

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:14.03.2017

C O R A M

THE HONOURABLE Mrs.JUSTICE **PUSHPA SATHYANARAYANA**

C.R.P.P.D.No.3564 of 2016

1. M/s.RCONS Estates  
Rep by its Managing Partner  
Mr.C.S.S.Rajah
2. M/s.Rajkumar Constructions Limited  
Rep by its Mangaging Director  
Mr.C.S.S.Rajah .. Petitioners

-Vs.-

1. M/s. Arihant Shelters (India) Limited  
Rep by its Authorised Signatory  
Mr.Mohan S.Koonani
2. M/s.Kenses Constructions Private Limited  
Rep by its Managing Director .. Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 3.10.2016 passed in I.A.No.1655 of 2016 in O.S.No.1499 of 2016 on the file of the Principal District Munsif Court, Coimbatore.

For petitioners ... Mr.Kuberan  
for M/s.Rank Associates

For Respondent-1... Mr.M.S.Krishnan, Senior Counsel  
for Ms.V.Vasista

For Respondent-2... Mr.P.B.Balaji

O R D E R

The defendants 1 and 2 are the revision petitioners herein challenging the order dated 3.10.2016 passed by the Court below in allowing the application under Order 2 Rule 2 C.P.C filed by the plaintiff.

2. The suit is filed by the plaintiff for permanent injunction restraining the defendants from alienating or encumbering the suit property and for other reliefs.

3. The brief facts leading to the revision petition are as follows:-

The plaintiff and the first defendant had entered into a Memorandum of Understanding on 27.11.2006 for sale of 33 apartments of a total extent of 33,000 sq.ft built up area in the project, which was proposed by it, in an extent of 1.46 acres in Singanallur, Coimbatore. Pursuant to the said Memorandum of Understanding, the plaintiff had also paid a sum of Rs.3,17,50,000/- excluding the other incidental expenses etc. for the purchase of the proposed apartments of an extent of 33,000 sq.fts built up area. The Memorandum of Understanding also provided further that in the event

of either of the parties desirous of rescinding the Memorandum of Understanding, the first defendant should refund the entire amount along with interest to the plaintiff. As a developer, the first defendant agreed to apply for necessary approvals for the project and other obligations to comply with the rules and regulations relating to the planning approval. It is stated that due to various reasons, the project did not take off, despite various efforts taken by the first defendant. As the project could not be commenced, the plaintiff sent a legal notice dated 10.09.2016 to the petitioners alleging that the first defendant had orally agreed to convey the land of an extent of 1.46 acres, in which, the project was originally proposed to be developed. It was proposed by the first defendant that the second defendant would be involved for the execution of the project at appropriate stages. In response, the first defendant also sent a reply dated 19.09.2016, denying the allegations and claims relating to the alleged oral understanding. The first defendant also had expressed its inability to convey the property. Hence, the plaintiff sent a rejoinder dated 04.10.2016. Thereafter, the suit came to be filed by the plaintiff for permanent injunction. Along with the suit, an interim injunction application was filed and an ex-parte order was obtained by the plaintiff. It is also stated by the learned counsel for the petitioners that though the second defendant is not a party to the

Memorandum of Understanding dated 27.11.2006, they have been arrayed as a party in the suit. The first defendant had also mortgaged the property with the second respondent, who is the third defendant in the suit and availed a loan. As a rightful owner of the property, the first defendant is said to have dealt with the property and the right of the mortgagee cannot be scuttled by the plaintiff by way of filing a suit for injunction.

4. However, it is stated by the learned counsel for the plaintiff that the act of the first defendant in failing to execute the Memorandum of Understanding, but subsequently mortgaging the project loan exclusively to the benefit of the first defendant, is nothing but a breach of contract both under the Memorandum of Understanding as well as under the agreement to convey the project land to the plaintiff. The plaintiff has paid the entire sale consideration to the first defendant. The first defendant also agreed to convey the schedule 'A' Property to the plaintiff in the event of failure of the project. While so, the act of the first defendant mortgaging the property and encumbering the same, amounts to cheat and criminal breach of trust. Hence, the plaintiff had reserved the right to file a suit for specific performance of execution of the sale deed in respect of schedule 'A' property separately and also reserved

the right to file a suit for alternative relief for refund of sale consideration paid under Memorandum of Understanding and also the stamp duty of Rs.40 lakhs. According to the plaintiff, the act of the first defendant in mortgaging the property has put the interest in jeopardy. The said mortgage is not valid and binding on the plaintiff. The plaintiff is also not aware as to how much money was paid to the first defendant under the mortgage. According to the plaintiff, it is only in order to defeat the agreement to sell the schedule property, the first defendant has mortgaged the property with the third defendant. However, the plaintiff's case is that the first defendant is bound to refund the amount with 18% interest from the date of the Memorandum of Understanding till the date of realisation. The first defendant, having received the entire sale consideration from the plaintiff and having failed to commence the project, as agreed in the Memorandum of Understanding, cannot encumber or alienate the suit property. Therefore, the plaintiff had filed a suit for bare injunction to stop further encumbrance over the property reserving the plaintiff's right to file a separate comprehensive suit relief for permanent injunction and in the alternative, relief for refund of sale consideration paid. Hence, the application under Order 2 Rule 2 of C.P.C was filed separately. The said application was allowed by the Principal District Munsif, Coimbatore on 03.10.2016. The said order

is now under challenge in the above revision.

