

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.06.2018

Coram

The Hon'ble Mr. Justice M.M.SUNDRESH  
and  
The Hon'ble Mr. Justice N.ANAND VENKATESH

O.S.A.No.60 of 2018  
and  
C.M.P.No.3327 of 2018

A.Aswinsolomon ... Appellant

Vs

R.Kaviraj ... Respondents

Appeal preferred under Clause 15 of Letters Patent r/w Order XXXVI Rule 9 of O.S. Rules against the judgment and decree dated 10.02.2017 made in C.S.No.715 of 2009.

Prayer C.S.No.715 of 2009

Has been filed before the original Civil Jurisdiction of this Court praying for specific performance of contract of agreement of sale dated.06/09/2007 between the plaintiff and Defendant herein by directing the defendant herein to execute deed of sale in favour of the plaintiff herein relating to the suit schedule mentioned property and register the same before the office of Sub-Registrar having jurisdiction.

To pay the cost of the Suit.

For Appellant .. Mr.T.Murugamanickam,  
Sr. Counsel  
for Mr.S.Ilamparithi  
For Respondent .. No appearance

JUDGMENT

(Judgment of the Court was delivered by M.M.SUNDRESH, J.)

This appeal has been preferred by the plaintiff in the suit filed for specific performance.

2. An agreement was entered into between the parties under Ex.P1 dated 06.09.2007. As per the aforesaid agreement, the total sale consideration was for a sum of Rs.36,50,000/-, of which, the appellant has paid a sum of Rs.6,50,000/-. Clause 11 of the agreement says that the sale shall be completed within seven days on the day of fully demolished condition of schedule mentioned property which in turn has to be done by the respondent within three months. Thus the aforesaid clause makes it clear that the time is the essence of the agreement.

3. The appellant issued a notice Ex.P2 dated 30.11.2007 asking the respondent to execute the deed of sale by performing his part of the contract. Ex.P5 is the letter issued by the respondent dated 23.01.2008, by which, it has been clearly stated that the agreement stands cancelled and the advance is returned. Another reply was sent by way of telegram by the respondent to the plaintiff viz., appellant on 26.01.2008.

4. The appellant instead of filing suit for specific performance, filed a suit for permanent injunction restraining the respondent from alienating and encumbering the suit property in O.S.No.865 of 2008. In the aforesaid suit, leave was sought, but no order was passed by the jurisdictional Court, except by observing that the aforesaid application has been perused. Thereafter, the present suit was filed for specific performance on 16.02.2009. The learned single Judge has framed three issues, which are as under:

1. Whether the present suit is hit by Order II Rule 2 of C.P.C. in view of the suit for bare injunction filed before the City Civil Court in respect of the very same cause of action?

2. Whether the plaintiff is entitled to ask for the equitable relief of executing the sale deed in respect of the suit property even after the receipt of the advance amount by way of demand draft?

3. To what other relief the plaintiff is entitled to?

5. The issues have been answered against the appellant inter alia holding that the suit is barred by Order 2 Rule 2 C.P.C., having filed earlier suit for injunction and not obtaining the leave despite the fact that the cause of action for the subsequent suit was available at the relevant point of time. Secondly, it was held that the respondent has returned the advance amount paid by the appellant and therefore, there is no basis for maintaining the suit.

6.Learned senior counsel appearing for the appellant would submit that Clause 11 of the agreement has to be seen contextually, which is a contingent contract. Inasmuch as the respondent did not comply with the demolition part within the time granted, the earlier suit has to be taken as one maintainable in law. The cause of action for the two suits are distinct and different. The advance amount returned has been kept in a fixed deposit. Mere returning of the aforesaid amount will not take away the right of specific performance. Reliance has been made on the decision of the Apex Court in Sucha Singh Sodhi (D) through L.Rs Vs. Baldev Raj Walia and Another (2018-3-L.W.1).

7. There is no representation on behalf of the respondent and even on the last occasion we have held that the appeal would be taken up for final hearing.

