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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	12.07.2021
PRONOUNCED ON	03.08.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

S.A.NO.381 OF 2012

AND

M.P.NO.1 OF 2012

(THROUGH VIDEO CONFERENCING)

1. G.Bagyalakshmi
2. G.Sakthivel
3. G.Shanmugam (Died)
4. G.Anantha Kumar
5. S.Palaniammal
6. Minor S.Yogeswaran
rep.by his mother/guardian
S.Palaniammal
7. Minor S.Dharani
rep.by his mother/guardian
S.Palaniammal

(Appellants 5 to 7 brought on record as Lrs.
of Appellant 3 vide order dated 12.07.2021
made in C.M.P.No.10318 of 2021)

...Appellants/
1 to 4 Plaintiffs/5 to 7 Appellants

vs.

1. Nachimuthu (Died)
2. Dhamodharan
3. Chinnarasu
4. Pappathi
5. Jaya lakshmi
6. Gokila
7. Jayanthi

... Respondent/Defendant

(Respondents 2 to 7 brought on record as
Legal representatives of sole respondent
vide order dated 12.07.2021 made in
C.M.P.No.17130 to 17132 of 2017 in SA.No.381/2012)

.. Respondents/
2 to 7 Respondents



This Second Appeal filed under Section 100 of the Code of the Civil Procedure, against the Judgment and Decree dated 27.07.2011 in A.S.No.90 of 2008, on the file of the First Additional District Court, Coimbatore confirming the Judgment and Decree dated 15.07.2008 in O.S.No.1413 of 2001 on the file of the Principal Sub-ordinate Court, Coimbatore.

For Appellants : Mr.C.R.Prasanan

For Respondents : Mr.S.Mukunth
for M/s.Sarvabhauman Associates

J U D G M E N T

This Second Appeal has been filed by the legal representatives of the deceased plaintiff against the Judgment and Decree dated 27.07.2011 passed by the I Additional District Court, Coimbatore (hereinafter referred to as First Appellate Court) in A.S.No.90 of 2008.

2. By the impugned Judgment and Decree, the Appellate Court had dismissed the appeal filed by the appellants herein against the Judgment and Decree dated 15.07.2008 passed by the Principal Subordinate Court, Coimbatore (hereinafter referred to as Trial Court) in O.S.No.1413 of 2001.

3. The plaintiff (since deceased), whose interest was represented by second to fifth plaintiffs before the Trial Court and the appellants herein had originally filed in O.S.No.1413 of 2001 on 20.11.1998 for the following reliefs before the Trial Court:-

" i. for specific performance of the agreement dated 22.11.1995 and directing the defendant to execute the sale-deed on receipt of the remaining sale consideration for a sum of Rs.14,800/- (fourteen thousand eight hundred rupees only) out of the total consideration agreed by the defendant (seller) fixing the sale-price for a sum of Rs.2,15,000/- (two lakhs and fifteen thousand rupees only) free from all encumbrances within a date to be specified by this Court and in case the defendant commit default to get sale deed executed and registered by this court in favour of the plaintiff by the defendant at the cost



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of the defendant herein;

ii. directing the defendant to pay the cost of the suit;

iii. pass such other suitable reliefs like return the entire advances with 36% annual interest (compound) from the period of receipt of the advance(s) till the same are returned to the plaintiff in case if she desires."

4. The suit was filed by the deceased plaintiff (Ponnammal) on 20.11.1998. It was just two days before the expiry of the lapses of period of three years limitation on payment of a token Court Fee of Rs.1.

5. Subsequently, the Court Fee was paid over a period of time and finally the suit was taken on file on 07.12.2001, though no supporting application for extension of time under Section 149 of CPC was filed by the deceased plaintiff before the Trial Court. The Trial Court kept extending the time to pay the Court Fee by the deceased plaintiff. Ultimately, the suit was numbered on 07.12.2001.

6. Before the Trial Court, the first respondent/sole defendant (since deceased, whose interest is represented by the second to fifth respondents in this Second Appeal) resisted the above suit denying the execution of Ex.A3 Sale Agreement dated 22.11.1995 and receipt of the sale consideration pursuant to the said aforesaid Ex.A3 Sale Agreement.

