

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.03.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.496 of 2017
and C.M.P.No.15821 of 2017

Manickkam

.. Appellant/Plaintiff in OS

Vs.

1. Sundaram

2. Rajendren

.. Respondents/Defendants 3 and 2 in OS

* * *

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 28.06.2012 made in A.S.No.87 of 2005 on the file of the Principal District Judge, Salem, reversing the judgement and decree dated 10.02.2004, made in O.S.No.932 of 1995 on the file of the Additional Subordinate Court, Salem.

* * *

For Appellant : Mr.P.Ganapathy

For Respondents: Mr.P.Jagadeesan for R1

J U D G E M E N T

The plaintiff in a suit for specific performance has preferred the above appeal.

2. The plaintiff has entered into an agreement with defendants 1 and 2 on 12.12.1991 agreeing to purchase the suit property for a sum of Rs.1,06,000/- and paid an advance of Rs.20,000/-. As per the recitals in the agreement, the sale should have been completed on or before 14.06.1992, that is, six months time was fixed. Though the plaintiff was ready and willing, the defendants were evading the execution of the sale deed and also attempted to alienate the property. The plaintiff filed a suit in O.S.No.125 of 1992 seeking the relief of permanent injunction. Later, the same was dismissed for default. In the meanwhile, the third defendant in the instant suit had purchased the property from the first and second defendants. Hence, he was also added as a party in O.S.No.125 of 1992. As the defendants are bound to honour the agreement dated 12.12.1991, the suit has been filed for specific

performance.

3. The first and second defendants had filed written statements contending that the agreement dated 12.12.1991 was not true and valid. The plaintiff was never ready and willing to perform his part of the contract, as he was not possessed of sufficient means. The suit filed by the plaintiff in O.S.No.125 of 1992 was dismissed for non-prosecution. The plaintiff having not reserved his right, with the sanction of the Court, to file a subsequent suit for specific performance, the suit is barred by the provisions of Order 2, Rule 2 of the Code of Civil Procedure (CPC). The first and second defendants had already sold the property to the third defendant on 11.02.1992 based on which, the third defendant was added even in the earlier suit in O.S.No.125 of 1991 and in the present suit also. The plaintiff has also sought for cancellation of sale deed in favour of the third defendant, which is not maintainable. The first and second defendants further contended that the suit is barred by limitation.

4. The third defendant, who is the respondent herein, had filed his written statement contending that he had purchased the property from the owners, who are the first and second defendants, for valid consideration on 11.02.1992. It is contended that he is the bonafide purchase, without notice of the said sale agreement dated 12.2.1991. The previous suit in O.S.No.125 of 1992 was filed on 04.02.1992, whereas, he had purchased the property on 11.02.1992. In fact, the fourth defendant was impleaded as party to the previous suit also. It is further contended that the relief of specific performance was available to the plaintiff even at the time of filing the suit in O.S.No.125 of 1992. The plaintiff having not sought for the said relief earlier, cannot maintain the instant suit, as the same is barred under Order 2, Rule 2 of the CPC. Thus, prayed for dismissal.

5. Before the trial court, the plaintiff examined himself as P.W.1 and examined P.Ws.2 and 3 and marked Exs.A.1 to A.9. On the side of the defendants, the third defendant was examined as D.W.1 and one Mahalingam was examined as D.W.2. Exs.B.1 to B.17 were also marked on their side.

6. Upon considering the oral and documentary evidence, the Trial Court had held that the agreement dated 12.12.1991- Ex.A.1 was true and valid and decreed the suit. Aggrieved by the same, the third defendant preferred A.S.No.87 of 2005 on the file of the Principal District Court, Salem. After elaborately discussing the facts and the legal propositions, the appellate court had allowed the appeal and dismissed the suit. Aggrieved, the appeal is filed.

7. The question that arises for consideration is : whether the third defendant is a bona fide purchaser for value after due enquiry ; whether the third defendant is entitled to raise the question of readiness and willingness ; whether the suit is barred by Order 2, Rule 2 and the payment of court fees ; when the original first and second defendants have not raised the point and remained ex parte and allowed the suit to be decreed in favour of the plaintiff ?”

