IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03-02-2020

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.No.107 of 2014
And
M.P.No.1 of 2014

Antony Moses ... Appellant/Plaintiff

vs.

1.Roselin
2.Dhanalakshmi
3.K.Vijayalakshmi
4.Shyam Sundar ... Respondents/Defendants

Appeal Suit preferred under Section 96 of the Code of Civil Procedure read with Order 41, Rule 1 of the Code of Civil Procedure, against the judgment and decree dated 10.12.2013 passed in O.S.No.236 of 2008 on the file of the V Additional District and Sessions Judge, Coimbatore.

For Appellant : Ms.V.Srimathi

For Respondents-1,3&4 : Mr.Rishab S.Kothari for M/s.McGan Law Firm.

For Respondent-2 : Ex Parte vide Bata SR 23277 dated 11-03-2014.

J U D G M E N T

The appeal suit on hand is directed against the judgment and decree dated 10.12.2013 passed by the learned V Additional District and Sessions Judge, Coimbatore in O.S.No.236 of 2008.

2. The appellant in the appeal suit is the plaintiff in the suit and the respondents in the appeal suit are the defendants in the suit.

3. The suit was instituted by the appellant for specific performance to enforce the suit Sale Agreement entered into between the plaintiff and the defendants on 02.06.2005.

4. The facts, in nutshell, as narrated by the plaintiff in the plaint, are that the first defendant is the owner of the suit property and he agreed to sell his property to the plaintiff for a sale consideration of Rs.20,13,000/- and both executed an agreement on 02.06.2005. The title to the Sale Deed was in the name of the first defendant vide No.167/2004, which was pending before the Special Deputy Collector Stamps as a pending document to ascertain the stamp value. Thus, it was agreed that the sale is to be completed after getting the original title deed by the first defendant. The plaintiff claims that the possession was also handed over to the plaintiff on the date of Sale Agreement. In spite of repeated demands made by the plaintiff, the first defendant evading execution of the Sale Deed and therefore, the plaintiff issued a notice on 31.01.2007 to the first defendant for enforcement of the Sale Deed dated 02.06.2005 and thereafter, instituted the suit for specific performance.

5. The defendants disputed the contentions raised in the plaint and denied the allegations. The first defendant did not execute any Sale Agreement with the plaintiff at all. The first defendant states that he borrowed some amount from the plaintiff and signed in blank stamp paper, promissory note and blank green paper and the Sale Agreement was not true.

6. It is contended that the first defendant repaid the loan amount but the plaintiff refused to hand over the blank papers under some false pretext. Even assuming, without admitting the existence of Sale Agreement, the defendants submitted that already the plaintiff filed O.S.No.611 of 2007, alleging the same cause of action and pray for an injunction only. Thus, the suit is barred under Order II, Rule 2 of the Code of Civil Procedure, because the cause of action for the suit is very well available to the plaintiff even at the time of filing of the earlier suit and the earlier suit pleadings and the present suit pleadings are one and the same. It is contended that the plaintiff was not at all ready to perform his part of the contract and he never sent any notice during the pendency of the agreement and the suit has been filed for a prolonged period after sending the notice and meanwhile the value of the property had been enhanced. Thus, the suit is to be dismissed.

7. The Trial Court framed the following issues for consideration:-

"(1) Whether the plaintiff is entitled to the relief of specific performance ?

(2) Whether the plaintiff is entitled to the permanent injunction against the defendants ?

(3) To what other relief the plaintiff is entitled ?"

8. The following additional issues were also framed by the Trial Court for consideration:-

"(1) Whether the third and fourth defendants are purchaser for value without notice ?

(2) Whether the plaintiff is not ready and willing to perform his part of the contract ?

(3) Whether the suit is barred under Order II, Rule 2 of the Code of Civil Procedure ?"

9. On the side of the plaintiff, the plaintiff was examined as PW-1 and one Mr.Samsen was examined as PW-2 and Exs.A-1 to A-9 were marked as documents. On the side of the defendants, the first defendant was examined as DW-1 and the third defendant was examined as DW-2 and Ex.B-1 was marked as a document.