7. Eventually, the suit was dismissed by the Trial court on the ground that the suit was time barred. It has also concluded that there was no evidence to substantiate that either the execution of Ex.A3 Sale Agreement dated 22.11.1995 and that an earlier suit was filed by the deceased plaintiff for a permanent injunction in O.S.No.1970 of 1997 which was precluded the deceased plaintiff from filing the subsequent suit for specific performance having regard to Order 2 Rule 2 of CPC.

8. Aggrieved by the impugned Judgment and Decree of the Trial Court, appellants herein the legal representatives of the deceased plaintiff filed A.S.No.90 of 2008 before the First Appellate Court.

9. The First Appellate Court by its impugned judgment and decree while upholding the validity and execution of Ex.A3 Sale Agreement dated 22.11.1995 has however declined to order refund of the sale consideration allegedly paid by the deceased plaintiff to the deceased defendant and thus dismissed the appeal.



10. This case was not admitted when it was listed for admission. As was the practice, notice of admission was ordered on the respondent/defendant. Thus, no question of law has been framed by this Court. Both the counsel for the appellants and respondents are present. With their consent, this appeal is taken up for final hearing.

11. The learned counsel for the appellants seeks to persuade the Court to answers the following questions as substantial questions of law in this appeal:-

i. Whether in law the Lower Appellate Court erred in holding that the suit is barred under Order 2 Rule 2 of CPC in the absence of any plea in the written statement, and when the cause of action for the previous suit and the present suit is different as held in the judgements reported in 2010 10 SCC 141 and in 2010 (2) CTC 184?

ii. Whether in law the courts below erred in holding that the suit is bad under Section 149 of CPC in the absence of any plea in the written statement, overlooking that once Court has extended time the payment of deficit court fee and the court fee paid, it shall take effect from the date of presentation of the plaint and that the other party/defendant cannot attack the order on ground that it takes away his valuable right to plead the bar of limitation, as held in the judgment reported in A.I.R. 1953 SC 431?

iii. Whether in law the courts below, having considered the admission of the defendant's signature in the suit agreement and held that the suit agreement is genuine, ought to have decreed the suit for specific performance, especially when the defendant failed to prove his case of obtaining loan as held in the judgment reported in.

iv. Having held that the suit agreement is genuine, and having seen that various payments made to the defendant and assuming without admitting that the appellant may not be entitled to the relief of specific performance whether in law the courts below erred in not considering the alternate prayer and passing a decree for return of advance or compensation



with interest as prayed for in the plaint alternatively?

12. The learned counsel for the appellants has heavily placed the reliance on the decision of the Hon'ble Supreme Court in Mahasay Ganesh Prasad Ray and Another Vs. Narendra Nath Sen and Others, AIR 1953 SC 431, wherein, the Hon'ble Supreme Court upheld the view of the High Court that the payment of court-fees was a matter primarily between the Government and the plaintiff and therefore preliminary objection of the defendant who was the appellant before the Hon'ble Supreme Court was to fail.

13. The learned counsel for the appellants further submits that in absence of the specific plea on behalf of the deceased defendant/ first respondent that the suit was time barred, it was not open either for the Trial Court or for the First Appellate Court to deny the relief in O.S.No.1413 of 2001. The learned counsel for the appellants also referred to the following decisions:-

- i. Dalip Singh Vs. Mehar Singh Rathee and Others, (2004) 7 SCC 650.
- ii. P.Kumar Vs. Sanjay Agarwal and Others, 2005 (5) L.W. 663.
- iii. V.P.Venkatachalam Vs. N.Venkatachalam, 2015 (4) L.W. 711.

14. The learned counsel for the appellants further submits that in P.Kumar Vs. Sanjay Agarwal and Others, 2005 (5) L.W. 663, this Court held that an application to receive the Court fee is not a mandatory one and the same is only optional and the Trial Court is quite competent and well within its bound to accept or deposit court fee in a prudent, sensible and equitable manner.

