

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.10.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.118 of 2011
and M.P.No.1 of 2011

Judgment reserved on 22.08.2017	Judgment delivered on 11.10.2017
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Sarangapani

... Petitioner

Vs.

1.T.Dhanavel

2.Ramakrishnan

... Respondents

PRAYER: Civil Revision Petition filed under Section 115 of CPC against the order and decree dated 11.11.2010 made in I.A.No.123 of 2008 in O.S.No.17 of 2008 on the file of Learned Subordinate Judge, Panruri.

For Petitioner : Mr.D.Ravichander
 For R1 : Mr.V.Raghavachari
 for Mr.M.Venkatakrisnan
 For R2 : No appearance

ORDER

This Civil Revision Petition has been filed against the order and decretal order dated 11.11.2010 made in I.A.No.123 of 2008 in O.S.No.17 of 2008 on the file of the Subordinate Court, Panruti.

2. The petitioner is the first defendant, the first respondent is the plaintiff and second respondent is the second defendant in the suit in O.S.No.17 of 2008 filed before the Subordinate Court, Panruti. The first respondent filed the suit for specific performance of agreement of sale executed by the petitioner in favour of the first respondent. The petitioner filed I.A.No.123 of 2008 for rejection of plaint.

3. According to the petitioner, first respondent filed O.S.No.109 of 2007 on the file of District Munsif Court, Panruti for permanent injunction against the petitioner and others. At the time of filing of the said suit itself, the cause of action for the relief of specific performance was available to the first respondent and he ought to have prayed for decree of specific performance also in the

said suit. The cause of action for both the suits are one and the same and therefore subsequent suit is hit by provisions of Order II Rule 2 CPC and prayed for rejection of plaint.

4. The learned counsel for the petitioner contended that the petitioner sent a reply dated 12.04.2007 to the notice dated 09.04.2007 issued by the first respondent denying the endorsement dated 15.01.2003 and 15.12.2005. The first respondent suppressed the reply notice issued by the petitioner and filed the suit for injunction. After reply notice dated 12.04.2007, the petitioner sold the property on 16.04.2007 to the second respondent by sale deed dated 16.04.2007.

5. The first respondent filed counter affidavit and opposed the said application. According to the first respondent, the cause of action for both the suits are entirely different and relief sought for in both the suits are different. At the time of filing of the subsequent suit, earlier suit was pending. Therefore, Order II Rule 2 CPC is not applicable. The earlier suit is for permanent injunction restraining the petitioner and others from interfering with his peaceful possession and enjoyment of the suit property. The petitioner and

other defendant in the earlier suit tried to destroy the sugarcane crop cultivated by the first respondent. In view of eminent threat of dispossession, the first respondent filed suit for permanent injunction. Subsequently, the first respondent has filed the present suit for specific performance of agreement of sale as the petitioner is evading execution of sale deed. Pending application for rejection of plaint, the first respondent withdrew the suit in O.S.No.109 of 2007 filed for permanent injunction as not pressed.

6. The petitioner received Rs.1,00,000/- from the first respondent and made endorsement in the agreement of sale. The first respondent is cultivating sugarcane and is enjoying the property for the past five years. The petitioner only received the amount and made the endorsement on 15.01.2003 and 15.12.2005. The first respondent demanded the petitioner to execute the sale deed but the petitioner failed to execute and register the sale deed. The second respondent gave a complaint to Kullanchavady Police Station against the first respondent & 4 others and first respondent and others obtained anticipatory bail. After 15.01.2003, the petitioner was never in possession and enjoyment of the suit property. The second respondent, in June 2007 trespassed into the

suit property and first respondent prevented the same. The petitioner and 5 others destroyed nine months old sugarcane crops by using tractor. The first respondent withdrew the suit in O.S.No.109 of 2007 as not pressed. The cause of action in both the suits are different and the present suit is not hit by provisions of Order II Rule 2 CPC.

7. The learned Judge, considering the averments in both the plaint, affidavit, counter affidavit and judgments relied on by the parties, dismissed the Interlocutory Application holding that the contention of the petitioner that he made endorsement dated 15.01.2003 and 15.12.2005 in Ex.P1 can be decided only after examination of witnesses. In view of the fact that the first respondent has withdrawn the earlier suit as not pressed, there is no sufficient reason to reject the plaint at that stage.

8. Against the said order of dismissal dated 11.11.2010 made in I.A.No.123 of 2008 in O.S.No.17 of 2008, the present Civil Revision Petition is filed.

9. The learned counsel for the petitioner contended that -

(i) Cause of action in both the suits are one and the same and the first respondent had opportunity of seeking relief of specific performance while filing the earlier suit for permanent injunction.