10. The Trial Court narrating the facts set out in the plaint as well as the defence set out in the written statement, proceeded with the trial. The plaintiff states that he paid the advance amount of Rs.2 lakhs and the suit Sale Agreement was executed on 02.06.2005. But the first defendant had stated that he borrowed some amount from the plaintiff for which, he signed in blank stamp papers and in blank green papers. The first defendant, who was examined as DW-1, had clearly admitted that the signature in Ex.B-1 (suit Sale Agreement). She has further deposed that she is unable to show on which dates she borrowed the amount from the plaintiff. further stated that he had paid the entire amount to the plaintiff. How much amount she borrowed from the plaintiff and further she stated that she is unable to remember the details that she deposed before the Trial Court. In respect of the signature and the execution of the suit Sale Agreement, the Trial Court accepted the version of the plaintiff and arrived a conclusion that the Sale Agreement entered into between the plaintiff and the defendants was a true one. The first defendant could not able to establish that she borrowed some amount from the plaintiff and the details regarding such loan. However, the plaintiff could able to establish the signature of the first

defendant and the execution of the suit Sale Agreement. Thus, the Trial Court arrived a conclusion that the suit Sale Agreement in Ex.A-2 was true.

11. However, the plaintiff did not let in any evidence to show that he met the first defendant and requested her to get a Sale Deed in his favour during the subsistence of the agreement period. The plaintiff no where stated in the plaint what is the time limit prescribed in the agreement. In the Ex.A-2 suit Sale Agreement, the time is fixed as 3 months and more than one place, it has been stated that the plaintiff must get Sale Deed in his favour within 3 months. The stipulation has been stated in the agreement that it is the duty of the first defendant to clear the pending document No.167/2004. But it is not a condition precedent to execute the Sale Deed entered into between the plaintiff and the defendants. Even the plaintiff did not sent any notice within the time stipulated that he is ready with the funds and requested the first defendant to come and execute the Sale Deed. Thus, within the stipulated period, the plaintiff did not take any steps to ascertain whether the document was cleared by the Deputy Collector's stamps.

12. The plaintiff in the plaint itself and in his evidence, has admitted in cross-examination that from Ex.A-5 encumbrance certificate, he came to understand that the title deed pending enquiry was released on 06.12.2006 and the said encumbrance certificate was obtained by one Mr.Govindaram on 02.03.2007. Therefore, on 02.03.2007 itself, the plaintiff came to the knowledge that the document was released. However, the plaintiff did not file the suit immediately thereafter and he filed the suit only on 09.04.2008. Moreover, Ex.A-3 notice was sent on 31.01.2007. Thus, the plaintiff did not take any steps or did not file the suit immediately from the date of issuance of the suit notice or from the date of his knowledge about the clearance of the document. Thus, the suit was filed after a lapse of about 15 months from the date of issuance of the suit notice.

13. The Trial Court considered all these facts and further arrived a finding that the plaintiff came to the knowledge about the Sale Agreement with the second defendant. The execution of a Sale Agreement, whether it is shame and nominal is a clear refusal to the plaintiff's Sale Agreement. Even such clear refusal by the first defendant, the suit was not filed immediately and there was a omission and latches on the part of the plaintiff in not approaching the Court promptly. Thus, the Trial Court held that the plaintiff was not ready and willing to perform his part of the contract as per the suit Sale Agreement.

14. The Trial Court further considered the issues raised with reference to the findings of the earlier suit by the very same plaintiff against the defendants. The earlier suit was filed by the plaintiff for bare injunction before the District Munsif Court in O.S.No.611 of 2006 against the first defendant. The plaintiff filed in the earlier suit, which was marked as Ex.B-1. The Trial Court compared the suit plaint as well as the Ex.B-1 earlier plaint in O.S.No.611 of 2006 and found that the pleadings are almost identical in nature. The cause of action stated in the earlier suit as well as in the present suit, are one and the same. The plaintiff, as PW-1, categorically admitted all those facts in his cross-examination. Thus, the plaintiff is very much aware that the first defendant refused to execute the Sale Deed even at the time of filing of the earlier suit.

