

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.08.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.4108 of 2011

Orders reserved on 02.08.2017	Orders pronounced on 10.08.2017
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Cuddalore Power Gen Company Limited,
Rep. By its Senior Manager,
K.Srinivasan
S/o V.M.Krishnasamy,
No.10/59, III Cross Street,
Seetharama Nagar,
Cuddalore.

.. Petitioner

Vs.

1. Chemplast Sanmar Limited,
No.9, Cathedral Road,
Chennai.
Rep. By its Assistant General Manager,
Mr.Balasundharam.

2. N.Sumathy .. Respondents

PRAYER: Civil Revision Petition filed Under Section 115 of the Civil Procedure Code, against the fair and decretal order dated 26.07.2011, made in I.A.No.230 of 2011 in O.S.No.121 of 2008, on the file of the II Additional Subordinate Judge, Cuddalore.

For Petitioner : Mr.D.Ravichander

For R1 : Mr.Vijaynarayanan (Senior Counsel)
for Dr.P.Vasudevan

For R2 : Given up

ORDER

This Civil Revision Petition has been filed against the fair and decreetal order dated 26.07.2011, made in I.A.No.230 of 2011 in O.S.No.121 of 2008, on the file of the II Additional Subordinate Judge, Cuddalore.

2. Petitioner is the second defendant, first respondent is the plaintiff and second respondent is the first defendant in O.S.No.121 of 2008, on the file of the Additional Subordinate Judge, Cuddalore. The first respondent filed suit for specific performance of agreement of sale dated 01.11.2006, which was entered into between the first respondent and second respondent, for sale of the suit property. The petitioner filed written statement and is contesting the suit. The second respondent remained exparte. The petitioner filed I.A.No.230 of 2010 under Order 7 Rule 11 to reject the plaint on the ground that earlier, the first respondent had filed O.S.No.3 of 2008 for declaration of sale deed dated 05.09.2007, executed by the second respondent, in favour of the petitioner as null and void and for a permanent injunction, in respect of the very same property. The cause of action for the present suit and earlier suit are one and the same. The relief of specific performance of agreement of sale was available, when the first respondent filed O.S.No.3 of 2008 for

declaration that the sale deed as null and void and for permanent injunction. He neither sought for the relief of specific performance in the suit in O.S.No.3 of 2008 nor did he seek permission to file suit for specific performance subsequently. In view of the same, the present suit is barred by law and is liable to be rejected.

3. The first respondent filed counter affidavit and submitted that the cause of action for both the suits are entirely different. The earlier suit for declaration that sale deed in favour of the petitioner is null and void and for consequential injunction. The present suit is for specific performance of agreement of sale. At that time, when the first respondent had filed the earlier suit, the Government had imposed a ban on registration of property in favour of non-power sector companies, in G.O.Ms.1986, dated 25.08.1986. A Public Interest Litigation was filed in W.P.No.11453 of 2007, challenging the said G.O. This Court, by the order dated 05.03.2008, set aside the ban and directed the Sub-Registrar, Cuddalore to register all the documents in respect of the lands in Thiyaagavalli and Kudikadu villages. The first respondent also filed two writ petitions in W.P.Nos.1783 and 6245 of 2008. Only when the order dated 05.03.2008, passed by this Court, quashing the G.O.Ms.1986 dated 25.08.1986, the cause of action to file the suit for specific performance arose. The petitioner also filed O.S.No.137 of 2007, on the file of the Subordinate Judge, Cuddalore, against the first

respondent, for declaration of title to the suit property and for restraining the first respondent from interfering with the petitioner's peaceful possession and enjoyment of the suit property. The District Court has ordered for joint trial and all the three suits are ripe for trial. Only to drag on the proceedings, the petitioner has come out with the present application.

4. The learned Judge, considering the affidavit, counter affidavit, averments in the plaint and documents filed along with the plaint and judgments relied on by the parties, dismissed the application, holding that the cause of action for both the suits are different.

5. Against the order of dismissal dated 26.07.2011, made in I.A.No.230 of 2010 in O.S.No.121 of 2008, the present civil revision petition has been filed by the petitioner.

