

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.04.2021

CORAM:

THE HON'BLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

CRP.PD.No.2716 of 2018 and
CMP.No.15994 of 2018

Gunasekar

... Petitioner

Vs.

Balasubramaniam

...Respondent

PRAYER:

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order of the Principal District Judge's Court at Villupuram, dated 21.12.2016 in IA.No.53 of 2015 in OS.No.119 of 2010.

For Petitioner : Mr.P.Valliappan

For Respondent : No Appearance

ORDER

This civil revision petition is filed against the fair and decretal order of the Principal District Judge's Court at Villupuram,

dated 21.12.2016 in IA.No.53 of 2015 in OS.No.119 of 2010, thereby dismissing the petition filed for rejection of plaint.

2. The petitioner is the second defendant and the respondent is the plaintiff. The respondent filed suit for specific performance on the strength of the agreement for sale dated 08.02.2003. While pending the suit, the petitioner filed petition for rejection of plaint and the same was dismissed. Aggrieved by the same, the present civil revision petition has been filed.

3. The learned counsel for the petitioner would submit that on the strength of the alleged agreement for sale dated 08.02.2003, the respondent issued notice on 14.07.2004, thereby called upon the petitioner to execute the sale deed on receipt of balance sale consideration. On receipt of summon, the petitioner issued reply notice on 22.07.2004 denying the very execution of sale agreement. Thereafter, only on 07.02.2009, the present impugned suit is filed for specific performance on the strength of the very same agreement for sale dated 08.02.2003 and as such the suit is clearly barred under Article 54 of Limitation Act. The respondent already filed suit for bare injunction in respect of the

very same property in OS.No.144 of 2004 on the file of the Principal District Court, Villupuram and thereafter it was transferred to the Additional District Court, Kallakurichi and renumbered as OS.No.3 of 2008. The very cause of action itself for filing the suit is present agreement for sale dated 08.02.2003. Even then, the respondent failed to sought for any relief of specific performance. The said suit was dismissed by the judgment and decree dated 08.02.2011. While pending the suit, the present suit has been filed without any leave of the Court under Order 2 Rule 2 of CPC. Therefore, the present suit is directly hit under Order 2 Rule 2 of CPC and it is liable to be rejected. Therefore, on these two grounds, the plaint is liable to be rejected. But unfortunately, the court below without considering the above grounds raised by the petitioner, dismissed the petition. In support of his contention, he relied upon the following judgments:

(i) N.V.Srinivasa Murthy and Ors Vs. Mariyamma (dead)

by proposed L.Rs and Ors reported in AIR 2005 SC 2897

(ii) M/s.Raptakos Brett and Co.Pvt. Ltd Vs. M/s.Modi

Business Centre (Pvt) Ltd reported in AIR 2006 Mad 236

(iii) Van Vibhag Karamchari Griha Nirman Sahakari Sanstha

Maryadit (Regd) V.Ramesh Chander and Ors

reported in AIR 2011 SC 41

(iv) N.Ravindran Vs. V.Ramachandran reported in
AIR 2011 Mad 136

(v) B.S.Garg Vs. R.Meena Sundar and others reported in
2016 (2) MWN (Civil) 752

(vi) Subbiah(died) Vs. Thiruneelapandian reported in
2017 (6) CTC 1

(vii) V.Venkataravanappa Vs. D.K.Gopal and another
reported in AIR 2019 Karnataka 122

(viii) Vurimi Pullarao Vs. Vemari Vyankata Radharani
Dhankoteshwarrao reported in AIR 2020 SC 395

(ix) K.Murali Vs. M.Mohamed Shaffir reported in
2020 (1) CTC 38

4. Heard, Mr.P.Valliappan, the learned counsel for the petitioner. Though notice was served to the respondent herein and name is also printed in the cause list, no one appeared on behalf of the respondent before this Court in person or through pleader.

5. The petitioner is the second defendant and the respondent is the plaintiff. The respondent filed suit for specific performance on the strength of the agreement of sale dated

08.02.2003. The case of the respondent is that the suit property belongs to the petitioner and he had obtained suit property by way of partition from his parents. He executed power of attorney in favour of the first respondent dated 21.01.2003 in respect of the suit property to deal with the same in all kinds of transaction. On the strength of the power of attorney, the first defendant entered into agreement for sale in respect of the suit property with the respondent for the total sale consideration of Rs.16,51,380/-, in which the first defendant received a sum of Rs.15,61,380/- as advance. Further agreed to execute sale deed within a period of three years from the date of sale agreement after receipt of balance sale consideration. Further averred that the respondent already filed suit for bare injunction in respect of the suit property in OS.No.144 of 2004 and subsequently transferred to the Fast Track Court, Kallakurichi and renumbered as OS.No.3 of 2008. Subsequently, the general power of attorney dated 21.01.2003 was also cancelled by the cancellation deed dated 21.04.2003. But the respondent did not aware of the said fact. When the respondent was ready and willing to perform his part of agreement, the first defendant failed to execute sale deed and hence the suit.