5. The first objection of the revision petitioners is that the order is a non speaking one. The contention of the petitioners is that when the plaintiff had knowledge about the non performance of the contract by the first defendant as per the reply dated 19.09.2016 sent by the first defendant, the cause of action had arisen for filing the suit for specific performance. Therefore, filing a bare injunction suit and seeking a leave to file another suit at a later stage, does not arise. Hence, the leave ought not to have been granted. The learned counsel appearing for the revision petitioners contended that Order 2 Rule 1 C.P.C requires every suit to include the whole of the claim to which the plaintiff is entitled to in respect of any particular cause of action. It is also open to the plaintiff to relinquish any part of his claim, if he so desires. In the event, the plaintiff omits to sue or intentionally relinquishes any portion of the claim or a relief available on the date of filing of the suit without leave of the Court as per Order 2 Rule 2 C.P.C, he shall not be permitted to sue afterwards the relief that was omitted or relinquished.

6. Order 2 Rule 2 C.P.C debars the plaintiff from making a claim, once the plaintiff omits or relinquishes his part of the claim,

which he is entitled to make. Secondly, when the plaintiff omits one of several reliefs that was available to him on the date of the plaint, the plaintiff is permitted to file a subsequent suit with the leave of the Court for omitting a particular relief. The learned counsel for the plaintiff has placed reliance on a decision of the Hon'ble Supreme Court reported in **2013 (1) SCC 625 [VIRGO INDUSTRIES (ENG.) PRIVATE LIMITED -VS- VENTURETECH SOLUTIONS PRIVATE LIMITED]** and in para 10 and 11, the Hon'ble Supreme Court held as follows:-

*"10. The object behind enactment of Order 2 Rule 2 (2) and (3) of the 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 a 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 II Rule 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](#)[2] may be usefully recalled below:*

*"6. In order that a plea of a bar under O. 2. r. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (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 [Deva Ram & Anr. v. Ishwar Chand & Anr.](#)[3] and *M/s. Bengal Waterproof Ltd. v. M/s Bombay Waterproof Manufacturing Co.& Anr.*[4]*

*11. The cardinal requirement for application of*



*the provisions contained in Order II Rule 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 the Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee[5]. 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 Law of England, (4th Edition). 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 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 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."*

7. The learned counsel appearing for the first respondent /plaintiff contended that the first defendant is duty bound to honour the contract having received the entire sale consideration. Secondly, having received the entire amount, instead of commencing project, first defendant has mortgaged the property to the third respondent and demanded further money. Therefore, as there was a dire urgency to safeguard the interest of the plaintiff, the suit was filed for injunction restraining the defendants from further alienating or encumbering the suit property. The plaintiff, in fact, has stated the reason for not filing the separate suit for specific performance in para 8 of the plaint. In para 11 of the plaint, it has been specifically stated by the plaintiff that the equitable mortgage dated 06.10.2008 by the first defendant, in favour of the third defendant is not binding on the plaintiff. In order to defeat the agreement to sell the suit property and keep the plaintiff away from the property, the first defendant has brought about the said mortgage. To avoid any further encumbrance by the third defendant, it became urgent for the plaintiff to file a suit for bare injunction, by reserving the right for filing a separate suit for specific performance. The plaintiff also stated that there is no time limit fixed under the Memorandum of

Understanding and the time would be the essence of contract when the separate suit is filed.

8. The learned counsel for the first respondent placed reliance on a decision of the Hon'ble Supreme Court reported in **2015 (5) SCC 223 [RATHNAVATHI AND ANOTHER -VS- KAVITA GANASHAMDAS]** and in paras 23, 24 and 25, the Hon'ble Supreme Court held as follows:-

*"23. At the outset, we consider it apposite to take note of law laid down by the Constitution bench of this Court in [Gurbux Singh v. Bhooralal](#), AIR 1964 SC 1810, wherein this Court while explaining the true scope of Order II Rule 2 of CPC laid down the parameters as to how and in what circumstances, a plea should be invoked against the plaintiff. Justice Ayyangar speaking for the Bench held as under:*

*"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....." (Emphasis supplied)*

*24. This Court has consistently followed the aforesaid enunciation of law in later years and reference to only one of such recent decisions in Virgo Industries (Eng.) P. Ltd. Vs Venturetech Solutions P. Ltd., (2013) 1 SCC 625, would suffice, wherein this Court reiterated the principle of law in following words:*

*"11.The cardinal requirement for application of the provisions contained in Order II 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 the Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee JT 2012 (6) SC 149. 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, (4th Edition). The*

*following reference from the above work would, therefore, be apt for being extracted herein below:*

*"'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."*

*25. In the instant case when we apply the aforementioned principle, we find that bar contained in Order II Rule 2 is not attracted because of the distinction in the cause of action for filing the two suits.*

*25.1. 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 2.1.2000 and 9.1.2000. 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 dated 15.2.1989 by defendant no. 2 in plaintiff's favour despite giving legal notice dated 6.3.2000 to*

*defendant no. 2 to perform her part.*

*25.2. 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*

*25.3. 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 CPC. 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.*

9. If the above said dictum laid down by the Hon'ble Supreme Court in the decision cited supra is applied, it is crystal clear that the cause of action for both the suits are different. On a careful examination of the entire facts, and having satisfied with the reasons given by the plaintiff, the trial Court has allowed the application granting leave. In such circumstances, the order of the trial Court is perfectly valid and does not warrant any interference by

this Court.

10. Accordingly, the Civil Revision Petition is dismissed. No costs.

**14.03.2017**

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To

The Principal District Munsif,  
Coimbatore.

**PUSHPA SATHYANARAYANA.J**

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C.R.P.P.D.No.3564 of 2016

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