

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.10.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.2482 of 2012
& M.P.No.1 of 2012

Marayi Ammal (Died)

1.A.Natesan (Died)

2.A.Arunachalam

3.Kathirvel

4.Parvathamani

5.Balamurugan

6.Gokila

7.Rajammal

8.Perumayee

.. Petitioners

(8th petitioner brought on record
as Legal Representative of the
deceased first petitioner viz., A.Natesan
vide Court order dated 06.10.2007)

Vs.

1.Muthusamy

2.T.A.Ramasamy

Kandayee (Died)

3.Devi

.. Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 24.01.2011 made in I.A.No.297 of 2010 in O.S.No.162 of 2008 on the file of the Subordinate Judge's Court at Tiruchengode.

For Petitioners : Mr.P.Valliappan

For R1 : Mr.Adeesh Anto
for Mr.K.Chandrasekaran

For R2 & R3 : No appearance

ORDER

This Civil Revision Petition is filed against the fair and decretal order dated 24.01.2011 made in I.A.No.297 of 2010 in O.S.No.162 of 2008 on the file of the Subordinate Judge, Tiruchengode.

2. The petitioners 1 to 7 are the defendants 3 to 9 and 8th petitioner is the legal heir of the deceased first petitioner, first respondent is the plaintiff and respondents 2 and 3 are the defendants 2 and 11 in O.S.No.162 of 2008 on the file of the Subordinate Judge, Tiruchengode. The first respondent initially filed a suit, O.S.No.938 of 2003 on the file of the Subordinate Court, Namakkal, which was subsequently transferred to the Subordinate Court, Thiruchengode and renumbered as O.S.No.168 of 2008. The said suit was filed for return of advance amounts against the petitioners 1 to 7 and three others. The second respondent and 6th

petitioner filed written statement on 15.09.2004 and 24.08.2009 respectively and are contesting the suit. The first respondent filed I.A.No.297 of 2010 under Order 6 Rule 17 and Section 151 C.P.C for amendment to include the relief of specific performance and to rectify the defects in the description of the property mentioned in the sale agreement dated 04.04.2001. According to the first respondent, on the advice of his previous counsel, Mr.S.Ganesan, he has filed the suit only for refund of advance amount. Due to lack of legal knowledge and inadvertence, he followed the advice of earlier Advocate Mr.S.Ganesan. After engaging the present counsel, he came to know that he can ask for relief of specific performance of agreement of sale. The suit was filed on 19.11.2003 and the relief now claimed by way of amendment is not barred by limitation.

3. The second petitioner filed counter and the same was adopted by the other petitioners and respondents 2 and 3. In the counter affidavit, the petitioners submitted that the suit, O.S.No.938 of 2003 was originally filed on 19.11.2003. The said suit is pending for last 7 years. The relief now sought for is barred by limitation. If amendment is allowed, it will change the character of the suit and will introduce a new cause of action and new case. The first

respondent ought to have claimed relief of specific performance in the original suit itself and cannot claim the relief of specific performance by way of amendment and prayed for dismissal of the I.A.No.297 of 2010.

4. The learned Judge, considering the averments in the affidavit and counter affidavit, allowed the application on the ground that the first respondent originally claimed for return of advance amount, as such his claim for relief of specific performance is not barred by limitation and held that he is allowing the application to give an opportunity to the first respondent to put forth his claim and in order to avoid multiplicity of proceedings.

5. Against the said order dated 24.01.2011 made in I.A.No.297 of 2010 in O.S.No.162 of 2008, the present Civil Revision Petitions are filed by the petitioners.

6. The learned counsel appearing for the petitioners contended that the first respondent filed suit for refund of advance amount and did not seek for specific performance of agreement of sale. The first respondent has stated that the description of the

property is vague in agreement of sale and another suit is pending and in view of the above facts, he is not seeking relief of specific performance of agreement. The first respondent has abandoned and relinquished the relief of specific performance. After 7 years of filing the suit, the first respondent is not entitled to seek the relief of specific performance and the relief sought for is barred by limitation. The amendment now sought for changes the character of the suit. The learned counsel appearing for the petitioners in support of his contentions, relied on the following judgments:

(i) 2011 (1) MWN (Civil) 232 in the case of **Van Vibhag K.G.N.Sahkari Sansthan, Maryadit Vs. Ramesh Chander & Others:**

"27. In this context, the provision of Article 54 of the Limitation Act is very relevant. The period of limitation prescribed in Article 54 for filing a suit for specific performance is three years from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.

