



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.07.2016

Coram:

THE HONOURABLE Ms.JUSTICE R.MALA

S.A(MD)Nos.933 and 934 of 2014

and

M.P. (MD)No.2 of 2014

1.S.Subbulakshmi

2.Amutha

3.Kala

4.S.Karuppanan @ Mani

5.G.Selvanayagi

6.Minor G.Rahul

represented through his  
guardian 5<sup>th</sup> appellant

.. Appellant/Appellants/Defendants  
in both appeals

vs.

V.Rajasekaran

.. Respondent/Respondent/ Plaintiff  
in both appeals

**PRAYER in S.A. (MD)No.933 of 2014:** Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree in Cross Appeal No.54 of 2013, in Appeal Suit No.46 of 2013, dated 30.01.2014, on the file of the Principal Subordinate Judge, Madurai, reversing the Judgment and Decree in O.S.No.279 of 2008, dated 19.02.2013, on the file of the District Munsif cum Judicial Magistrate, Vadipatti.

**PRAYER in S.A. (MD)No.934 of 2014:** Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree in A.S.No.46 of 2013, dated 30.01.2014, on the file of the Principal Subordinate Court, Madurai, confirming the Judgment and Decree in O.S.No.279 of 2008, dated 19.02.2013, on the file of the District Munsif cum Judicial Magistrate Court, Vadipatti.

For Appellants  
in both appeals

: Mr.M.V.Venkataseshan

For Respondent  
in both appeals

: Mr.N.Murugesan



### JUDGMENT

The legal heirs of the defendant, who lost the legal battle in both the Courts, have come forward with these Second Appeals viz., in S.A.(MD)No.933 of 2014, challenging the Decree and Judgment passed in A.S.No.54 of 2013 in Appeal Suit No.46 of 2013, dated 30.01.2014 by the Principal Subordinate Judge, Madurai, by reversing the Decree and Judgment made in O.S.No.279 of 2008, dated 19.02.2013, by the District Munsif cum Judicial Magistrate, Vadipatti and in S.A.(MD)No.934 of 2014 challenging the Decree and Judgment passed in A.S.No.46 of 2013 dated 30.01.2014 by the Principal Subordinate Judge, Madurai, by confirming the Decree and Judgment made in O.S.No.279 of 2008, dated 19.02.2013, by the District Munsif cum Judicial Magistrate, Vadipatti

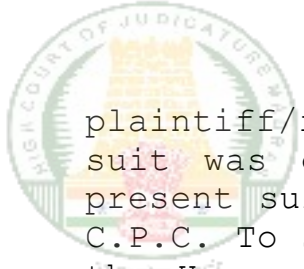
2. Heard the learned counsel for the appellants and perused the materials available on record.

3. The respondent as plaintiff filed a suit for recovery of possession stating that he is the owner of the property and the defendant is trespassed into the property. Hence, he filed a suit for recovery of possession and for past and future *mesne profits*

3. The defendant filed a written statement stating that the plaintiff and the defendant have entered into a sale agreement on the basis of the agreement and the value has been fixed at Rs.7,54,000/-, in which Rs.6,00,000/- has been paid as advance. In pursuant to that, the property has been handed over to him. He is in possession and enjoyment of the suit property as part performance of the sale agreement. So he is not a trespasser.

4. The trial Court, after considering the averments in plaint and written statement, framed necessary issues and also considering the oral documentary evidences has decreed the suit in respect of recovery of possession and dismissed the in respect of *mesne profits*. Against which, the defendant filed an appeal and the plaintiff filed a cross appeal and the cross appeal has been allowed and the appeal has been dismissed. Against which, the present Second Appeals have been preferred. S.A.(MD)No.934 of 2014 is concerned for allowing the cross-appeal and S.A.(MD)No.933 of 2014 is concerned for dismissal of A.S.No.46 of 2013.

5. The learned Counsel for the appellants would submit that there is substantial questions of law involved in these appeals, as the suit is barred under Order 2 Rule 2 C.P.C, since the respondent/plaintiff filed the suit for bare injunction i.e., O.S.No.107 of 2006, on the file of the District Munsif Court, <https://hisevils.courts.gov.in/HIServices/> the plaint was marked as Ex.B.1, the written statement was marked as Ex.A.7 and the reply statement was marked as Ex.B.2. After filing of the reply statement, the



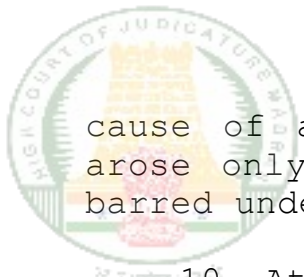
plaintiff/respondent herein has withdrawn the suit and hence, the suit was dismissed as withdrawn. Now the plaintiff filed the present suit. So the present suit is barred under Order 2 Rule 2 C.P.C. To substantiate his arguments, he relied upon a decision of the Honourable Supreme Court in **Virgo Industries (Eng.,) Private Limited Vs. Venturetech Solutions Private Limited** reported in **(2013)1 Supreme Court Cases 625**.