15. The learned counsel for the appellants submits that in P.Kumar Vs. Sanjay Agarwal and Others, 2005 (5) L.W. 663 the observation of the Trial Court that 'the Revision Petitioner/Plaintiff neither paid the Court fee within the period of limitation nor filed the Application under Section 149 of C.P.C. to extend the time for payment of deficit Court fee and consequently, rejecting the plaint by allowing I.A.No.74 of 2008, etc.' were held not correct in the eye of law.

16. The learned counsel for the appellants further submits that even otherwise both the Trial Court and the First Appellate Court had committed an error in not directing refund of the amounts paid as advance by the deceased plaintiff to the deceased defendant pursuant to Ex.A3 Sale Agreement dated 22.11.1995, particularly, in the light of the fact that the



First Appellate Court has come to a conclusion that Ex.A3 Sale Agreement dated 22.11.1995 was executed between the deceased plaintiff and the deceased defendant.

17. Defending the impugned Judgment and Decree of the Appellate Court upholding the judgment and decree of the Trial Court, the learned counsel for the respondents submits that the suit was time barred and therefore the Trial Court has correctly rejected the relief for specific performance.

18. In this connection, a reliance was placed on the decisions of this Court in K.Natarajan Vs. P.K.Rajasekaran, 2003 (2) MLJ 305 wherein, it was held as follows:-

" 21. We deem it necessary to clarify the legal position and lay down the procedure to be followed as under:

(1) Section 149 of Code of Civil Procedure is a proviso to Section 4 of the Tamilnadu Court Fees and Suits Valuation Act, 1955.

(2) The word 'document' employed in Section 149 of Code of Civil Procedure would include plaint also.

(3) Whenever a plaint is received, the same shall be verified and if found to be not in order, the same shall be returned at least on the third day (excluding the date of presentation so also the intervening holidays).

(4) If the suit is presented on the last date of limitation affixing less Court fee, than the one mentioned in the details of valuation in the plaint, an affidavit shall be filed by the plaintiff giving reasons for not paying the requisite Court fee.

(5) In such cases, the Court shall before exercising its discretion and granting time to pay the deficit Court fee, shall order notice to the defendants and consider their objections, if any. However, such notice is not necessary in cases where the plaintiff has paid almost the entirety of the requisite court fee and the Court is satisfied on affidavit by the party that the mistake happened due to some bona fide reasons such as calculation mistake or the alike.



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(6) The discretion referred to in Section 149 of Code of Civil Procedure is a judicial discretion and the same has to be exercised in accordance with the well established principles of law.

(7) But however, in cases where the time granted to pay the deficit Court fee falls within the period of limitation, the defendant need not be heard.

(7A) In case where the plaint is presented well within the period of limitation with deficit court fee and the court returns the plaint to rectify the defect giving some time (2 or 3 weeks), which also falls within the period of limitation, but the plaint is represented paying deficit court fee after the period of limitation, the Court is bound to hear the defendant, notwithstanding the fact that the plaintiff has paid substantial court fee (not almost entirety) at the first instance, before condoning the delay in paying the deficit court fee.

(8) In cases where part of the time granted to pay the deficit Court fee falls outside the period of limitation and the deficit court fee is paid within the time of limitation (i.e., the plaint is represented with requisite court fee), the court need not wait for the objections of the defendant and the plaint can be straight away numbered.

(9) The court should exercise its judicial discretion while considering as to whether time should be granted or not. Cases where the plaintiff wrongly (bona fide mistake) valued under particular provisions of law under Court Fee Act or where he could not pay the required Court fee for the reasons beyond his control, due to some bona fide reasons, the Court shall condone the delay. Payment of substantial court fee is a circumstance, which will go in favour of the claim of the plaintiff that a bona fide mistake has crept in.

But however, in cases where the plaintiff acted wilfully to harass the defendant (like wilful negligence in paying court fee, awaiting the result of some other litigation, expecting compromise, etc.).