33. This Court is, therefore, of the opinion that the appellant had the cause of action to sue for specific performance in 1991 but he omitted to do so. Having done that, he should not be allowed to sue on that cause of action which he omitted to include when he

filed his suit. This Court may consider its omission to include the relief of specific performance in the suit which it filed when it had cause of action to sue for specific performance as relinquishment of that part of its claim. The suit filed by appellant, therefore, is hit by the provisions of Order 2, Rule 2 of the Civil Procedure Code.

34. Though the appellant has not subsequently filed a second suit, as to bring his case squarely within the bar of Order 2, Rule 2, but the broad principles of Order 2, Rule 2, which are also based on public policy, are attracted in the facts of this case.

35. Even though the prayer for amendment to include the relief of specific performance was made about 11 years after the filing the suit, and the same was allowed after 12 years of the filing of the suit, such an amendment in the facts of the case cannot relate back to the date of filing of the original plaint, in view of the clear bar under Article 54 of the Limitation Act.

36. Here in this case, the inclusion of the plea of specific performance by way of amendment virtually alters the character of the suit, and its pecuniary jurisdiction had gone up and the plaint had to be transferred to a different Court."

(ii) 2001-3-L.W.280 in the case of **Tamil Nadu Electricity Board, Anna Salai, Chennai 600 002, represented by its Chairman and another Vs. The Tamil Nadu Alloy Foundry Co.**

Limited, Plots No.21 and 33 SIPCOT Complex, Hosur:

"9. The plaintiff, no doubt, did not relinquish any portion of his claim. That does not improve matters. The omission to make the claim itself results in the plaintiff becoming disentitled to raise the claim subsequently. The plaintiff again by stating in the plaint that he needs more time to quantify the amount of the damages cannot grant to it a period of time beyond the one prescribed by the law of limitation, for quantifying a higher amount. By his failure to act in time, he takes sum, which he may think that he is entitled to on the same cause of action.

10. The law of limitation is intended to protect the defendants from claims being made long after the periods specified in the law have elapsed. The plaintiff cannot, therefore be allowed to enlarge the period of limitation by merely stating in the plaint that he will come back to the court at a later point of time with the revised figure of the damages. If he is unable to state the amount precisely in the plaint, he must carry out such amendment as he may think, he is entitled to, within the period of limitation if he is to prevent a challenge to any subsequent application for amendment on the ground of limitation. The mandate of Section 3 of the Limitation Act is clear and indeed it casts a duty upon the Court to dismiss a suit or application which is barred by limitation at the

threshold. Having regard to the rigour of the provision, the plaintiff cannot be allowed to reserve to himself a right to spring surprise on a defendant by claiming a huge amount, as in this case, by seeking to revise a claim of Rs.10.00 lakhs more than hundred fold and making a claim for Rs.1295.81 lakhs."

(iii) 2014 (2) CTC 655 in the case of Ferani Hotels

Private Ltd., Vs. K.Raheja Development Corporation (KRDC):

"18.It is a well settled proposition of law that when the relief sought for, as per amendment is barred by limitation, the Court cannot permit for seeking such an amendment of the plaint, as held by the Hon'ble Apex Court.

22.In the light of various decisions referred to above, rendered by the Hon'ble Supreme Court, it has been made clear that while allowing the petition filed under Order 6, Rule 17 of the Code, the Court has to consider whether the amendment would cause prejudice to the other party and similarly if he relief sought for is barred by limitation, such an amendment cannot be allowed, as it would prejudice the other side.

27.As contended by the learned Senior Counsel appearing for the petitioner/defendant, even as per the averments of the plaint and the accompanying affidavit filed by the respondent/plaintiff, the amendment sought for is after a period of three years limitation and therefore, in the light of the decisions rendered by the

Hon'ble Supreme Court, permitting to make such an amendment under Order 6, Rule 17, C.P.C would be prejudicial to the rights of the petitioner, as the relief sought for is barred by limitation."