15. Thus, the Trial Court formed an opinion and arrived a conclusion that the suit was filed on 13.03.2007 and the reply notice sent by the first defendant in Ex.A-4 was dated 13.02.2007. Therefore, the present relief was very much available to the plaintiff, even at the time of filing of the earlier suit. The plaintiff did not get any permission from the Court under Order II, Rule 2 of the Code of Civil Procedure. Thus, the Trial Court held that the case is clearly barred by the principle enunciated in Order II, Rule 2 of the Code of Civil Procedure.

16. The filing of the earlier suit not only barred the present relief, but also proved that the first defendant was not ready and willing to perform his part of the contract. The plaintiff did not state anything about the filing of the prior suit in the pleading. Only in the evidence, he has stated about the filing of the earlier suit. Thus, the plaintiff did not approach the Court with clean hands. The proof of filing of the earlier suit was not denied by the plaintiff and even before the Trial Court, there was no acceptable argument was advanced by the plaintiff in this regard. Under these circumstances, the Trial Court arrived a conclusion that the plaintiff failed to prove the readiness and willingness to perform his part of the contract to be complied with by him. Thus, the Trial Court rejected the claim of specific performance.

17. It is further held that the earlier suit was dismissed for default on 15.07.2009 and the suit was restored to file on 20.06.2010. The third and the fourth defendants were executed the Sale Deed on 26.08.2009. Thus, there was no pendency at the time of their purchase. During the purchase of the suit mentioned property by the defendants 3 and 4, no suit was pending, as the earlier suit itself was dismissed

for default on 15.07.2009 and the Sale Deed was executed by the defendants 3 and 4 on 26.08.2009, as the suit was restored to file on 20.06.2010. This being the factum, the Trial Court in clear terms arrived a conclusion that the plaintiff has not established his readiness and willingness to perform his part of the contract and he suppressed Sale Agreement and accordingly, dismissed the suit.

18. The learned counsel appearing on behalf of the appellant strenuously contended that the suit cannot be dismissed under Order II, Rule 2 of the Code of Civil Procedure, as the relief sought for in the earlier plaint is unconnected with the relief sought for in the present plaint. The earlier suit was instituted for permanent injunction and the present is filed for the relief of specific performance. Both the reliefs are entirely different and therefore, the Trial Court has committed an error in rejecting the suit by relying upon the provisions under Order II, Rule 2 of the Code of Civil Procedure.

19. To substantiate the abovesaid contention, the learned counsel for the appellant cited the Division Bench judgment of this Court in the case of R.Vimalchand and another vs. Ramalingam and others [2003 (1) LW 484], wherein the Hon'ble Division Bench of this Court, in paragraphs 26 and 27, observed as under:-

> "26. There is, however, a 'distinction' between 'cause of action' and the 'right of action'. These terms are not synonymous and interchangeable. A right of action is a right to presently enforce a cause of action a remedial right affording redress for the infringement of a legal right belonging' to some definite person; a cause of action is the operative facts which give rise to such right of action. The right of action does not arise until the performance of all conditions precedent to the action, and may be taken away by the running of the statute of limitations, through an estoppel, or by other circumstances which do not affect the cause of action. There may be several rights of action and one cause of action and rights may accrue at different times from the same cause.
>
> 27. From the above principle, it is clear that where the new suit is founded upon a cause of action distinct from that which was the foundation for the former suit, then Order 2 Rule 2 C.P.C has no