(ii) The first respondent has stated in the earlier suit that he would file the suit for specific performance before the appropriate court which would show that the cause of action for specific performance was available while filing the earlier suit.

(iii) The first respondent has omitted a part of claim and he cannot be permitted to file subsequent suit for the said claim.

(iv) The first respondent has filed the present suit while the earlier suit was pending and subsequently withdrawn the earlier suit.

(v) The first respondent filed the present suit without obtaining leave of the court in the earlier suit to file the present suit.

(vi) The first respondent filed the present suit only to harass the petitioner.

(vii) The learned Judge failed to consider the scope of Order II Rule 2 CPC and adjudged on the issue of forgery.

(viii) The first respondent has mentioned in the plaint in the earlier suit that he came to know that the petitioner is making attempt to sell the said suit property to some third party while agreement of sale in his favour is in force.

(ix) The first respondent has also stated in the plaint that in such circumstances, issued a legal notice dated 09.04.2007 to the petitioner demanding to execute the sale deed in his favour. In view of such admission in the plaint, the first respondent ought to have claimed the relief of specific performance in the first suit itself.

(x) The petitioner sent a reply notice dated 12.04.2007 expressing his unwillingness to execute the sale deed. The said reply notice was received by the first respondent on 15.04.2007.

(xi) The first respondent filed a suit on 19.04.2007 only for injunction knowing full well that the petitioner is not willing to execute the sale deed in favour of the first respondent. The first respondent withdrew the earlier suit only when the petitioner in the written statement contended that the present suit is hit by provisions of Order II Rule 2 CPC.

10. In support of his contention, the learned counsel for the petitioner relied on para-14 of the judgment reported in **2013 (1) SCC 625 [Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited]**.

"14. The averments made by the plaintiff in C.S. Nos. 831 and 833 of 2005, particularly the pleadings extracted above, leave no room for doubt that on the dates when C.S. Nos. 831 and 833 of 2005 were instituted, namely, 28.8.2005 and 9.9.2005, the plaintiff itself had claimed that facts and events have occurred which entitled it to contend that the defendant had no intention to honour the agreements dated 27.7.2005. In the aforesaid situation it was open for the plaintiff to incorporate the relief of specific performance along with the relief of permanent injunction that formed the subject matter of above two suits. The

foundation for the relief of permanent injunction claimed in the two suits furnished a complete cause of action to the plaintiff in C.S. Nos. 831 and 833 to also sue for the relief of specific performance. Yet, the said relief was omitted and no leave in this regard was obtained or granted by the Court. "

11. Per contra, the learned counsel appearing for the first respondent submitted that whether subsequent suit is hit by provisions of Order II Rule 2 CPC can be decided only after considering the evidence let in by the parties. In the earlier suit, there are four defendants whereas in the present suit only the petitioner and the second respondent are the defendants. The cause of action for both the suits are entirely different and relief sought for also different. The first respondent withdrew the earlier suit by filing a memo. The first respondent has filed application for amendment of plaint for alternative prayer for refund of amounts paid to the petitioner. The learned counsel for the first respondent relied on the following judgments in support of his contention -

(i) **2014 (6) CTC 445 (Inbasegaran and another v. S.Natarajan (dead) through legal heirs);**

"26. *In the light of the principles* discussed and the law laid down by the Constitution Bench as also other decisions of this Court, we are of the firm view that if the two suits and the relief claimed therein are based on the same cause of action then only the subsequent suit will become barred under Order 2, Rule 2 of the CPC. However, when the precise cause of action upon which the previous suit for injunction was filed because of imminent threat from the side of the defendant of dispossession from the suit property then the subsequent suit for specific performance on the strength and on the basis of the sale agreement cannot be held to be the same cause of action. In the instant case, from the pleading of both the parties in the suits, particularly the cause of action as alleged by the plaintiff in the first suit for permanent injunction and the cause of action alleged in the suit for specific performance, it is clear that they are not the same and identical.

....

29A. In the instant case, as discussed above, suit for injunction was filed since there was threat given from the side of the defendant to dispossess him from the suit property. The plaintiff did not allege that the defendant is threatening to alienate

or transfer the property to a third party in order to frustrate the agreement. "

(ii) **2016 (4) CTC 344 (Chemplast Sanmar Limited, Chennai-600 086 v. Senthamizhselvi and another);**

"12. Perusal of the above cause of action in both the suits and the circumstances under which they are filed and the reliefs sought for therein would go to show without any doubt that both the suits were not filed on the same cause of action even though part of such cause of action in the latter suit may be one and the same. Needless to say that for deciding the issue as to whether the subsequent suit is hit by Order II Rule 2, C.P.C., that too while considering the application filed under Order 7 Rule 11 CPC, the facts and circumstances as well as the cause of action set out in the plaint of both the suits alone should be taken into consideration. It is also well settled that the grounds for rejection of the plaint as contemplated under Order 7 Rule 11 must be evident apparent on the face of the plaint and not to be culled out from the case of the defendant as projected by him.