6. The learned counsel appearing for the petitioner submitted that cause of action for both the suits are identical and to the first respondent, the relief of specific performance was available at the time of filing of the earlier suit. Failure on the part of the first respondent to obtain permission to file the suit for specific performance subsequently at that time itself, amounts to relinquishing his rights. When the first respondent did not obtain

leave of the Court to file the suit for specific performance, subsequent suit is hit by Order II Rule 2 C.P.C. The petitioner cannot be vexed with more than one suit for the same transaction. The learned Judge erroneously dismissed the application by considering the issue in the suit itself on merits. The findings of the learned Judge with regard to sale consideration in the sale deed executed in favour of the petitioner and comparing the same with consideration in the sale agreement has no relevance in deciding the application for rejection of plaint. The learned Judge has erroneously held that an application filed by the petitioner for rejection of plaint is belated, failing to take note of the fact that the petitioner was impleaded as second defendant in the suit, only by the order dated 10.08.2010 made in I.A.No.1 of 2010 and it is not the intention of the petitioner to drag on the proceedings. In support of his contentions, the learned counsel appearing for the petitioner relied on the following judgments:

(i) Sathiyamurthy V. R.Pavunambal & V.Shanmugam, reported in 2011 (4) L.W. 264:

"12. The real test for entertaining Order 7 Rule 11 C.P.C. Is that whether the cause of action for filing the present suit was available even on the date when the earlier suit was filed. In the instant case, the evidence on record would show that the respondents/defendants are

denying the agreement by their conduct even when the appellant/plaintiff has filed the earlier suit for injunction against the defendants from interfering with the peaceful possession and enjoyment of the suit properties. Under such circumstances, the appellant/plaintiff ought to have obtained leave under Order 2 Rule 2 CPC to file a suit for specific performance; but he has not done so. Therefore, under Order 2 Rule 11 (d) C.P.C., the subsequent suit filed by the appellant is barred by principle of res judicata. Under such circumstances, in my considered opinion, there is no infirmity in the order passed by the court below and there is no valid ground to interfere with the impugned order."

(ii) Joseph Arokiados, rep. By Power Agent, T.Kasi V.

P.Pradeep, reported in 2011 (2) CTC 177:

"8. The above extracted portions of the plaint in the latter suit would disclose that the necessity to file the latter suit by the respondent has arisen because the petitioner herein, namely the defendant in the said suit, had trespassed into the property on 18.08.2007 and hence it has made the respondent to file a comprehensive suit for declaration and for other incidental reliefs. I am unable to accept the said contention of the learned counsel appearing for the respondent, since the cause of action alleged, namely that the petitioner, has trespassed into the property even according to the respondent, was on 18.08.2007 i.e. After filing of the suit by the respondent in O.S.No.576 of 2008 for injunction. The said suit in O.S.No.576 of 2008 for injunction. The said suit in

O.S.No.576 of 2008 was filed on 21.10.2008 i.e. Much later to the allegation of trespass of the petitioner. In such circumstances, instead of filing an application for amending the plaint under Order 6, Rule 17, C.P.C., the respondent has chosen to file the subsequent suit.

Order 2, Rule 2, C.P.C., clearly envisages that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If the plaintiff omits to sue in respect of a particular cause of action, he shall not afterwards sue in respect of the other portions so omitted or relinquish. If he omits to incorporate a prayer except with the leave of the Court, he shall not file another suit."

(iii) Saradammal alias Saradambal V. G.S.Srinath, reported in 2012 (6) MLJ:

"30. In the present case also, we are of the considered view that the relief of specific performance ought to have been claimed by the plaintiff in the first suit filed by him in O.S.No.185 of 2006. Though the plaintiff has claimed in the reply statement, that he obtained leave of the Court for filing a comprehensive suit for specific performance, he has not substantiated the same by producing the order of the Court granting such leave. It is also relevant to point out that the date of order granting leave, is not mentioned in the reply statement. In such circumstances, we are of the considered view that the present suit seeking for the relief of specific performance, is apparently barred by Order 2 Rule 2 of Code of Civil Procedure. Point No.2 is determined accordingly."