application. When the earlier suit O.S. 6584 of 1978 is on the basis of the action of the respondents' entering into the long term lease, which formed the cause for filing the suit for injunction, the said cause of action cannot be said to be one and the same for the present suit which is for specific performance. As stated already, since the appellant has got sufficient time to perform his part of the contract and as there was no denial on the part of the respondents enabling the appellants to approach the court, it cannot be said that the appellants had relinquished their claim for the specific performance on their failure to include the said relief in O.S. 6584 of 1976. The learned Judge, merely referred to the averments made in both the plaints giving out the cause of action and since both are almost in verbatim the same, has concluded that the present suit is barred under Order 2 Rule 2 C.P.C which cannot be accepted. In order to find out the maintainability of the suit, on the principles of Order 2 Rule 2 C.P.C one has to consider the necessary fact which give rise the cause of action of the earlier suit and not the mere right to file the suit. It is necessary to keep in mind that the term 'cause of action' for the purpose of Order 2 Rule 2 C.P.C means the cause of action which gives occasion for and forms the foundation of the suit. There is a distinction between 'cause of action' and 'right of action'.

20. Relying on the abovesaid paragraphs of the Hon'ble Division Bench judgment of this Court (cited supra), the learned counsel for the appellant is of an opinion that the principles of res judicata would not arise as the relief sought for in both the suits are unconnected and therefore, the Trial Court has committed an error.



21. The learned counsel for the appellant further contended that the suit was instituted well within the period of limitation. Therefore, the delay cannot be attributed by the Trial Court in respect of the institution of the suit. When the suit itself is instituted within the time limit of three years as permissible, the delay cannot be a ground to dismiss the relief of specific performance. The plaintiff has not suppressed any fact regarding institution of the earlier suit for permanent injunction, cannot be construed

as a suppression of fact, when, admittedly, the subsequent suit is for specific performance.

22. This Court is of the considered opinion that undoubtedly, it is not on the ground of res judicata which is the basis for the rejection of the suit. The Trial Court considered the facts and the circumstances in entirety with reference to the documents and the evidences and arrived a conclusion that the plaintiff was not ready and willing to perform is part of the contract. Order II, Rule 2 of the Code of Civil Procedure enumerates that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court".

23. Thus, the spirit of Order II, Rule 2 of the Code of Civil Procedure ensure that suits are not insisting any piecemeal approach. Once a cause of action arose, the aggrieved person is expected to include the whole of the claim which the plaintiff is entitled to make in respect of such cause of action. This Court independently had gone through the plaint filed by the plaintiff in O.S.No.611 of 2007. Reading of the entire plaint reveals that the plaintiff contended that the first defendant Mrs.Roselin agreed to sell the schedule mentioned property for a consideration and the entire period of agreement in respect of release document No.167/2004, which was pending before the Deputy Collector Stamps under Section 47A (1) 19B of the Stamp Act was also mentioned in the suit. The facts relating to release document No.167/ 2004 is mentioned and the suit Sale Agreement was also the basis for filing of the earlier suit for permanent injunction. Therefore, the earlier suit is stated as the cause of action for the suit arose on 02.06.2005 when the plaintiff entered into an agreement for sale with the first defendant and when on the same day, the first defendant received a sum of Rs.2,00,000/- from the plaintiff for selling the suit property and when the first defendant agreed to get back the document No.167/2004, by clearing the dues and on 04.01.2007, when the first defendant in collusion with the second defendant, set up a Sale Agreement entered into between the defendants 1 and 2 by misrepresentation and fraud and where the plaintiff residing at 122, Manikandan Nagar, Edayarpalayam Pirivu, Kuniamuthur Post, Coimbatore-641 008 and where the suit property is situated well within the jurisdiction of this Court.

24. The cause of action in the present suit in O.S.No.236 of 2008 also states that the suit arose on 02.06.2005, when the plaintiff entered into an agreement for sale with the first defendant and when on the same day, the first defendant received a sum of Rs.2,00,000/- from the