(iv) AIR 1993 Supreme Court 1120 in the case of

Thakamma Mathew Vs. M.Azamathulla Khan and others:

"8.The learned counsel for the appellant has submitted that the High Court has virtually passed a decree for specific performance of the agreement to sell in favour of the defendant in the suit filed by the appellant and that such a relief could not be granted under Order 7, Rule 7, C.P.C. Moreover, a decree for specific performance could not be passed in the present case since the period of limitation prescribed for filing a suit for specific performance had long expired and the conditions which are required to be fulfilled by a person seeking a decree for specific performance of the contract under Section 16 of the Specific Relief Act were not satisfied in the present case. It has also been urged by the learned counsel for the appellant that the High Court has erred in proceeding on the basis that the principle of part performance would be attracted and a decree for possession could not be passed in favour of the appellant against the respondent. It has also been urged that the High Court had disposed of the appeal of the respondent and dismissed the suit of the

appellant without considering the cross appeal filed by the appellant.

We find considerable force in the aforesaid contentions of the learned counsel. In order that decree for specific performance of a contract may be passed it is necessary to consider whether such a relief can be granted in view of Section 16 of the Specific Relief Act, 1963. In other words the person seeking such a decree has to satisfy that S.16 of the Specific Relief Act does not bar the grant of such a relief and the person against whom the decree is passed can show that the relief of specific performance cannot be granted in view of the provisions of S.16 of the Specific Relief Act. Clause (c) of S.16 postulates that the person seeking specific performance of the contract must file a suit wherein he must 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. Moreover, in view of the Article 54 of the Limitation Act, 1963, a suit for specific performance of contract has to be filed within three years of the date fixed for the performance or if no such date is fixed where plaintiff has notice that performance is refused. In the present case, the appellant by his notice dated February 10, advance amount of Rs.16,000/- deposited by the defendant. By

the said notice, it was clearly indicated that the appellant was no longer willing to perform the agreement to sell dated November 12, 1974. In the circumstances, it was incumbent upon the defendant to have filed a suit for specific performance of the contract within a period of three years from the date of the said notice dated February 10, 1975 and if such a suit had been filed by the defendant, it would have been open to the appellant to show that it was barred by the provision contained in Section 16 of the Specific Relief Act. The defendant did not choose to adopt that course and remained content with defending the suit filed by the appellant for cancellation of the agreement to sell dated November 12, 1974 and for recovery of the possession of the property. Even if it is found that the appellant was not entitled to succeed in the said suit and the said suit is liable to be dismissed, it would not entitle the defendant to obtain a decree for specific performance of the contract in those proceedings. The High Court, with due respect, was not right in invoking its discretionary power under Order 7, Rule 7; C.P.C to grant such a relief to the defendant. The said power conferred on the Court does not enable it to override the statutory limitations contained in S.16 of the Specific Relief Act, 1963 and S.54 of the Limitation Act, 1963 which preclude the grant of the relief of specific performance of a contract except within the period

prescribed by the section."

(v) 1989 AIR (Kerala) 134 in the case of **Ayissabi Vs.**

Gopala Konar:

*"7.As was held in **Ardeshir H.Mama V. Flora Sassoon, AIR 1928 PC 208**, failure to make up such a case and commencement of an action for damages or an attempt for that purpose as in Ext.A2 by repudiating the contract amounts to an election to treat the contract as at an end. The election precluded the plaintiff from reverting back and claiming specific performance when Ext.A1 is having the effect of treating the contract as at an end. No suit for specific performance will thereafter lie....."*

7. The learned counsel appearing for the first respondent contended that in view of the suit filed by him, the present amendment sought for is not barred by limitation and amendment sought for does not change the character of the suit. The learned Judge has considered all the facts and law in proper perspective and has given valid reason for allowing the application filed for amendment. The learned counsel appearing for the first respondent relied on the following judgments in support of his contentions:

(i) 2015 (2) CTC 262, in the case of **Tamil Nadu Small**

Industries Development Corporation Ltd., Vs. P.Kalavathy**Sukumar:**

"25.The third question of law framed is as to whether the Courts below were right in decreeing the suit thereby granting the decree for specific performance without regard to the change of circumstances. Regarding the legal position, I agree that in a suit for specific performance, granting of decree for specific performance is not automatic is well settled. But, at the same time, it is also the law that not in every case where there is escalation of price that a decree for specific performance should be denied. It all depends upon the facts and circumstances of each case. As rightly contended by the learned counsel, there are cases where a meagre amount would have been paid towards the sale consideration and due to long lapse of time, there may be escalation of price, in such a case, the Court would decline to grant a decree for specific performance. There are also cases where for the delay, if the plaintiff is held responsible, either in full or in part, the Court have declined to grant a decree for specific performance. But, in the instant case, for the delay of nearly about 30 years, the plaintiff is not at all responsible. As rightly pointed out by the learned counsel for the respondent the entire sale consideration was paid even in the year 1985 itself. What was demanded in the year 1985 was