8. The appeal is filed by the plaintiff. The original ownership of the properties with the first and second defendants is not in dispute. The trial court as well as the lower appellate court have found that the agreement dated 12.12.1991 between the plaintiff and the first and second defendants is true and valid. The third defendant had purchased the property on 11.02.1992 from the first and second defendants, as per Ex.B.4. Though the third defendant had denied the execution of the sale agreement dated 12.12.1991, such contention cannot be maintained by him, as he is not a party to the document, and it is only the plaintiff and the first and second defendants, who are parties under the document Ex.A.1 can have a say. The plaintiff has also proved that Ex.A.1 was true and valid by examining the witnesses to the document.

9. So far as the question of whether the time is essence of the contract is concerned, as per Ex.A.1, the parties have agreed to complete the sale within six months, that is, on or before 14.06.1992. The plaintiff seems to have issued a notice on 01.02.1992, as per Ex.A.5. The plaintiff also had filed a suit on 04.02.1992 in O.S.No.125 of 1992 on the file of the District Munsif Court, Salem, for a permanent injunction restraining the defendants from alienating the suit property to any other person other than the plaintiff as per Ex.A.8. The lower appellate court has held that time is essence of the Court on the ground that there is a forfeiture clause of the advance amount paid, in the event of not completing the sale before the date fixed.

10. The next question that arises for consideration is whether the plaintiff was ready and willing to perform his part of the contract. From the foregoing discussion, it is clear that Ex.A.1 is valid and the time is also essence of the contract. It is the specific case of the plaintiff that despite he being ready for purchasing the property, the first and second defendants were not ready to execute the sale deed in his favour. As the first and second defendants were attempting to sell the property to third parties, the plaintiff had filed O.S.No.125 of 1992 for injunction restraining him from in any way manner alienating the suit property. As the first and

second defendants had executed the sale deed in favour of the third defendant on 11.02.1992, the third defendant herein was impleaded in O.S.No.125 of 1992. It is contended in the written statement of the first and second defendants that the plaintiff did not have the wherewithal to complete the sale. Though the plaintiff had categorically stated that he was ready and willing to complete the sale and he had sufficient means to purchase the property, he has not let-in any evidence in that regard.

11. In Ex.A.5, legal notice, the plaintiff had stated that the extent of the suit property is less than what has been agreed in the agreement under Ex.A.1. Hence, he had also stated that he would not pay the amount agreed and he would only pay the proportionate value for the land that is available, after deducting the value for the extent, which is not available. It is pointed out that the said notice under Ex.A.5 was sent only to the first defendant and not to the second defendant. The suit filed in O.S.No.125 of 1992 by the plaintiff was also dismissed for default on 18.03.1993, which is marked as Ex.A.9. Even on the date when O.S.No.125 of 1992 was filed by the plaintiff, the relief of specific performance was available to him, but the suit was laid only for permanent injunction. Therefore, it is contended by the learned counsel for the first respondent that if only the plaintiff was willing to perform his part of the contract, he would have included the relief of specific performance also in O.S.No.125 of 1992 and deposit the balance of sale consideration before the trial Court. As the plaintiff was not having the balance of sale consideration, he had not chosen to include the relief of specific performance at the earliest instance. To substantiate the said contention, it is also pointed out that the suit for specific performance in O.S.No.932 of 1995 is filed on 09.06.1995 by affixing only a Court fee of Rs.1.25. Later, only on 16.10.1995, the balance of Rs.7,950/- was paid. Hence, it is contended that the Court fee itself was paid by the plaintiff with a delay of 97 days, which would go to show that the plaintiff was not ready and willing to perform his part of the contract, even on the date of the suit.

12. Yet another contention of the learned counsel for the first respondent was that even pending O.S.No.125 of 1992, the plaintiff was aware of the fact that the first and second defendants had sold the property to the third defendant and the plaintiff also impleaded him as a party to the suit. While so, there is no convincing reason given by the plaintiff for not filing a suit for specific performance in the year 1992 itself. Though there is no hard and fast rule to conclude whether the plaintiff is ready and willing to perform his part of the contract, the same may be interfered from the facts of the case. Thus, in this case, the plaintiff had not proved his readiness and willingness.