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" "

19. In this case, I do not find any deliberate

omission on the part of the plaintiff to make a claim in the earlier suit. Further, in a case of this nature wherein the possession of the suit property is said to have been handed over to the agreement holder, it is not an unusual situation of sudden interference by the land owner warranting the agreement holder to file a suit for bare injunction. Therefore if any such situation arises, the agreement holder cannot be precluded from claiming or seeking an immediate and emergent relief first in order to prevent further damage or abuse. Therefore, filing of such suit for bare injunction also by reserving the right to file a comprehensive suit later cannot be construed or considered as the one arising out of same cause of action in order to bring it under the hammer of Order 2 Rule 2 C.P.C. "

12. Heard the learned counsel for the petitioner as well as first respondent and perused the materials available on record.

13. Points for consideration in the present Civil Revision Petition is whether the present suit is hit by provisions of Order II Rule 2 CPC.

14. The first respondent originally filed O.S.No.109 of 2007 for injunction restraining the petitioner, second respondent and others from interfering with his peaceful possession and enjoyment of the suit property. According to the first respondent, after receiving the advance amount, the petitioner entered into an agreement of sale to sell the suit property. The petitioner expressed his difficulty in executing the sale deed within the time limit and requested for extension of time. He received a further sum of Rs.1,00,000/- on 15.01.2003 and made an endorsement in the agreement of sale. The petitioner handed over the possession to the first respondent and the first respondent was cultivating sugarcane crop in the suit property from that day onwards. Again on 15.12.2005, the petitioner received a further sum of Rs.50,000/- and made an endorsement in the agreement of sale.

15. According to the first respondent, the petitioner was evading execution of sale deed. The first respondent sent a notice to the petitioner on 09.04.2007 to execute the sale deed. On 16.04.2007, the petitioner, second respondent and two others attempted to trespass into the suit property. The first respondent prevented the same. In view of the threat and trespass by the

petitioner, second respondent and two others, the first respondent filed suit for injunction. According to the first respondent, in the said suit, the respondent has stated that he would file suit for specific performance before the competent court. Subsequently, the first respondent filed present suit for specific performance of agreement of sale.

16. The petitioner filed I.A.No.123 of 2008 for rejection of plaint on the ground that the second suit is hit by provisions of Order II Rule 2 CPC. A reading of both the suits reveal that the first suit is filed for permanent injunction while the second suit is filed for specific performance of agreement of sale. Question that arose for consideration is whether the relief of specific performance was available to the first respondent when he filed the first suit on 19.04.2007. A reading of Para (g) of the plaint reveals that the first respondent came to know that the petitioner is making arrangements to sell the suit property to third party when agreement of sale in his favour is in force. The relevant portion of the plaint in O.S.No.109 of 2007 is extracted hereunder for better appreciation.

“PARA (g)The plaintiff has recently come

to know that the Ist Defendant is making an attempt to sell the suit property to some third parties, when the agreement for sale executed by the 1st defendant in favour of the plaintiff in respect of suit property is in force. Hence, the plaintiff issued a legal notice to the Ist defendant demanding that to execute the sale deed in favour of the plaintiff as per the sale agreement on 09.04.2007. The said notice was duly served upon the Ist defendant.”

17. Considering these facts, alongwith the contention of the learned counsel for the petitioner that in the reply notice dated 12.04.2007, the petitioner has categorically stated that he is not willing to execute the sale deed in favour of the first respondent which was received by the first respondent on 15.04.2007 and suit was filed only on 19.04.2007, without seeking the relief of specific performance, amounts to giving up the relief of specific performance by the first respondent. The first respondent has not produced any material to show that he filed petition under Order II Rule 3 seeking leave to file the suit for specific performance at a later stage. Having failed to obtain leave of the court to file a suit for specific performance at a subsequent date, the first respondent is not entitled to maintain the present suit for specific performance

of agreement of sale. In this regard, it is useful to extract again PARA 29 (A) of the judgment of the Hon'ble Apex Court reported in **2014 (6) SCC 445**, cited supra relied on by the learned counsel for the first respondent.