(iv) Virgo Industries (Eng.) Private Limited V. Venturetech Solutions Private Limited, reported in 2013 (1) SCC 625:

*"10. The object behind the enactment of Order 2 Rules 2(2) and (3) CPC is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons. The situations where the bar under Order 2 Rules 2(2) and (3) will be attracted have been enumerated in a long line of decisions spread over a century now. Though each of the aforesaid decisions contain a clear and precise narration of the principles of law arrived at after a detailed analysis, the principles laid down in the judgment of the Constitution Bench of this Court in **Gurbux Singh V. Bhooralal** may be usefully recalled below: (AIR p. 1812, para 6)*

"6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more

than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar."

The above principles have been reiterated in several later judgments of this Court. Reference by way of illustration may be made to the judgments in Deva Ram V. Ishwar Chand and Bengal Waterproof Ltd. V. Bombay Waterproof Mfg. Co.

11. The cardinal requirement for application of the provisions contained in Order 2 Rules 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression i.e. Cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in Church of Christ Charitable Trust and Educational Charitable Society V. Ponniamman Educational Trust. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury's Laws of

England. The following reference from the above work would, therefore, be apt for being extracted hereinbelow:

" 'Cause of action' has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

(v) State Bank of India V. Gracure Pharmaceuticals Ltd., reported in 2014 (1) L.W. 1:

"15. Respondent is not entitled to split the cause of action into parts by filing separate suits. We find, as such, that respondent had omitted certain reliefs which were available to it at the time of filing of the first suit and after having relinquished the same, it cannot file a separate suit in view of the provisions of sub-rule 2 of Order 2 Rule 2, CPC. The object of Order 2 Rule 2 is to avoid multiplicity of proceedings and not to vex the parties over and again in a litigative process. The object enunciated in Order 2 Rule 2, CPC is laudable and it has a larger public purpose to achieve by not burdening the

court with repeated suits."

7. The learned Senior Counsel appearing for the respondents submitted that cause of action for both the suits are entirely different and it is not identical. The first respondent had entered into an agreement of sale and paid entire sale consideration. The second respondent executed power of attorney in favour of the first respondent, as he could not execute the sale deed in view of the ban order of the Government in G.O.Ms.1986, dated 25.08.1986. During that time, the Government has directed the villagers to sell 1000 acres of land for a power project to be established by Tamilnadu Electricity Board. For that purpose, Government imposed a ban in G.O.Ms.1986, dated 25.08.1986, the sale of a land to non power sector companies. Subsequently Tamilnadu Electricity Board could not implement the project and project was transferred to the petitioner herein. The petitioner was directed to negotiate with the land owners to acquire the land by providing negotiation. The petitioners dictated terms and forced the owners to sell the land at the price fixed by them. In the circumstances, Public Interest Litigation in W.P.No.11453/2007 was filed, challenging the G.O.Ms.1986, dated 25.08.1986. The first respondent also filed two writ petitions in W.P.No.1783 and 6245 of 2008, challenging the G.O.Ms.1986, dated 25.08.1986. Mean while, the second respondent cancelled the power of attorney executed in favour of

the first respondent and sold the property to the petitioner. In order to protect the interest of the first respondent and protect his possession, the first respondent filed suit for a declaration that the sale deed dated 05.09.2007, executed in favour of the petitioner by the second respondent is null and void and for injunction restraining the petitioner and second respondent from interfering with peaceful possession and enjoyment of the suit property. The first respondent could not claim the relief of specific performance, as there was no cause of action in view of the ban order. Only when this Court passed the G.O.Ms.1986, dated 25.08.1986, imposing a ban order, cause of action for the specific performance of agreement of sale arose for the first respondent to file the suit for said relief. The above facts clearly show that cause of action for both the suits are not identical and they are entirely different and it is not hit by Order II Rule 2 C.P.C. The learned Senior Counsel appearing for the second respondent referred to the following judgments, in support of his contentions:

(i) Rathnavathi & another V. Kavita Ganashmdas, reported in 2014 (6) CTC 333:

"29. In the instant case, when we apply the aforementioned principle, we find that bar contained in Order 2, Rule 2, is not attracted because of the distinction in the cause of action for filing the two Suits. So far as the suit for permanent injunction is concerned, it was based on a threat given to the

plaintiff by the defendants to dispossess her from the suit house on 02.01.2000 and 09.01.2000. This would be clear from reading para 17 of the plaint. So far as cause of action to file suit for specific performance of agreement is concerned, the same was based on non-performance of Agreement is concerned, the same was based on non-performance of agreement dated 15.02.1989 by defendant no.2 in plaintiff's favour despite giving legal notice dated 06.03.2000 to defendant no.2 to perform her part.

30. In our considered opinion, both the suits were, therefore, founded on different causes of action and hence could be filed simultaneously. Indeed even the ingredients to file the suit for permanent injunction are different than that of the suit for specific performance of agreement.

31. In case of former, plaintiff is required to make out the existence of prima facie case, balance of convenience and irreparable loss likely to be suffered by the plaintiff on facts with reference to the suit property as provided in Section 38 of the Specific Relief Act, 1963 (in short "the Act") read with Order 39, Rule 1 & 2 of C.P.C. Whereas, in case of the later, plaintiff is required to plead and prove her continuous readiness and willingness to perform her part of Agreement and to further prove that defendant failed to perform her part of the agreement as contained in Section 16 of the Act.

32. One of the basic requirements for successfully invoking the plea of Order 2, Rule 2 of CPC is that the defendant of the second suit must be

able to show that the second suit was also in respect of the same cause of action as that on which the previous suit was based.

33. As mentioned *supra*, since in the case on hand, this basic requirement in relation to cause of action is not made out, the defendants (appellants herein) are not entitled to raise a plea of bar contained in Order 2, Rule 2 of C.P.C. To successfully non suit the plaintiff from prosecuting her suit for specific performance of the agreement against the defendants.

34. Indeed when the cause of action to claim the respective reliefs were different so also the ingredients for claiming the reliefs, we fail to appreciate as to how a plea of Order 2, Rule 2, could be allowed to be raised by the defendants and how it was sustainable on such facts.

37. Since the plea of Order 2, Rule 2, if upheld, results in depriving the plaintiff to file the second suit, it is necessary for the Court to carefully examine the entire factual matrix of both the suits, the cause of action on which the suits are founded, reliefs claimed in both the suits and lastly the legal provisions applicable for grant of reliefs in both the suits.

38. In the light of foregoing discussion, we have no hesitation in upholding the finding of the High Court on this issue. We, therefore, hold that Second Suit (O.S.No.2334 of 2000) filed by the plaintiff for specific performance of agreement was not bared by virtue of bar contained in Order 2, Rule 2, C.P.C."

**(ii) Inbasegaran and another V. S.Natarajan(Dead) thr. L.Rs.,
reported in 2014 (6) CTC 445:**

"16. Admittedly, the first Suit being O.S.No.445 of 1985 was filed by the plaintiff-Appellant for the grant of Permanent Injunction restraining the Defendant, his agents and servants from interfering with the possession and enjoyment of the Suit property by the Plaintiffs either by attempting to trespass into it or in any other manner whatsoever. Besides other facts, it was pleaded that in pursuance of the sale Agreement the Plaintiff took possession of the Suit plot from the Defendant and began construction of Kalyana Mahal. It was alleged by the Plaintiff that the Defendant with an ulterior mala fide motive and intention of extracting more money was representing to the Plaintiffs that he would execute the Sale Deed after getting the Sale Deed from the Housing Board and after completion of the construction of the building. With that ulterior motive, the Defendant tried to forcibly take possession of the building constructed by the Plaintiffs and threatened the Plaintiffs' worker to remove them from the building. The Plaintiffs then gave Complaint to the Police and in response, the Police immediately rushed to the Suit property and warned the rowdies not to enter into the building. The Plaintiffs, therefore, pleaded that the Defendant was again arranging to gather unruly elements and to forcibly and unlawfully take possession of the Suit property from the

Plaintiffs. With that apprehension, the Suit was filed mainly on the cause of action which arose when the Defendant attempted to forcibly occupy the Suit property by driving away Plaintiffs' workers and that the Defendant was arranging to forcibly and unlawfully take possession of the Suit property. The Defendant, in his Written Statement, denied each and every allegation and stated that building was constructed by him and in fact the Plaintiffs attempted to forcibly take possession of the building.