6. While pending the suit, the petitioner filed petition for rejection of plaint on two grounds. First, the suit is barred by limitation under Article 54 of the Limitation Act. Second, the suit is directly hit under Order 2 Rule 2 of CPC when the respondent already filed suit in OS.No.144 of 2004 on the strength of the very same sale agreement for bare injunction.

7. The points for consideration are that whether the suit filed by the respondent is barred by limitation under Article 54 of Limitation Act? and whether the suit is hit by Order 2 Rule 2 of CPC?

8. Admittedly, the present suit has been filed on 07.02.2009 on the strength of the agreement for sale dated 08.02.2003. Therefore, the respondent ought to have filed suit within a period of three years from the date of agreement. In fact, the alleged agreement for sale was executed by the first defendant in the suit as power of attorney of the petitioner herein and subsequently, the power of attorney dated 21.01.2003 was cancelled by the registered cancellation deed dated 21.04.2003. In fact, on the strength of the very same agreement for sale, the respondent already filed suit in OS.No.144 of 2004 on the file of the

Principal District Court, Villupuram and subsequently it was transferred to the file of the Fast Track Court, Kallakurichi and renumbered as OS.No.3 of 2008, which was dismissed by the judgment and decree dated 08.02.2011. Though it was dismissed for default, the respondent did not take any step to restore the same. In the said suit on 31.12.2004 itself, the petitioner herein filed detailed written statement stating that the power of attorney executed in favour of the first defendant in the present suit dated 21.01.2003 has been duly cancelled and the cancellation deed was also registered on 21.04.2003. Even then, the respondent failed to amend the suit challenging the cancellation of power of attorney or the suit for specific performance on the strength of the agreement for sale. That apart, the respondent caused legal notice dated 14.07.2004, for which the petitioner duly replied by the reply notice dated 22.07.2004 by stating that denial of execution of agreement for sale and also cancellation of power of attorney. Therefore, the present impugned suit for specific performance is clearly barred under Article 54 of the Limitation Act, 1963. Insofar as the other ground is concerned, the second impugned present suit was filed by the respondent without obtaining permission under Order 2 Rule 2 of CPC.

9. The learned counsel for the petitioner vehemently contended that the present impugned suit is directly hit under Order 2 Rule 2 of CPC and it has been filed without leave of the Court as contemplated under Order 2 Rule 2 of CPC. In support of his contention he relied upon several judgments in his favour. It is relevant to rely upon the judgment in the case of **Vurimi Pullarao Vs. Vemari Vyankata Radharani Dhankoteshwar Rao** reported in **AIR 2020 SC 395**, wherein it is held as follows:

The situation as it obtained in the case before the Constitution Bench in Gurbux Singh [Gurbux Singh v. Bhooralal, AIR 1964 SC 1810] is distinct from the events as they transpired in the present case. The first appellate court, in the judgment which it delivered upon remand took note of the fact that the defendant had by its application at Ext. 117 prayed for summoning the original record of the earlier suit for injunction for proving the plaint. The plaintiff opposed that plea with the assertion that a certified copy of the document could be placed on record instead of summoning the original record. The Civil Judge, Senior Division, accordingly rejected the application on the ground that since the certified copy was filed on the record, it was unnecessary to call for the original record. The defendant had moved another application at Ext. 118 in the nature of a notice to admit the certified copy of the plaint in the earlier suit. This came to be allowed by the

trial court. The first appellate court noted that there was no objection from the plaintiff whereupon the certified copy of the plaint was marked as Ext. 137. In this background, the first appellate court was clearly justified in coming to the conclusion that this is not a case where the plaintiff was deprived of an opportunity to explain the pleadings in the earlier suit. The finding that there was no prejudice to the plaintiff cannot be faulted. The parties were all along aware of the pleadings, the nature of the objection to the maintainability of the subsequent suit on the ground of the bar under Order 2 Rule 2 and the fact that the plaint in the earlier suit was brought on the record. Indeed, it was at the behest of the plaintiff that a certified copy of the plaint in the earlier suit was allowed to be brought on the record and marked as Ext. 137. In the circumstances, we are of the view that the bar under Order 2 Rule 2 is attracted. The plaintiff was entitled to sue for specific performance when the earlier suit for injunction was instituted but omitted to do so. There was an identity of the cause of action in the earlier suit and the subsequent suit. The earlier suit was founded on the plea of the plaintiff that it was in pursuance of the agreement to sell dated 26-10-1995 that he had been placed in possession of the property. Yet, without seeking the leave of the Court, the plaintiff omitted to sue for specific performance and rested content with the prayer for permanent injunction. In these circumstances, we agree with the finding which has been arrived at by all the three courts

that the subsequent suit filed is barred under Order 2 Rule 2 does not warrant any interference in this appeal. The appeal would accordingly have to stand dismissed and we order accordingly.