plaintiff for selling the suit property and when the first defendant agreed to get back the document No.167/2004 by clearing the dues and when the possession of the suit property handed over to the plaintiff and when the plaintiff made several demands on the first defendant to executed and register the Sale Deed in his favour and on 31.01.2007, when the plaintiff issued a legal notice to the first defendant, calling upon her to come and execute the Sale Deed and on 06.12.2006, when the first defendant cleared the pending document from the R.D.O., and when the plaintiff applied for encumbrance certificate and came to know about a transaction taken place and on 04.01.2007, when the first defendant in collusion with the second defendant, set up a Sale Agreement entered into between the defendants 1 and 2 by misrepresentation and fraud and when the plaintiff again applied for the encumbrance certificate for the suit property on 29.07.2011, it came to know that the first defendant had sold the suit property to the defendant No.3 under registered Sale Deed in D.No.3867/2009 and to the defendant No.4 under registered Sale Deed D.No.3868/2009. At the time of lis - pendency the alleged sale made by the first defendant in favour of defendant Nos.3 and 4 are null and void and not binding on this plaintiff and where the plaintiff residing at 122, Manikandan Nagar, Edayarpalayam Pirivu, Kuniamuthure Post, Coimbatore-641 008 and where the suit property is situated well within the jurisdiction of this Court.

25. This Court is of the considered opinion that the cause of action was initially arrived from the date of suit Sale Agreement dated 02.06.2005 between the plaintiff and the defendants as well as on payment of advance amount of Rs.2 lakhs by the plaintiff to the first defendant. However, the plaintiff had chosen to file suit for permanent injunction in the earlier suit in O.S.No.611 of 2007 to prevent the defendants from selling the property to any other person. Even at this point of time, there was no mention regarding plaintiff's readiness and willingness to perform his part of the contract, so as to execute the Sale Deed.

26. The conduct of the party in this regard is to be considered as the relief of specific performance, which is the discretionary relief. Now the Courts are bound to consider the facts and circumstances as well as the conduct of the parties. In this case, the plaintiff had earlier filed a suit for permanent injunction restraining the defendants from alienating the property. However, he has not chosen to file any suit for specific performance at this length of time. That is the reason why the Trial Court came to the conclusion that Order II, Rule 2 of the Code of Civil Procedure shall be pressed into service so as to reject the claim of specific performance. When the plaintiff did not pray for specific performance at the

earliest point of time, when he filed suit for permanent injunction and even in the subsequent suit he has not stated anything regarding the filing of the earlier suit for permanent injunction. The Trial Court came to the conclusion that the plaintiff had not approached the Court with clean hands and consequently, the plaintiff is not entitled for the relief of specific performance.

27. This Court is of the considered opinion that Order II, Rule 2 of the Code of Civil Procedure in clear terms stipulates that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. Thus when the cause of action aroused from and out of the suit Sale Agreement dated 02.06.2005 and on payment of advance by the plaintiff to the first defendant, the plaintiff ought to have instituted the suit for specific performance at the first instance. Contrarily, he has chosen to file a suit for permanent injunction to sell the property and after a prolonged period by not stating the earlier suit filed in O.S.No.236 of 2008 for specific performance. Thus, such a conduct is a clear suppression of fact as far as the plaint filed in O.S.No.236 of 2008 is concerned. In the plaint, there is no averment regarding the filing of the earlier suit in O.S.No.611 of 2007. This being the factum, the Trial Court is right in rejecting the relief of specific performance and there is no perversity or infirmity as such in respect of the decision arrived by the Trial Court.

28. When the suit for specific performance is rejected, the refund of advance amount received is the consequential one. The parties may not be permitted to have an unjust enrichment in respect of the advance amount in view of the fact that the return of advance amount has not been established by the first defendant in the suit. The first defendant though denied all the allegations in the plaint, admitted the signature in the suit Sale Agreement while giving evidence. Thus, the existence of the suit Sale Agreement was established before the Trial Court and the Trial Court also arrived a conclusion that the suit Sale Agreement is a true one. This being the factum, the Court has to consider that the advance amount had been received by the first defendant from the plaintiff and in respect of return of advance amount, the same has not been proved by the first defendant before the Trial Court. Thus, this Court has to consider the alternate relief of return of advance amount to the plaintiff.

29. The learned counsel for the defendants raised a contention that there is no prayer for alternate relief. This Court is of the considered opinion that

such relief could be granted by invoking the general relief clause under Order VII, Rule 7 of the Code of Civil Procedure.