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(10) If the court had exercised its discretion without issuing notice, then it is open to the defendant to file application under Section 151 of Code of Civil Procedure for proper relief. It will be open to the defendant to file a revision under Article 227 of Constitution of India. That apart, objection can also be raised at the trial or even at the appellate stage, since the failure to exercise judicial discretion in a manner known to law (as laid down in various decisions of the Supreme Court) amounts to Court applying a wrong provision of law."

19. He further submits that the conduct of the deceased plaintiff shows that the suit was filed without any seriousness. He refers to Section 3 of the Limitation Act and states that every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitations was not set as a defence in the written statement before the Trial Court. The learned counsel also referred to the decision of the following cases:-

" i. S.V.Arjunara Vs. P.Vasanth 2005(5) CTC 401.

ii. K.Rajendran Vs. S.Nagarajan 2012 (5) CTC 857."

20. The learned counsel for the respondents submits that the deceased plaintiff having failed to pay the correct Court Fee at the time of presentation of the plaint ought to have filed application under Section 149 of CPC and the Court cannot suo moto extend the time as has been held by the Court in the above two cases.

21. Under these circumstances, the learned counsel for the respondents submits that even though Ex.A3 Sale Agreement has been executed between the deceased plaintiff and the deceased defendant and was allegedly witnessed by the second appellant herein, the son of the deceased plaintiff, and the relief was rightly rejected.

22. It is submitted that since the plaint was presented with insufficient Court fee, it was not a proper presentation of the plaint in the eye of law. He further submits that in absence of supporting application for condoning the delay in paying the Court Fee, under Section 149 of CPC, the suit was fatal.



23. It is submitted that for admitting the plaint, the correct Court Fee ought to have been paid and in the absence of appropriate application for condoning the delay under Section 149 of CPC ought to have been filed. The learned counsel for the respondents therefore submits no substantial questions of law arises for consideration in this appeal.

24. I have heard the learned counsel for the appellants and the learned counsel for the respondents. I have perused the impugned Judgment and Decree passed by the First Appellate Court, the Judgment and Decree passed by the Trial Court and the Exhibits marked by both parties.

25. Having considered rival submission, I of the view that the following substantial questions of law arises for consideration in this appeal:

- i. Whether the suit for specific performance was barred under Order II Rule 2 of CPC in view of an previous suit for permanent injunction by the deceased plaintiff against defendant?
- ii. Whether it was competent on the part of the Trial Court to have numbered the suit in O.S.No. 1413 of 2011 even though the deceased plaintiff had filed the plaint with a token court fee of Rs. 1 and had repeatedly taken time for making good the deficit court fees and later without filing appropriate application under Section 149? Had paid deficit court fee and
- iii. Whether the appellate Court was justified in refusing specific performance and in the alternative refund of the amount paid to the defendant?

26. I shall deal each of these questions in seriatim and answer them in the succeeding paragraphs.

27. Substantial questions of law relating to Order II Rule 2 requires no detailed consideration in the light of the decision of the Hon'ble Supreme Court in Dalip Singh Vs. Mehar Singh Rathee and Others, (2004) 7 SCC 650. In para 12. the Hon'ble Supreme Court has held as follows:-

" 12. Contention of the learned counsel for the appellant that the suit filed by Respondent 1 was barred under Order 2 Rule 2



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CPC is not sustainable on two counts. Firstly, the plea of applicability of Order 2 Rule 2 CPC and the subsequent suit being barred was not taken by the appellant in his written statement filed in response to the notice of the suit nor was any issue framed on the point. The sine qua non for applicability of Order 2 Rule 2 CPC is that a person entitled to more than one relief in respect of the same cause of action has omitted to sue for some relief without the leave of the court. When an objection regarding bar to the filing of the suit under Order 2 Rule 2 CPC is taken, it is essential for the court to know what exactly was the cause of action which was alleged in the previous suit in order that it might be in a position to appreciate whether the cause of action alleged in the second suit is identical with the one that was the subject-matter of the previous suit. As the plea had not been raised in the written statement and no issue framed on this point, no opportunity was provided to Respondent 1 to lead evidence to rebut the same. In the absence of pleadings and proof of identity of cause of action, the appellant could not be permitted to raise the plea of bar of Order 2 Rule 2 CPC. The High Court had gone into merits as well and held that the two suits filed by Respondent 1 were not based on the same cause of action. We need not examine this on merit as we have held that in the absence of pleadings or the issue regarding the bar of Order 2 Rule 2 CPC in filing the suit the appellant cannot be permitted to raise such a plea."