6. The above decision relied upon by the learned Counsel for the appellants is not applicable to facts of the present case, because in that the agreement holder filed a suit for bare injunction without filing a suit for specific performance and in that it was held that subsequent suit for specific performance is barred under Order 2 Rule 2 C.P.C.

7. On perusal of Exs.B.1, A.7 and B.2, it would show that the suit was filed for injunction restraining the defendant not to interfere his peaceful possession stating that he has attempted to interfere with his peaceful possession. The defendant has filed a written statement which was marked as Ex.A.7. In that he has stated that he entered a sale agreement and the sale price has been fixed at Rs.7,54,000/-, out of which Rs.6,00,000/- has been paid as advance. As part performance, the possession has been handed over to him. Hence, he is in possession and enjoyment and his possession is legal and hence, he prayed for dismissal. Immediately, a reply statement has been filed and that was marked as Ex.B.2. In that, the theory of oral sale agreement has been disputed by the plaintiff and subsequent to the suit, the defendant encroached upon the property and hence, he withdrew the suit and filed the present suit.

8. In such circumstances, considering the fact of the case, it is clear that on the date of filing the suit, the plaintiff was in possession of the suit property and subsequently, the defendant encroached upon the possession. Hence, the cause of action for filing the suit for recovery of possession arose only on the date of encroachment. Hence, the above decision relied upon by the learned Counsel for the appellants is not applicable to the present case.

9. The learned Counsel for the appellants in **Coffee Board Vs. M/s Ramesh Exports Pvt. Ltd.**, reported in **2014-4-L.W. 729**, in which it was held that after identifying the cause of action, if it is found that the cause of action pleaded in both the suits is identical and the relief claimed in the subsequent suit could have been pleaded in the earlier suit, then the subsequent is barred by Order 2 Rule 2 C.P.C. It is also not applicable to the present case, because as already stated, on the date of filing the suit, the plaintiff is in possession of the suit property and subsequent to the suit, the defendant encroached upon the property. So, the



cause of action for filing the suit for recovery of possession arose only on the date of encroachment. Hence the suit is not barred under Order 2 Rule 2 C.P.C.

10. At this juncture, it is appropriate to incorporate Order 2 Rule 2 C.P.C. Which is hereunder:

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

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

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

11. So on the date of filing of the suit, if there is a cause of action for filing the suit, the relief is available. But here, on the date of filing of the suit, there is no relief for recovery of possession is available. In such circumstances, I am of the view that the above citation is not applicable to facts of the present case.

12. Considering the decision relied upon the learned Counsel for the appellants in **Coffee Board Vs. M/s Ramesh Exports Pvt. Ltd.**, reported in **2014-4-L.W. 729**, where it was held that if different reliefs and claims arise out of same cause of action, then the plaintiff must place all his claims before the Court in one suit and cannot omit one of the reliefs or claims except without the leave of the Court. But, here once the plaintiff filed a suit for injunction restraining the respondent to interfere his peaceful possession, the relief for recovery of possession does not arise. In such circumstances, I am of the view that Order 2 Rule 2 C.P.C. is not applicable to the facts of the present case. Furthermore, in the written statement, the defendant has not taken this plea.

13. Furthermore, the learned Counsel for the appellants would submit that there is another substantial question of law arisen in respect of Order 23 Rule 4 C.P.C.



14. It is appropriate to incorporate Order 23 Rule 4 C.P.C.

**"4.Proceedings in execution of decrees not affected:-**

Nothing in this Order shall apply to any proceedings in execution of decree or order."

WEB COPY

15. But it is not a case that he has abandoned. After filing of the suit, the defendant has trespassed into the suit property and hence, the plaintiff withdrew the suit and filed a separate suit for recovery of possession. In such circumstances, no substantial question of law under Order 23 Rule 4 C.P.C., has been arisen.

16. The third limb of the argument advanced by the learned Counsel for the appellants is that he filed a cross-objection in respect of *mesne* profits and that has been allowed and hence, there is a substantial question of law arisen, because admittedly the defendant is in possession of the property. He would submit that as per Section 53 (A) of Transfer Property Act and in view of the sale agreement, he is in possession and his possession is legal and hence he is not liable to pay the *mesne* profits.

17. But admittedly, no suit for specific performance has been filed. So the defendant cannot claim that he is not liable to pay that *mesne* profits, merely because the cross-appeal has been allowed, no substantial question of law has been arisen in the second appeal. Hence, both the Second Appeals are liable to be dismissed at the stage of admission itself, as no substantial question of law has been arisen.

18. Accordingly, both the second appeals are dismissed in the admission stage itself. No costs. Consequently, the connected Civil Miscellaneous Petition is also dismissed.

Sd/-

Assistant Registrar (CS-II)

/True copy/

Sub Assistant Registrar

To

1. The Principal Subordinate Judge, Madurai.
2. The District Munsif cum Judicial Magistrate, Vadipatti.
3. The Section Officer, V.R.Section,

Madurai Bench of Madras High Court, Madurai.

+2 CC to Mr.V.VENKATASESHAN, Advocate, SR No.38385

+2 CC to Mr.N.MURUGESAN, Advocate, SR No.38353

S.A(MD)Nos.933 and 934 of 2014 and

M.P.(MD)No.2 of 2014

21.07.2016