13. The next question that arises for consideration is whether the suit is barred by Order 2, Rule 2 of the CPC. When the plaintiff filed the suit in O.S.No.125 of 1992 for injunction, the relief of specific performance was very much available to him. No doubt, there was time till 14.06.1992 to perform his part of the contract, as per the agreement. O.S.No.125 of 1992 was filed on 04.02.1992. Ex.A.5 notice was issued by the plaintiff on 01.02.1992. In the said notice itself, it is mentioned that the first defendant should not alienate the property to anybody else, as the plaintiff was ready to pay the balance of the sale consideration and take the sale. As mentioned earlier, the said notice was not issued to the second defendant. When the notice specifically mentioned that the property has to be sold only to the plaintiff, there is no convincing reason coming forth for not including the relief of specific performance in the previous suit itself. The plaintiff has impleaded the first respondent herein being the purchaser from the first and second defendants even in O.S.No.125 of 1992. Even after coming to know of the fact that the first and second defendants have sold the property in violation of the agreement- Ex.A.1 to the third defendant, the plaintiff has not sought for specific performance by amending the plaint. In fact, cause of action for the earlier suit is only as per the agreement under Ex.A.1. As per Order 2, Rule 2, a subsequent suit would be a bar if the previous suit did not include all the reliefs that were available on the cause of action alleged.

14. As per the foregoing discussion, it is clear that the first suit itself only came to be filed only on the apprehension that the first and second defendants were attempting to alienate the suit properties to third parties. While so, nothing prevented the plaintiff from asking the relief of specific performance at the first instance itself. Ironically, the said suit in O.S.No.125 of 1992 was dismissed for default for not filing the amended plaint. Hence, the plaintiff also had not taken the permission of the Court to sue separately for specific performance. In other words, the plaintiff has not taken the leave of the Court to file a second suit on the same cause of action. In support of his contentions, learned counsel for the respondent relied on S.Gananatha Perumal V. S.Valliappan, 2010 (6) CTC 95, wherein, it has been held as follows :

"33. Adverting to the facts of the present case, the sale agreement was executed on 07.07.1980. Ex.D.1 is the first occasion where the parties started exchange of communication. By Ex.D.1, on 19.09.1980, the respondent sent a telegram requiring the appellant to produce and deposit the original title deeds expressing his apprehension that the appellant was negotiating

with the third party to make an unlawful gain. He has also asked the appellant to produce the documents within 24 hours or otherwise he would take legal action. The same demand has been reiterated in Ex.P.4 advocate notice dated 20.09.1980. Afterwards, the respondent had not moved his little finger to claim the original title deeds nor had he taken any further steps to get the sale deed executed.

34. In O.S.No.6145 of 1980, causes of action alleged are that on 07.07.1980, the sale agreement was executed and on 18.09.1980, the plaintiff sent the telegraphic notice and subsequently. As far as the respondent is concerned, he simply stopped with demanding the appellant to produce the original title deeds and had done nothing more except on two occasions, i.e. on 18.09.1980 and 20.09.1980. In the cause of action column in the present plaint, it is stated that the cause of action for the suit arose at Madras on 07.07.1980 where and when the sale agreement was executed and subsequently. Obviously, two causes of action for the present suit are that the issue of telegraphic notice Ex.D.1 and advocate notice Ex.P.4 by the respondent.

35. It is apparent that the cause of action for filing the fresh suit was existing even at the time of filing of the earlier suit. Even though the reliefs claimed in both the suits are different, the causes of action for filing of both the suits are identical, that is to say, the issuance of telegraphic notice, on 19.09.1990 and notice dated 20.09.1980. Two statutory requirements as per order 2 Rule 2 CPC that the existence of causes of action for the subsequent suit at the time of filing of the earlier suit and the presence of identical causes of action in both the suits, are very much available in this case. In this case, the legal position enunciated in N.V.Srinivasa Murthy's case cited supra is applicable. Hence, there is no legal impediment to reach a conclusion that the present suit is barred by the provision Order 2 Rule 2 CPC. I answer this point in affirmative."

15. In *Virgo Industries (Eng.) P. Ltd., V. Venturetech Solutions P. Ltd.*, 2012 (5) SCC 359, the Hon'ble Apex Court has held that the principle in Order 2, Rule 3 of the CPC discourages vexing the defendant again and again by multiple suits. It is useful to advert to the relevant paragraphs :

"9. Order 2, Rule 1 requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2, Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order 2, Rule 2 of CPC makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order 2 Rule 2(2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the Court is contemplated by Order 2 Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. It is, therefore, clear from a conjoint reading of the provisions of Order 2 Rule 2 (2) and (3) of the CPC that the aforesaid two sub-rules of Order 2 Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit provided that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit.