30. The alternate relief of return of advance in a suit for specific performance is a consequential relief and therefore, the same need not be construed as a different relief. Once the relief of specific performance is rejected, then the refund of advance amount shall be consequential as no parties to the suit can be allowed to have an unjust enrichment. In other words, the dismissal of the relief of suit for specific performance, cannot stand in the way of granting the alternate relief to refund the advance amount with reasonable interest. The question arises in the absence of any such relief sought for in the plaint, whether the Court can grant the relief or not. This Court is of the considered opinion that the alternate relief to refund the advance amount is to be construed as a general relief, as such a relief is consequential to the rejection of the relief of specific performance. In the event of not considering the alternate relief under the umbrella of general relief, then one of the party to the civil suit would be prejudiced and the other party will get an unjust enrichment.

31. Keeping in mind the prejudice likely to be caused to one of the parties in the event of not granting the alternate relief of refund of advance amount, this Court has to adopt a pragmatic approach and constructive interpretation with reference to the Code of Civil Procedure and shall have a pragmatic approach.

32. Order VII, Rule 7 of the Code of Civil Procedure enumerates that "every Plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent a if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement".



33. The spirit of Order VII, Rule 7 of the Code of Civil Procedure is to be considered in the general format of the plaint. In the relief column, the plaintiffs used to pray for "grant such other relief or reliefs as the Hon'ble Court may deem fit and proper in the circumstances and thus render justice". Such a relief is to be construed as a general relief sought for in the plaint, the facts and circumstances and the equity to be considered in the interest of justice and the general relief is to be moulded, so as to grant the alternate

relief of refund of advance amount in the event of rejecting the relief of specific performance by the Courts.

34. Order XLI, Rule 33 of the Code of Civil Procedure enumerates that "the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection". Therefore, the Trial Court granted the general relief by moulding the prayer for grant of the relief of refund of advance amount with interest in the event of rejection of the relief of specific performance and the Appellate Court by invoking Order XLI, Rule 33 also grant the similar relief in respect of the appeals preferred against the judgment and decree of the Trial Court. In either of the circumstances, both the Trial Court as well as the Appellate Court are empowered to grant the consequential relief of return of advance amount in the event of rejection of the relief of specific performance on the basis of the principles of equity. Therefore, there is no impediment either for the Trial Court or for the Appellate Court to grant the alternate relief of refund of advance amount to either of the parties to the civil suit or an appeal in the event of rejecting the relief of specific performance in a suit or in an appeal suit.

35. Thus, in the interest of justice, the plaintiff would be entitled for refund of the advance amount. Though the respondents pleaded that they have repaid the loan amount, the same had not been proved before the Trial Court. Even before this Court no document has been filed to establish that the amount of the loan or the loan amount received had been settled in favour of the plaintiff.

36. This being the factum, the appellant/plaintiff is entitled for a refund of advance amount of Rs.2 lakhs with interest at the rate of 10% per annum from the date of filing of the plaint till the date of passing of the decree and thereafter at the rate of 6% per annum till the date of realisation. Thus, the following orders are passed:-

(i) The the judgment and decree dated 10.12.2013 passed by the learned V Additional District and Sessions Judge, Coimbatore in O.S.No.236 of 2008 stands confirmed in respect of rejection of the relief of specific performance is concerned.

(ii) The appellant/plaintiff is not entitled for the relief of specific performance. However, the first defendant is directed to refund the advance amount of Rs.2 lakhs along with interest at the rate of 10% per annum from the date of plaint till the date of decree and thereafter, at the rate of 6% per annum till the date of realisation, within a period of four months from the date of receipt of a copy of this judgment.

(iii) Accordingly, the present appeal suit, namely A.S.No.107 of 2014 stands allowed in part. However, there shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The V Additional District and Sessions Judge,
Coimbatore.

+1cc to M/s.V.Raghavachari, Advocate Sr.8395
+1cc to McGan Law firm, Advocate Sr.8322

A.S.No.107 of 2014

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