17. In the subsequent Suit filed by the Plaintiff being O.S.No.252 of 1986, a Decree for Specific Performance of the Agreement was claimed on the ground inter alia that the Defendant in the earlier Suit took a defence that the Sale Agreement was allegedly given up or dropped by the Plaintiff. The cause of action, as pleaded by the Plaintiff in the subsequent Suit, arose when Defendant-Respondent disclosed the transfer made by Housing Board in his favour and finally when the Defendant was exhibiting an intention of not performing his part of the Sale Agreement and in reply to the Lawyer's Notice the Defendant made a false allegation and denied to execute the Sale Deed as per the Agreement.

18. A perusal of the pleadings in the two Suits and the cause of action mentioned therein would show that the cause of action and reliefs sought for are quite distinct and are not same.

19. Indisputably, cause of action consists of a

bundle of facts which will be necessary for the plaintiff to prove in order to get a relief from the Court. However, because the causes of action for the two suits are different and distinct and the evidences to support the relief in the two suits are also different then the provisions of Order 2, Rule 2, C.P.C. Will not apply.

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 Suit 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 C.P.C. 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.

27. Besides the above, on reading of the Plaint of the Suit for Injunction filed by the Plaintiff, there is nothing to show that the Plaintiff intentionally relinquished any portion of his claim for the reason that the Suit was for only injunction because of the threat

from the side of the Defendant to dispossess him from the Suit property. It was only after the Defendant in his Suit for injunction disclosed the transfer of the Suit property by the Housing Board to the Defendant and thereafter denial by the Defendant in response to the Legal Notice by the Plaintiff, the cause of action arose for filing the Suit for Specific Performance."

and submitted that both the judgments were delivered on the same date, by two different benches and both the benches have overruled the judgments relied on by the learned counsel for the petitioner. In reply to the contentions of the learned Senior Counsel for the first respondent, the learned counsel appearing for the petitioner submitted that judgments relied on by the learned Senior Counsel are not applicable to the facts of the present case, in view of the fact that first respondent had knowledge of breach of agreement of sale by second respondent.

8. Heard the learned counsel appearing for the petitioner and the learned Senior Counsel appearing for the first respondent and perused the materials available on record and judgments relied on by both the parties.

9. The only point for consideration in the present civil revision petition is whether the relief of specific performance of agreement of

sale was available to the first respondent, when they filed the earlier suit for declaration. The first respondent is an agreement holder for purchase of the suit property. According to the first respondent, the second respondent received entire sale consideration and executed a power of attorney in favour of the first respondent. The second respondent could not execute the sale deed in favour of the first respondent as there was a ban order in G.O.Ms.1986, dated 25.08.1986, for the sale of the suit property and other lands to non-power sector companies. The second respondent taking advantage of the ban order, sold the property to the petitioner. The petitioner tried to interfere with the possession of the first respondent and therefore to safeguard their possession and their interest, filed earlier suit for declaration and injunction.

10. From the materials on record, it is seen that in view of the ban order, the first respondent could not have filed suit for specific performance of agreement of sale. It is not disputed by the petitioner, that there was a ban order and Public Interest Litigation was filed, challenging the said G.O.Ms.1986, dated 25.08.1986. It is also not in dispute that first respondent also filed two W.P.Nos.1783 and 6245 of 2008, challenging the G.O.Ms.1986, dated 25.08.1986. This Court, by the order dated 05.03.2008, quashed the G.O.Ms.1986, ban order of sale to the non-power