8. Heard the learned senior counsel appearing for the appellant and perused the documents.

9. Two issues came up for consideration before us. One is about the scope and applicability of Order 2 Rule 2 C.P.C. Admittedly, no demolition has taken place. Therefore, virtually, there is no difference in the cause of action available at the time of filing the first suit and thereafter. In the decision relied upon by the learned senior counsel appearing for the appellant in Sucha Singh Sodhi (D) through L.Rs Vs. Baldev Raj Walia and Another (2018-3-L.W.1), the Apex Court has considered the scope of Order 2 Rule 2 C.P.C. in the following manner:

27) In our opinion, the sine qua non for invoking Order 2 Rule 2(2) against the plaintiff by the defendant is that the relief which the plaintiff has claimed in the second suit was also available to the plaintiff for being claimed in the previous suit on the causes of action pleaded in the previous suit against the defendant and yet not claimed by the plaintiff.

28) Therefore, we have to examine the question as to whether the plaintiff was entitled to claim a relief of specific performance of agreement in the previous suit on the basis of cause of action pleaded by the plaintiff in the previous suit against the respondents/defendants in relation to suit property.

29) In other words, the question that arises for consideration is whether Sucha Singh (original plaintiff) could claim the relief of specific performance of agreement against the respondents/defendants in addition to his claim of permanent injunction in the previously instituted suit?

30) Our answer to the aforementioned question is in favour of the plaintiffs (appellants) and against the defendants (respondents). In other words, our answer to the aforementioned question is that the plaintiff could not claim the relief of specific performance of agreement against the defendants along with the relief of permanent injunction in the previous suit for the following reasons. 31) First, the cause of action to claim a relief of permanent injunction and the cause of action to claim a relief of specific performance of agreement are independent and one cannot include the other and vice versa.

32) In other words, a plaintiff cannot claim a relief of specific performance of agreement against the defendant on a cause of action on which he has claimed a relief of permanent injunction.

33) Second, the cause of action to claim temporary/permanent injunction against the defendants from interfering in plaintiff's possession over the suit premises accrues when defendant No.1 threatens the plaintiff to dispossess him from the suit premises or otherwise cause injury to the plaintiff in relation to the suit premises. It is governed by Order 39 Rule 1 (c) of the Code which deals with the grant of injunction. The limitation to file such suit is three years from the date of obstruction caused by the defendant to the plaintiff (See - Part VII Articles 85, 86 and 87 of the Limitation Act).

34) On the other hand, the cause of action to file a suit for claiming specific performance of agreement arises from the date fixed for the performance or when no such date is fixed, when the plaintiff has noticed that performance is refused by the defendant. The limitation to file such suit is three years from such date (See - Part II Article 54 of the Limitation Act).

35) Third, when both the reliefs/claims namely, (1) Permanent Injunction and (2) Specific Performance of Agreement are not identical, when the causes of action to sue are separate, when the factual ingredients necessary to constitute the respective causes of action for both the reliefs/claims are different and lastly, when both the reliefs/claims are governed by separate articles of the Limitation Act, then, in our opinion, it is not possible to claim both the reliefs together on one cause of action.

10. The ratio laid down therein would actually militate against the appellant. There is no distinct or separate cause of

action which is available to the case in which we are dealing as against the case dealt with by the Apex Court. The suit filed for permanent injunction to protect the possession is the case involved before the Apex Court whereas we are dealing with the alleged alienation. Secondly, no leave was granted in the case on hand. Thirdly, the situation continues with respect to the alleged non-performance by the respondent. To put it differently, even on the date of filing of the earlier suit, the respondent did not demolish the construction. Therefore, the contentions raised cannot be sustained. Further more, even on the date of filing of the earlier suit, under Ex.P5 followed by a telegraphic reply, the respondent had made it very clear that there was cancellation of earlier agreement entered into under Ex.P1. Thus the cause of action was very much available to the appellant even on that date in view of the clear intention expressed through the legal notice. Therefore, we are of the view that the rigour of Order 2 Rule 2 CPC would certainly apply as rightly held by the learned single Judge.

11. Considering the other issue, admittedly, the advance amount was repaid by the respondent in favour of the appellant. Despite the same, the appellant did not choose to file a suit for specific performance. After all, the relief is discretionary, which normally has to be exercised in favour of the owner as against the agreement holder. Thus the judicial discretion having been exercised by the learned single Judge rightly, we do not find any error in the order passed by the learned single Judge, warranting interference. Hence the Original Side Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-  
Assistant Registrar(CS VI)

//True Copy//

सत्यमेव जयते  
Sub Assistant Registrar

mmi

To

The Sub Assistant Registrar,  
Original Side, High Court, Madras.

+1cc to Mr.S.Ilamparithi, Advocate, S.R.No.38515

O.S.A.No.60 of 2018

RJI (CO)  
GSP(10/07/2018)