can sue for all or any of such reliefs, but shall not sue for the omitted reliefs afterwards, unless at the time of filing of the suit for some of the reliefs alone he gets the leave of the court. This position has been clarified in the decision of the Hon'ble Supreme Court in Virgo Industries (Eng.) P. Ltd. vs. Venturetech Solutions P. Ltd. reported in 2012 (5) CTC 359 and the decision of this court in S.Thirugnanasambandam vs. P.Kaliyaperumal and others reported in (2013) 4 MLJ 563.

27. In the case on hand, admittedly the cause of action for filing the suit for specific performance arose on the receipt of Ex.A7-reply notice i.e. before the filing of the former suit O.S.No.115/2001. The right to sue for the reliefs which was lost by not seeking and obtaining leave of the court at the time of filing of the former suit, cannot be restored or revived by simply withdrawing the earlier suit filed for some of the reliefs alone or part of the claim alone by getting a permission under Order 23 Rule 1(3) CPC. A permission granted under Order 23 Rule 1(3) CPC shall not cure the defect of not getting prior permission at the time of filing of the earlier suit. The permission granted under Order 23 Rule 1(3) CPC shall be in respect of a claim validly made and withdrawn under the said provision on proof of the presence of any one of the grounds mentioned in (a) and (b). Both the rules operate on different sphere and at different stages. The mere fact that the suit for injunction filed in O.S.No.115/2001 on the file of District Munsif Court, Sholingur was permitted to be withdrawn by the court may permit the plaintiffs to file a fresh suit for the very same relief, namely the claim of permanent injunction and it

cannot be interpreted to confer a right on the plaintiffs to file the suit for specific performance, which claim was omitted to be made in the former suit, namely O.S.No.115/2001 without the leave of the court as contemplated under Order 2 Rule 2(3) CPC. Therefore the present suit for specific performance attracts the bar provided under Order II Rule 2(3) CPC. The learned trial judge has not committed any error or mistake in holding that the present suit for specific performance is barred by Order 2 Rule 2 (3) CPC. The said finding deserves to be confirmed.

Point No.2:-

28. Section 16(c) of the Specific Relief Act, 1963 reads as follows:

"16. Personal bars to relief - specific performance of a contract cannot be enforced in favour of a person -

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.-For the purposes of clause (c),-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

The plaintiffs made a bald averment that they were ready to pay the balance amount of sale consideration and get the sale deed executed and registered in their favour. They have not chosen to deposit the balance amount of sale consideration into court. They chose to file the plaint in 2002, to be precise on 22.11.2002, defectively with a court fee of Rs.10/- alone as against Rs.55,200/- being court fee payable. They got the plaint returned and kept it in cold storage for five years and thereafter re-presented the same supplying the deficit court fee. The very fact that the plaintiffs were not able to mobilise funds even to pay the court fee payable on the plaint will make it clear that the plaintiffs were not actually ready and willing to perform their part of the obligations under the agreement for sale. The further fact that they got the plaint returned, kept it idle for five years and thereafter re-presented the same supplying the deficit court fee, but without even depositing the balance amount of sale consideration, makes it clear that for the said spell of five years also the plaintiffs were not ready to perform their part of the obligations under the agreement, namely payment of the balance sale consideration.

29. In this regard, the evidence of PW3 is not helpful to the plaintiffs as he has not stated anything about the readiness and willingness of the plaintiffs to perform their part of the obligations under the agreement for sale. However, during cross examination he has stated that a recital came to be incorporated in Ex.A1 agreement to the effect that the sale deed would be executed after the disposal of the cases pending on the date of execution of Ex.A1-agreement. But there is no such recital in Ex.A1. It is also his evidence that though he was aware that there was a case pending regarding the suit property as on the date of Ex.A1, he was not aware of pendency or otherwise of such suit as on the date of his examination as a witness. Apart from the above said facts, nothing has been stated by him in his testimony as to the readiness and willingness on the part of the plaintiffs.

30. The first plaintiff who deposed as PW1 has made a statement in his testimony he had stated in his notice that he was ready and willing to pay the balance amount of sale consideration. Such a statement came to be made when he was confronted with a question "whether you have made an averment in the plaint to the effect that you were ready and willing from the date of agreement?" - such an answer will make it clear that he was sure as to whether he had made an averment regarding his readiness and willingness. On further cross-examination on 08.10.2009 pursuant to the presentation of an additional proof affidavit by him he had stated that he had expressed his readiness and willingness from 1999 till 2009 by issuance of two notices and that apart from the same they had a discussion with the defendant on two or three occasions. However he would also state that he could not furnish the particulars like the date of such discussions and the persons in whose presence such discussions were made. Probably PW1 refers to Exs.A2 and A3-notices dated 21.10.2000 and 06.11.2002 respectively. Before the issuance of Ex.A3 - Notice a reply to Ex.A2-Notice came to be issued on 24.10.2000 and the same has been marked as Ex.A7. After the receipt of the said reply notice, the plaintiffs chose to file the former suit in 2001 for bare injunction alone. No acceptable reason is forthcoming from the plaintiffs as to why they did not file the suit for specific performance and chose to file a suit for bare injunction. There is also total absence of explanation as to why the present suit for specific performance was filed with a court fee of Rs.10/- alone, knowing fully well that the plaint would be returned and kept the plaint idle for five years after taking back the returned bundle. The probability shall be that the plaintiffs were not ready and willing to perform their part of the contract, namely payment of the balance sale consideration during the said period.

31. An attempt was made to contend that the pendency of the suit in respect of the suit property between the defendant and one Veeraraghavalu and then the pendency of appeal was the reason for the non-fulfilment of the obligation by the defendant and postponement of the same. Such a contention cannot be accepted as a reasonable excuse for the plaintiffs not being ready to perform their part of the obligation under the suit agreement for sale. If

the evidence in this regard is marshalled, the only conclusion that is probable is that the plaintiffs were not ready and willing to perform their part of the obligations under the suit agreement for sale and that the plaintiffs did not prove their readiness and willingness strictly in accordance with Section 16(c) of the Specific Relief Act, 1963. As such the finding of the trial court that the plaintiffs have not proved their readiness and willingness in accordance with Section 16(c) of the Specific Relief Act, 1963 and they are not entitled to the relief of specific performance, cannot be found fault with and this court finds no reason to interfere with the said finding. On the other hand, the said finding deserves to be confirmed. Point No.2 is answered accordingly.

Point No.4:-

32. In view of the findings rendered by this court on points 1 to 3, this court comes to the conclusion that the plaintiffs are not entitled to the relief of specific performance as prayed for by them in the suit. The plaintiffs have not chosen to make even an alternative plea for refund of advance amount with or without interest. During the pendency of the suit before the trial court and even after the dismissal of the suit and during the pendency of this appeal, they have not chosen to seek amendment of the plaint to incorporate an alternative prayer for refund of advance amount. In addition, this court has rendered a finding that the execution of the suit sale agreement and the payment of a sum of Rs.50,000/- as advance have not been substantiated by the plaintiffs. Hence the appellants/plaintiffs are not entitled to the any other relief. Point No.4 is answered accordingly.

In the result, the Appeal Suit is dismissed confirming the decree passed by the trial court. However, considering the facts and circumstances of the case, there shall be no order as to cost.

Sd/-

Assistant Registrar

True Copy

Sub-Assistant Registrar

asr

To

- 1.The Additional District and Sessions Judge
Fast Track Court No.III, Ranipet, Vellore District.
- 2.The Record Keeper, V.R.Section, High Court.

1 cc to Mr.T.P.Prabakaran, Advocate Sr.20367

A.S.No.915 of 2010

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