The Hon'ble Supreme Court of India held that the plaintiff was entitled to sue for specific performance when the earlier suit for injunction was instituted, but omitted to do so. There was an identity of the cause of action in the earlier suit and subsequent suit. Therefore, the subsequent suit is barred under Order 2 Rule 2 of CPC.

10. In the case on hand, it is quite clear that those causes of action were very well available at the time of filing of the earlier suit. Both the causes of action referred only to the agreement for sale in question dated 08.02.2003. Therefore, the present suit is barred by Order 2 Rule 2 of CPC. The respondent already filed suit for bare injunction for the very same cause of action on the strength of the agreement for sale dated 08.02.2003. While pending the suit, the present impugned suit has been instituted without obtaining any leave of the court as contemplated under Order 2 Rule 2 of CPC. After filing the present suit, the earlier suit was dismissed for default

by the judgment and decree dated 08.02.2011. It is relevant to extract provision under Order 2 Rule 2 of CPC as follows:

2. Suit to include the whole claim:

1. *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.*
2. **Relinquishment of part of claim:**
Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.
3. **Omission to sue for one of several reliefs:**
A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

11. Accordingly, the present impugned suit is clearly barred by operation of law under Order 2 Rule 2 of CPC. That apart, the readiness and willingness is also not explained by the respondent herein. According to the alleged agreement for sale, the time fixed for execution of sale deed is three years. Whereas, the respondent caused notice on 14.07.2004 and it was duly replied by the petitioner dated 22.07.2004. Even thereafter, the respondent did not file any suit for specific performance and the present suit has

been laid only on 07.02.2009. Therefore, at any cost, the suit cannot be sustained and it is liable to be rejected. Therefore, the order passed by the court below is illegal, perverse and liable to be set aside.

12. Accordingly, this civil revision petition is allowed and the order of the Principal District Judge's Court at Villupuram, dated 21.12.2016 in IA.No.53 of 2015 in OS.No.119 of 2010 is set aside. Consequently, the plaint in OS.No.119 of 2010 on the file of the Principal District Judge's Court at Villupuram is rejected. Consequently, connected miscellaneous petition is closed. No costs.

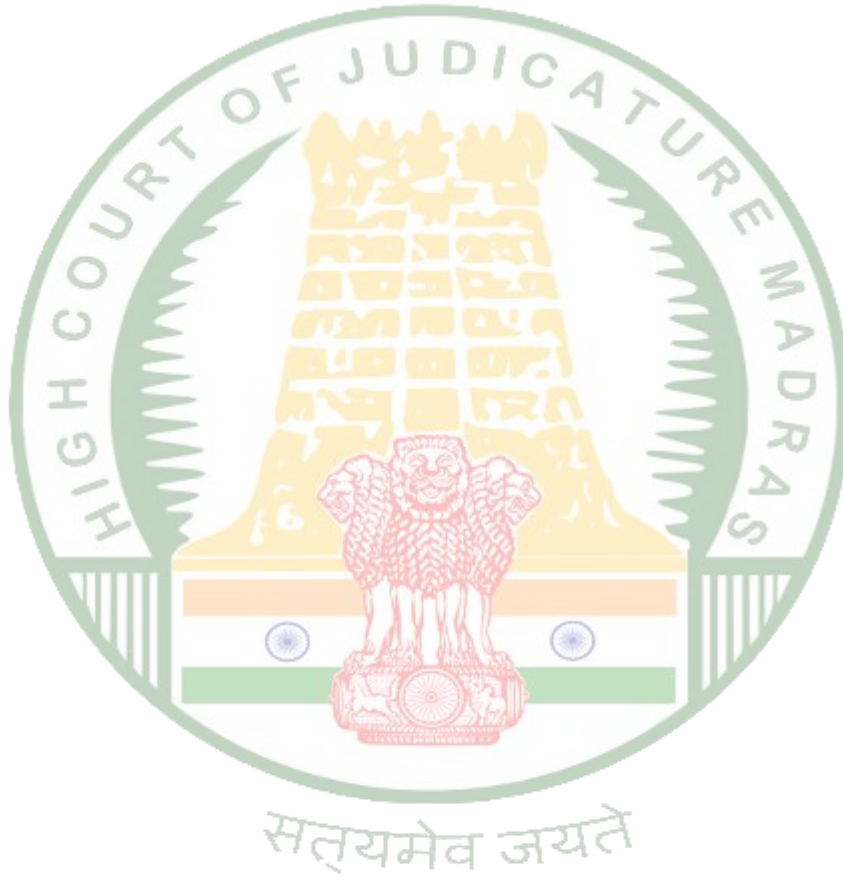
23.04.2021

Index : Yes / No
Internet : Yes / No
Speaking order /Non-speaking order
lok

WEB COPY

To

The Principal District Judge,
Villupuram



WEB COPY

CRP.PD.No.2716 of 2018

G.K.ILANTHIRAIYAN, J.

lok



CRP.PD.No.2716 of 2018 and
CMP.No.15994 of 2018

WEB COPY

23.04.2021