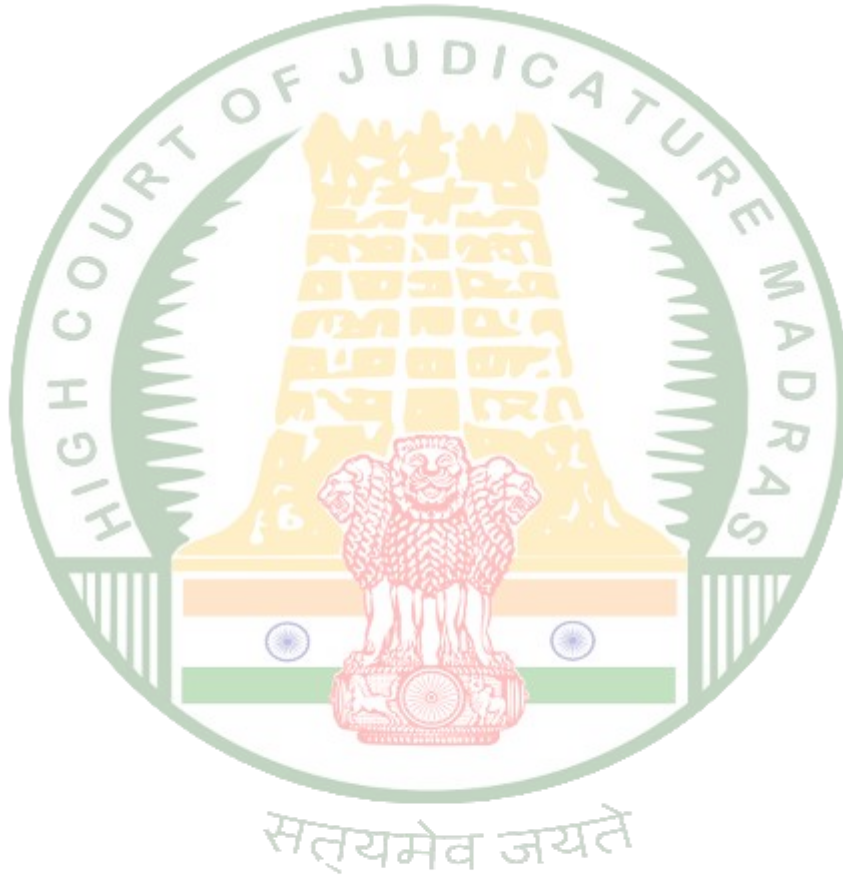
sector companies. Only when this Court, quashed the G.O.Ms.1986, the cause of action for the suit for specific performance was available for the first respondent. The first respondent has filed earlier suit to safeguard his possession and the cause of action in the earlier suit for declaration that sale deed in favour of petitioner is null and void and for injunctions restraining the petitioner and second respondent from interfering with the possession of the first respondent is different from cause of action for present suit for specific performance of agreement of sale.

11. From the readings of the both the complaints, it is clear that cause of action for both the suits are entirely different and relief of specific performance of agreement of sale was not available to the first respondent in view of the ban order. The facts in the two judgments relied on by the learned Senior Counsel appearing for the first respondent are identical to the facts of the present case and are squarely applicable to the facts of the present case. For the above reason, I hold that the cause of action for both the suits are not identical and they are different and relief of specific performance was not available to the first respondent at the time of filing of the earlier suit. The learned Judge has not committed any irregularity or illegality, warranting interference by this Court.

12. Accordingly, the civil revision petition is dismissed. No

costs. Consequently, connected miscellaneous petition is closed.

Since the suit is of the year 2008, the learned Additional



WEB COPY

V.M.VELUMANI, J.

gsa

Judge, Cuddalore, is directed to dispose of the suit as expeditiously as possible in any event not later than three months from the date of receipt of a copy of this order.

10.08.2017

Index: Yes/No
Internet: Yes/No
gsa

To

1. K.Srinivasan
Senior Manager,
Cuddalore Power Gen Company Limited,
No.10/59, III Cross Street,
Seetharama Nagar,
Cuddalore.

2. Mr.Balasundharam
Assistant General Manager,
Chemplast Sanmar Limited,
No.9, Cathedral Road,
Chennai.

3. The II Additional Subordinate Judge,
Cuddalore.

Pre-delivery order made in
C.R.P.(PD)No.4108 of 2011