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 2 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, AIR 1964 SC 1810, may be usefully recalled below:

"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., 1995 (6) SCC 733 and M/s. Bengal Waterproof Ltd. v. M/s Bombay Waterproof Manufacturing Co. & Anr. AIR 1997 SC 1398.

11. The cardinal requirement for application of the provisions contained in Order 2 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, 2012 (4) CTC 308 (SC). 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."

16. The third defendant had purchased the suit property pending earlier lis. However, he has been impleaded in the present suit not at the inception, but only in the year 1999 in I.A.No.359 of 1997. The prayer in the suit is for specific performance directing the defendants to execute the sale deed in favour of the plaintiff. Already the third defendant had purchased the property by way of registered document. Even in the event of the success, the plaintiff has to get the sale of the property reconveyed from the third defendant. Therefore, the third defendant is deemed to have stepped into the shoes of the first and second defendants and all those objections that are available for the first and second defendants are equally available to the third respondent also.

17. Thus, the questions of law are answered against the appellant and the appeal is dismissed confirming the judgment and decree of the lower appellate Court. No costs. Consequently, pending application is closed.

Sd/-
Assistant Registrar (CS-V)

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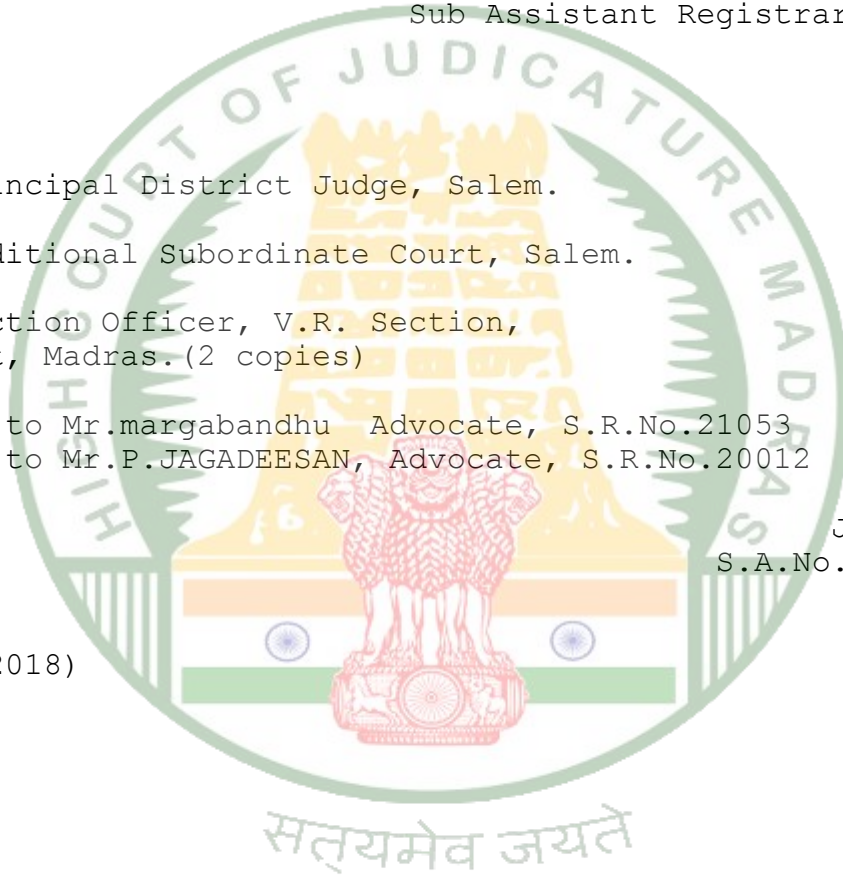
To

1. The Principal District Judge, Salem.
2. The Additional Subordinate Court, Salem.
3. The Section Officer, V.R. Section,
High Court, Madras. (2 copies)

+1cc to Mr.margabandhu Advocate, S.R.No.21053
+1cc to Mr.P.JAGADEESAN, Advocate, S.R.No.20012

Judgement in
S.A.No.496 of 2017

SKV(CO)
TR(27/04/2018)



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