28. Similar was the view in Alka Gupta Vs. Narender Kumar Gupta 2010 (10) SCC 141 and Periyasamy and Others Vs. Lakshmi Nadesan, 2010 (2) CTC 184. The Court have also explained the scope of Order II Rule 2 of CPC.

29. The deceased defendant had also not taken a plea before the Trial Court that O.S.No.1413 of 2011 was barred under Order II Rule 2 of CPC in view of the previous suit in O.S.No.1970 of 1997 filed by the deceased plaintiff for a permanent injunction. Incidentally O.S.No.4034 of 1996 was also filed by the 2nd appellant who was arrayed as the 2nd plaintiff after the death of the plaintiff though the details of the said proceeding is not available. From the averments in the plaint and written



statement it appears that last mentioned suit was decreed as prayed for.

30. In absence of the plea defence under Order II Rule 2 of CPC, this defence was not available either before the Trial Court or before the Appellate Court. Further, no application was filed by the deceased defendant for rejecting the plaint in O.S.No.1413 of 2011 under Order VII Rule 12 read with Order VII Rule 11(d) of CPC.

31. Therefore, the defence of the learned counsel for the respondents-defendants that the suit was barred under Order II Rule 2 of C.P.C. lacks merits. There was no bar in filing O.S.No.1413 of 2011 by the deceased plaintiff. Accordingly, the first question of law is answered in favour of the appellant.

32. Coming to the 2nd substantial question of law it is noticed that there are divergent views of the Courts.

33. However, on a plain reading of Section 149 of CPC, it is evident that a litigant required to pay court fee is not required to file an application for extension of time to pay the deficit Court Fee.

34. Section 149 of CPC merely contemplates that the Court may in its discretion, at any stage, allow the person, by whom such fee was payable to pay the whole or part, as the case may be, of such Court Fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

35. In Buta Singh (Dead) by L.R.s. Vs. Union of India, (1995) 5 SCC 284, it was held that "The aid of Section 149 could be taken only when the party was not able to pay court fee in circumstances beyond his control or under unavoidable circumstances and the court would be justified in an appropriate case to exercise the discretionary power under Section 149, after giving due notice to the affected party."

36. In A.Nawab John and Others Vs. V.N.Subramaniam, (2012) 4 SCC 206, it was held that "In a case where the plaint is filed within the period of limitation prescribed by law but with deficit court fee and the plaintiff seeks to make good the deficit of the court fee beyond the period of limitation, the court, though has discretion under Section 149 CPC, must scrutinise the explanation offered for the delayed payment of the deficit court fee carefully because exercise of such discretion would certainly have some bearing on the rights and obligations of the defendants or persons claiming through the defendants. (The case on hand is a classic example of such a



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situation.) It necessarily follows from the above that Section 149 CPC does not confer an absolute right in favour of a plaintiff to pay the court fee as and when it pleases the plaintiff". If this decision is applied it is clear that the deceased plaintiff was not entitled to pay the court fee belatedly without an application.

37. In Mahalingam Vs. K.Krishnasamy Naidu, 2009 (60 CTC 92, this Court noted the judgment of the Division Bench of this Court in Venugopal Pillai v. ThirugnanaValliammal, 1940 (2) MLJ 487 wherein it was held that if deficit Court fee is paid after the period of limitation, the same would date back to the date of its initial presentation. This was followed in P.Venkatachalam Vs. N.Venkatachalam, 2015 (4) L.W. 711 and in P.Kumar Vs. Sanjay Agarwal and Others, 2005 (5) L.W. 663.