"29A. In the instant case, as discussed above, suit for injunction was filed since there was threat given from the side of the defendant to dispossess him from the suit property. The plaintiff did not allege that the defendant is threatening to alienate or transfer the property to a third party in order to frustrate the agreement. "

18. The Hon'ble Apex court, in the above paragraph took note of the fact that the plaintiff did not allege that the defendant is threatening to alienate or transfer the property to third party in order to frustrate the agreement. In the present case, the first respondent specifically stated that the petitioner is attempting to sell the suit property to some third party while agreement of sale is in his favour. Further, on 09.04.2007, the first respondent issued a notice to the petitioner calling upon him to execute the sale deed in his favour. In such circumstances, the relief of specific performance was available to the first respondent on 19.04.2007 when he filed

the earlier suit and first respondent ought to have claimed such relief.

19. In the judgment relied on by the learned counsel for the first respondent, it has been held that the suit is hit by provisions of Order II Rule 2 CPC is a mixed question of fact and law and that plaint can be rejected only based on the averments in the plaint. As extracted above, in the suit itself, the first respondent has stated that the petitioner is trying to sell the suit property to some third party and therefore issue a notice dated 09.04.2007. In view of this specific case of first respondent, there is no dispute that second suit for specific performance is hit by provisions of Order II Rule 2 CPC. The learned Judge, in the impugned order has not decided whether the present suit is hit by provisions of Order II Rule 2 CPC but dismissed the application on the ground that the first respondent has withdrawn the earlier suit as not pressed and the question of endorsements in agreement of sale are made by the petitioner or not can be decided after letting in evidence by the parties. The above reasons given by the learned Judge are not valid reasons and the learned Judge has committed an irregularity and illegality in not considering the fact and law in proper perspective and the failed to exercise the power properly.

20. For the above reason, the impugned order of the learned Judge dated 11.11.2010 made in I.A.No.123 of 2008 in O.S.No.17 of 2008 is liable to be set aside and it is hereby set aside. The judgments relied on by the learned counsel for the first respondent do not advance the case of the first respondent. On the other hand, the judgment of the Hon'ble Apex court reported in 2013 (1) SCC 625, cited supra, supports the case of the petitioner.

21. In the result, this Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

11.10.2017

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Index: Yes/No

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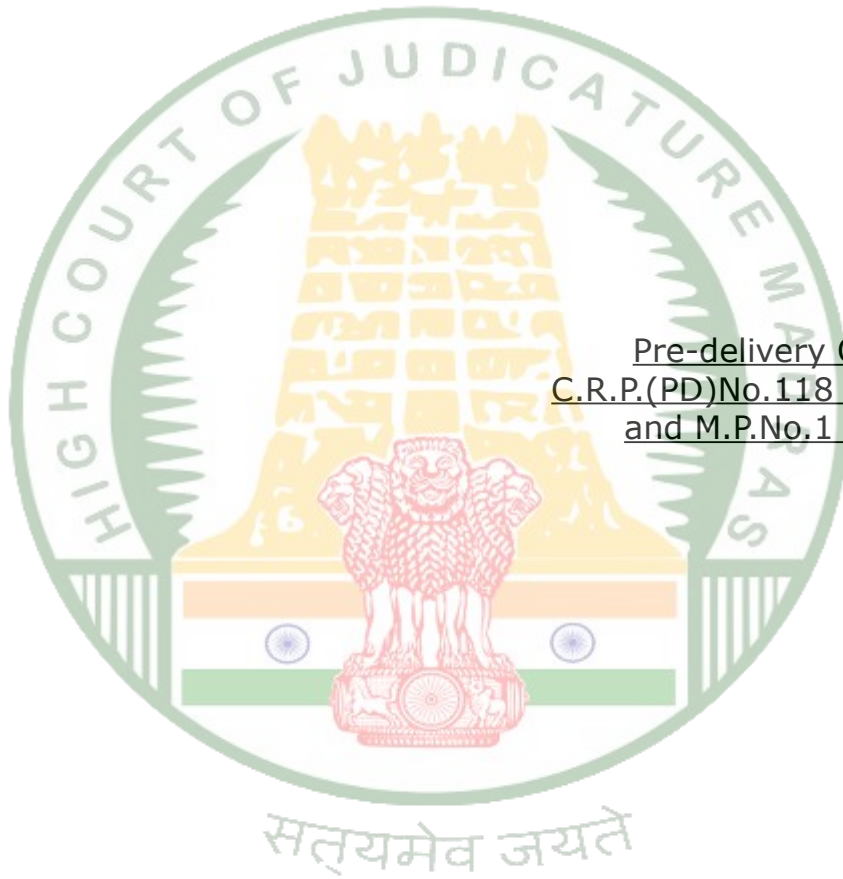
The Subordinate Judge,

Panruti.

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Pre-delivery Order in
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