additional amount to recognize the reconstitution of the partnership firm. That was set aside by the Court in O.S.No.8195 of 1985. It cannot be concluded that the full amount was not paid, therefore, when there is a delay of price manifold, that cannot be a ground to deny a decree for specific performance. I find that the Courts below have not granted the decree in a mechanical fashion or in an automatic fashion as contended by the appellant. After having considered all the factual aspects and after considering the evidence scrupulously, the Courts below have rightly come to the conclusion that the decree for specific performance should be granted and accordingly they have granted, in which, I do not find any infirmity. Thus, the third substantial question of law is also answered against the appellant."

(ii) AIR 2008 SC 1960 in the case of **Puran Ram Vs.**

Bhaguram and Anr.:

"13. Before parting with this judgment, we may deal with the submission of the learned counsel for the respondent that the application for amendment could not be allowed in as much as the same was barred by limitation. We are unable to accept this contention of the learned counsel for the respondents. In this regard, we may observe that the Court may, in its discretion, allow an application for amendment of the plaint even where the relief sought to be added by amendment is

*allegedly barred by limitation. This view was also expressed by this Court in **Pankaja and Anr. V. Yellappa (Dead) by Lrs. And others MANU/SC/0590/2004: AIR2004SC4102**. In that decision, it was held that there is no absolute rule that in such a case, the amendment should not be allowed and the discretion of the court in that regard depends on the facts and circumstances of the case and such discretion has to be exercised on a judicious evaluation thereof. It was further held in that decision that an amendment, which subserves the ultimate cause of justice and avoids further litigation, should be allowed. It is well settled by a catena of decisions of this Court and amendment of the rejecting an application for amendment of a plaint is really the discretion of the Court and amendment of the plaint also should not be refused on technical grounds....."*

(iii) 2009 (1) CTC 624 in the case of **Chandran Vs.**

Mariappan:

"10. In view of the fact that Section 26(1)(a) of the Specific Relief Act, 1963 permits either party or his representative in interest may institute a suit to have the instrument rectified and in as much as the mistake which has crept in the agreement of sale and incorporated in the plaint has come to the notice of the parties only during the course of trial, the act of the trial Court in allowing the amendment application

I.A.No.43 of 2008 in O.S.No.161 of 2006 cannot be found fault with and the trial Court in the considered opinion of this Court has exercised its discretion in a proper and effective way for the purpose of complete adjudication of controversies/disputes involved in the suit between the parties and in that view of the matter, this revision petition fails and the same is hereby dismissed.”

8. Heard the learned counsel appearing for the petitioners as well as the first respondent and perused the materials available on record and considered the judgments relied on by the learned counsel appearing for the petitioners and first respondent.

9. The first respondent originally filed the suit on the file of Subordinate Court, Namakkal in the year 2003 in O.S.No.938 of 2003. The first respondent's claim in the suit is only return of advance amounts. According to the first respondent, on the advice of his previous counsel that since the description of property is vague and another suit in O.S.No.244 of 2001 on the file of the Subordinate Court, Sankari, which was transferred to Subordinate Court, Thiruchengode and renumbered as O.S.No.716 of 2002 with regard to the title of the petitioners and others was also pending, he

did not file the suit for specific performance, but filed the suit only for return of advance amount paid by him. The suit was transferred to Subordinate Court, Thiruchengode and on the advice of the present Advocate, he filed application for amendment to include the relief of specific performance. According to the first respondent, the suit is not barred by limitation as he has filed suit for return of amounts in the year 2003 itself. The said contention is without merits and contrary to well settled judicial pronouncements. When the plaintiff is entitled to more than one relief and cause of action for all the reliefs were available at the time of filing of the suit, the plaintiff must have filed comprehensive suit claiming all the reliefs he is entitled to. If he failed to seek any one of the relief, it amounts to relinquishing his right to claim such a relief. If plaintiff intends to file subsequent suit for some of the reliefs which he is entitled to at the time of filing of the first suit, then plaintiff must obtain leave from the Court to file subsequent suit under Order 2 Rule 2 (3) C.P.C. Failure to file suit for all the relief or failure to obtain leave to file subsequent suit from the Court, the subsequent suit would be barred as per Order 2 Rule 2 C.P.C. In a suit to enforce the agreement of sale, the plaintiff must seek a relief of specific performance. If he fails to seek the relief of specific performance,

but files the suit only for refund of advance amount, it amounts to abandoning his claim for specific performance of agreement of sale. The relief of specific performance of agreement of sale cannot be included subsequently by way of amendment. Especially, when the plaintiff cannot file a suit for specific performance in view of the fact that the said suit is barred by law of limitation.