38. In K.Rajendran Vs. S.Nagarajan 2012 (5) CTC 857, the petitioner had not made any application under Section 149 at any point of time like in the present case. The Court held that the very grant of time by the Court below for payment of deficit Court-fee by its order dated 16.4.2007 was not valid and not sustainable in law.

39. The Court held that the application filed by the petitioner therefore before the Court seeking for condonation of delay of 150 days in re-presenting the plaint without there being any prayer seeking for permission to pay the deficit Court-fee was not sustainable.

40. In K.Natarajan Vs. P.K.Rajasekaran, 2003 (2) MLJ 305, it was held that if the suit is presented on the last date of limitation affixing less Court fee, than the one mentioned in the details of valuation in the plaint, an affidavit shall be filed by the plaintiff giving reasons for not paying the requisite Court fee. The Court further held that the Court shall before exercising its discretion under Section 149 of CPC to grant time to pay the deficit Court fee, shall order notice on the defendants and consider their objections, if any.

41. The above view was doubted by the decision of the Hon'ble Supreme Court of India in P.K.Palanisamy vs. N.Arumugham and Another, (2009) SCC 173.

42. Further, the above decision is of the year 2003. Whereas in the present case the plaint was filed by the deceased plaintiff on 22.11.1998. The suit was also numbered and the suit summons was served on the defendant. Therefore, the said decision of this Court in K.Natarajan Vs. P.K.Rajasekaran, 2003 (2) MLJ 3 even if had laid down the procedure to be followed under similar circumstances, the said procedure cannot be



applied retrospectively to the prejudice of the deceased plaintiff.

43. The Hon'ble Supreme Court in P.K.Palanisamy vs. N.Arumugham and Another, (2009) SCC 173 has also referred to its views in Ganapathy Hegde vs. Krishnakudva' (2005) 13 SCC 539 as follows:-

"5. In our opinion, the High Court was not right in forming the opinion which it did. The proviso to Order 7 Rule 11 CPC is attracted when the time for payment of court fee has been fixed by the court and the court fee is not supplied within the time appointed by the court. In the case at hand, though the plaint as originally filed was not affixed with the requisite court fee stamps, but before the suit was registered, the deficit court fee was supplied. The present one is not a case where the court had fixed the time for payment of requisite stamp paper which was not done within the time fixed and thereafter the plaintiff was called upon to seek an extension of time. Had that been the case, then, under the proviso, the plaintiff would have been called upon to assign and show the availability of any cause of an exceptional nature for delay in supplying the requisite stamp paper within the time fixed by the court. The trial court was also empowered under Section 149 CPC to extend the time. In the present case, the order passed by the trial court accepting the deficit court fee paid on 23-2-2000, thereafter registering the suit on 10-4-2000 and consequently the order dated 3-11-2001 rejecting the respondent-defendants' application under Order 7 Rule 11 CPC were perfectly in accordance with law and within the discretion conferred on the trial court with which the High Court ought not to have interfered in exercise of the jurisdiction vested in the High Court under Section 115 CPC. The order of the High Court, if allowed to stand, is likely to occasion failure of justice."

44. The Hon'ble Supreme Court in P.K.Palanisamy vs. N.Arumugham and Another, (2009) SCC 173 has also held that such a notice is not necessary in cases where the plaintiff has paid almost the entirety of the requisite court fee and the Court is



satisfied on the affidavit by the party that the mistake happened due to some bona fide reasons such as calculation mistake or the alike.

45. It was further held that in case where the plaint is presented well within the period of limitation with deficit court fee and the court returns the plaint to rectify the defect giving some time (2 or 3 weeks), which also falls within the period of limitation, but the plaint is represented paying deficit court fee after the period of limitation, the Court is bound to hear the defendant, notwithstanding the fact that the plaintiff has paid substantial court fee (not almost entirety) at the first instance, before condoning the delay in paying the deficit court fee.

46. In Ganapathy Hegde vs. Krishnakudva' (2005) 13 SCC 539, an application under Order VII Rule 11 (c) of C.P.C was moved. The application was rejected by the Trial Court. The defendant therefore moved this Court under Article 227 of the Constitution of India which came to be allowed.