10. In the present case, the petitioner filed the suit only for refund of advance amount. The amendment now sought for to include the relief of specific performance is filed after 7 years of filing of suit is clearly barred by limitation. The judgments relied on by the learned counsel appearing for the petitioners are squarely applicable to the facts of the present case. In the above judgments, the Hon'ble Apex Court, this Court and Hon'ble Kerala High Court have held that once the plaintiff has chosen to file suit for return of advance amount only, subsequently he cannot claim the relief of specific performance. The plaintiff has to file the suit within 3 years from the time fixed in the agreement of sale and if no time is fixed, the suit has to be filed within 3 years from the date when the defendant commits breach of contract and refuses to execute the sale deed. The judgments relied on by the learned counsel

appearing for the respondents are not applicable to the facts of the present case. The learned Judge has failed to consider these facts and committed an error in holding that the suit is not barred by limitation in view of the fact that the suit filed by the first respondent is pending. The learned Judge has committed an irregularity in allowing the application.

11. In view of the same, the order passed by the learned Subordinate Judge in I.A.No.297 of 2010 in O.S.No.162 of 2008 is set aside and Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

23.10.2017

Index: Yes/No

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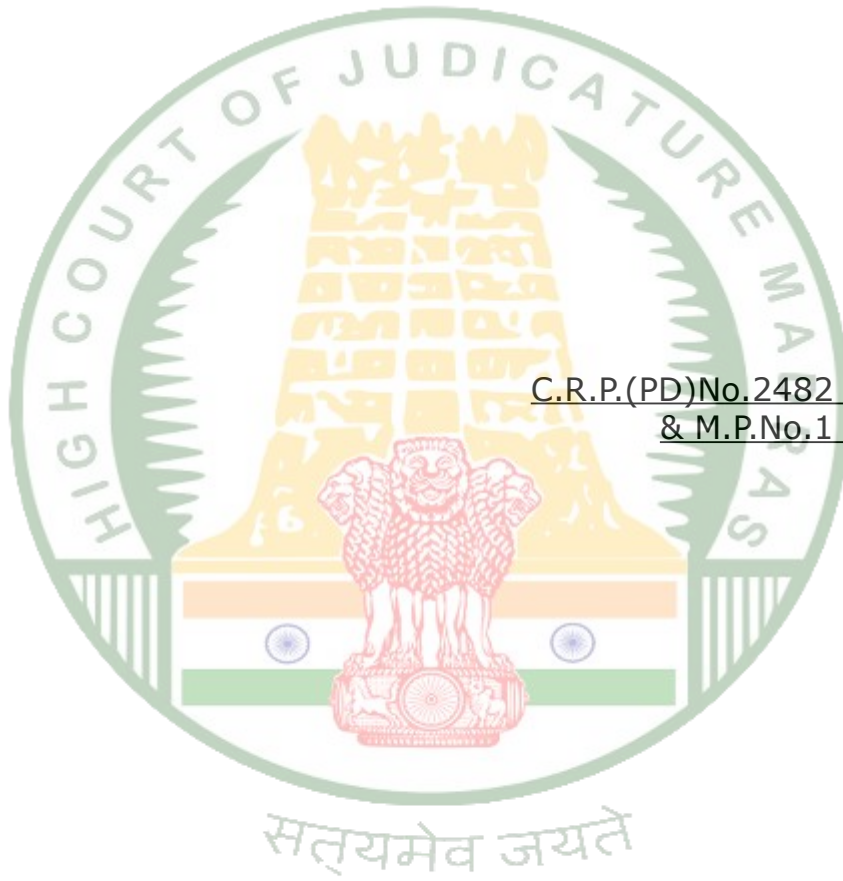
To

The Subordinate Judge,
Tiruchengode.

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