47. On appeal filed by the plaintiff before the Hon'ble Supreme Court in P.K.Palanisamy vs. N.Arumugham and Another, (2009)9 SCC 173. the Hon'ble Supreme Court allowed the appeal of the plaintiff. While allowing the appeal, in para 23, it was observed as under:-

"23. We would assume that the respondents were entitled to a notice before registration of plaint under Section 149 of the Code. Indisputably, the courts were required to assign reasons in support of their orders. Had the validity and/or legality of those orders been challenged before an appropriate court, it would have been possible for the plaintiffs to contend that the defendants had waived their right by their subsequent conduct and they would be deemed to have accepted the same. Even on later occasion, the courts would assign reasons upon satisfying itself once over again. If an order has been passed without hearing one side, he may be heard but by reason thereof, the plaint would not be rejected outrightly. Before doing so, the applications of the plaintiff under Section 149 of the Code have to be rejected."



48. The Hon'ble Supreme Court further noted that an application for rejection of the plaint was filed only in the year 2008. Evidently, that was not the stage for entertaining the application. Order 7 Rule 11(c) of the Code could not have been invoked at that point of time. In the present case, no application was filed by the 1st respondent/defendant under Order VII Rule 11 (c) of C.P.C.

49. Recently, this Court has also held that it is not necessary to file a separate application under Section 149 of C.P.C. in P.Kumar vs. Sanjay Agarwal & Others, 2010-5-L.W.663 and another decision of this Court in V.P.Venkatachalam vs. N.Venkatachalam, 2015-4-L.W.711.

50. Section 149 makes it very clear that it is the discretion of the Court to extend the period for paying the deficit court fee. The deficit court fee can be demanded at any stage of the proceedings.

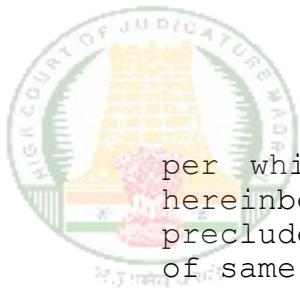
51. The Trial Court proceeded with the Trial as if there was a proper presentation of the plaint. Curiously, the Trial held that the suit was not maintainable for want of appropriate application under Section 149 of CPC after the Trial.

52. No objection was taken at the preliminary stage by the defendant when the suit summons was served on him. Neither revisionary nor appellate remedy were initiated by the defendant to reject the plaint on the ground that the plaint in O.S.No.1413 of 2011 on account of delayed payment of court fee.

53. Before numbering the plaint in O.S.No.1413 of 2011, after the deficit court fee was paid belatedly, the Trial Court could have returned the plaint and asked the deceased plaintiff explain and to file appropriate application and ordered notice on the defendant to respond.

54. Instead, issues were framed. The Trial Court concluded that the deceased plaintiff paid the court fee belatedly without filing any sub application under Section 149 of the CPC and therefore the suit was not maintainable.

55. As per Order VII Rule 11 (c) of CPC, plaint can be returned where relief claimed in properly is valued, but where the plaint is returned upon the paper being insufficiently stamped and the plaintiff on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so, the plaint can be rejected. The delayed payment of Court fee appears to be procedural in nature. This is evident from a reading of Order VII Rule 13 of CPC as



per which the rejection of a plaint on any of the grounds hereinbefore mentioned in Order VII shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of same cause of action.

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56. Though, in this case, the suit was filed just two days before the expiry of limitation with deficit Court Fee i.e. with a token Court Fee of Rs.1, nevertheless, the suit was numbered at a later point of time and the suit was proceeded as if the court fee had been paid in the first instance.

57. Therefore, the substantial questions of law is answered in favour of the appellants as far as the limitation is concerned.

58. Therefore, the Trial Court committed an error by holding that the suit was not maintainable for want of appropriate application under Section 149 of CPC. The 2nd question is also therefore answered in favour of the appellants.

59. Having answered the 2nd substantial question of law, I shall proceed to answer the other two questions of law.

60. The First Appellate Court has concluded that the deceased plaintiff had executed Ex.A3- Sale Agreement dated 22.11.1995 in favour of the deceased defendant (since deceased). The First Appellate Court has noted that Ex.A3-Sale Agreement dated 22.11.1995 was witnessed by P.W.1 (2nd appellant herein). Having concluded that Ex.A.3 was a genuine document in absence of any contra evidence of the defendant (1st respondent-since deceased), the First Appellate Court ought not to have refused one of the two reliefs on merits.

61. The First Appellate Court has held that the suit was filed on 22.12.2000 and taken on file on 07.12.2001. It has therefore held the advantage due to indifference on the part of the deceased plaintiff would accrue to the defendant.

62. However, from a reading of the Judgment and Decree of the Trial Court in O.S.No.1413 of 2001 it is evident that the suit was filed on 20.11.1998 not on 22.12.2000 was observed in the impugned Judgment and Decree of the First Appellate Court.

63. Since the suit was filed in time, the deceased plaintiff was either entitled to the main relief of specific performance of the agreement in Ex.A.3 dated 22.11.1995 or in the alternative the refund of the amount paid by the deceased plaintiff to the defendant(since deceased). The First Appellate



Court ought to have considered the refund of the amount if the specific performance was not to be ordered.

64. Specific relief by way of specific performance of the obligation under an agreement is a discretionary remedy. Though the deceased defendant/first respondent had denied the receipt of the aforesaid amount, what is evident that the documents in question has been executed and its validity has not been questioned by the deceased defendant/first respondent or her legal representatives who were impleaded as the second to the fifth respondents in this Second Appeal.

65. The suit for specific performance was not filed at an earliest opportunity. The deceased plaintiff had been recalcitrant and paid a mere token court fee of Rs.1 at the time of lodging the plaint and took time to pay the balance. The deceased plaintiff had also filed O.S.No.1970 of 1997 for permanent injunction. Therefore, courts cannot grant specific relief by way of specific performance of the agreement in Ex A-3.

66. The deceased plaintiff had not made out the case for decreeing the suit by directing the defendant (since deceased) to execute a sale deed in terms of Ex.A.3 dated 22.11.1995.

67. Therefore, the alternate relief for refund of the amount is to be ordered together with interest. The lower Courts ought to have ordered to refund of the amount.

68. The deceased plaintiff whose interest is represented by the appellants are thus entitled to refund of the amount paid towards the sale consideration by the deceased plaintiff to the deceased defendant (since deceased) whose interest is represented by the respondents.

69. The evidence on record namely, Ex.A.3 - Sale Agreement dated 22.11.1995 indicates that out of total sale consideration of Rs.2,15,000/-, a sum of Rs.2,00,200/- was totally paid by the deceased plaintiff to the deceased defendant/1st respondent and the balance amount of Rs.14,800/- was to be paid to the deceased defendant/1st respondent at the time of execution of sale deed. Details of payments are as under :-

SL.N o.	Date	Amount in Rs.
1	22.11.1995	1,18,200/-
2	27.11.1995	15,000/-
3	30.11.1995	15,000/-



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SL.N o.	Date	Amount in Rs.
4	02.12.1995	10,000/-
5	05.12.1995	5,000/-
6	06.12.1995	12,000/-
7	27.01.1996	25,000/-
Total		2,00,200/-

70. Under these circumstances, the 3rd substantial question of law is answered in favour of the appellants by directing the respondents herein to pay a sum of Rs.2,00,200/- (Rs.2,15,000 - Rs.14,800) together with interest at the rate of 7.5% p.a. from the date of each payment till the date of Judgment.

71. Accordingly, this appeal is partly allowed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

jen/kkd

To

1. The First Additional District Court, Coimbatore.
2. The Principal Subordinate Court, Coimbatore.
3. The Section Officer,
V.R. Section, Madras High Court.

+1cc to Mr.C.R.Prasanan, Advocate, S.R.No.38167
+1cc to Sarvabhauman Associates, Advocate, S.R.No.38209

S.A.No.381 of 2012
and M.P.No.1 of 2012

PP (CO)
PM/21/10/2021