



C.R.P. (PD) No. 2284 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Date of Reserving Order <u>26.10.2021</u>	Date of Pronouncing Order .11.2021
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CORAM:

THE HONOURABLE Mr. JUSTICE G.CHANDRASEKHARAN

C.R.P.(PD)No.2284 of 2021

and

CMP.No.17284 of 2021

1. Raj Ganesan

2. Bhuvaneshwari

...Petitioners

Versus

Dr. Geeth Ragunath

...Respondent .

PRAYER: Civil Revision Petitions filed under Article 227 of the Constitution of India, to revise and set aside the impugned fair and decretal order passed in IA No.1 of 2019 in OS No.279 of 2004 dated 30.04.2021 on the file of the Learned II Additional District and Sessions Judge, Salem and allow this Civil Revision Petition.

For Petitioners

: Mr.Navaneetha Krishnan
Senior Advocate for
Mr.R.Naveen



C.R.P. (PD) No.2284 of 2021

For R1 to R3

: Mr.M.Nandhakumar
for Mr.Eswar Kumar and Rao

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ORDER

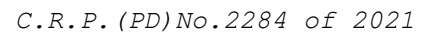
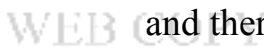
This Civil Revision Petition is directed against the order passed in I.A.No.1 of 2019 in O.S.No.279 of 2004 on 30.04.2021 by the learned II Additional District and Sessions Judge, Salem.

2. I.A.No.1 of 2019 was filed under Order 7 Rule 11 r/w section 151 of C.P.C., for rejecting the plaint in O.S.No.279 of 2004. The learned counsel for the petitioners submitted that the respondent filed O.S.No.39 of 2004 against Mr.Rajendiran and four others seeking the relief of permanent injunction for protecting her possession in respect of the suit properties. She claimed that she entered into sale agreement with Chinnappa Udayar and Ammasi Udayar, defendants 4 and 5 in that suit on 28.01.1991. She paid an advance of Rs. 1,00,000/- (Rupees one lakhs) and was handed over possession of the suit properties. She is in possession and enjoyment of suit properties from the date of sale agreement. When the defendants in the suit tried to disturb her possession, she filed the suit. The respondent has also filed O.S.No.279 of 2004 against Chinnappa Udayar and nine others for the relief of specific performance of the contract on the basis of sale agreement dated 28.01.1991. The cause of



action for both the suits are the alleged execution of sale agreement by Chinnappa Udayar and Ammasi Udayar in favour of the respondent. It is specifically claimed in the plaint in O.S.No.39 of 2004 that despite the readiness and willingness to perform the part of the contract, defendants were evading from performing their part of the contract. When the respondent knew well that the defendants in O.S.No.39 of 2004 are evading to perform their contract, she ought to have filed the suit for specific performance, instead of filing the suit for permanent injunction. Under Order 2 Rule 2 CPC the suit shall include whole claim. When the plaintiff in the suit 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. 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. In the case before the hand, the respondent has not sought any permission from the Court to omit the relief of specific performance and initiate a separate action, at the time of filing O.S.No.39 of 2004. Therefore, the suit is barred under Order 2 Rule 2 of C.P.C.,

3. Thus petitioners filed I.A.No.1 of 2019 under Order 7 Rule 11 C.P.C., for rejection of plaint. This petition was contested by the respondent. The learned II Additional District and Sessions Judge, Salem after considering the



4. In response, the learned counsel for the respondent submitted that the cause of action for both the suits are different. Earlier suit was filed when the defendants in the suit tried to interfere with the possession of the respondent. Subsequent suit was filed, when the defendants refused to execute the sale deed as per the sale agreement. When the cause of action for both the suits are different, subsequent suit is not barred under Order 2 Rule 2 CPC. In fact, petitioners filed a memo before the Trial Court to try both the suits jointly in a joint trial. This petition was filed after 18 years of filing the suit, only with a view to protract the proceedings. Petitioner instituted several parallel proceedings to see that the specific performance is avoided. The learned II Additional District and Sessions Judge, Salem considered the issue in right perspective and dismissed the petition. Therefore, the learned counsel for the respondent prayed for confirming the order of the learned II Additional District and Sessions Judge, Salem and for dismissal of this Revision petition. In



support of his submission he relied on the following judgments for the proposition that when the cause of action for both the suits are different, subsequent suit cannot held to be barred under Order 2 Rule 2 C.P.C.,.

i). ***Sucha Singh Sodhi (dead) through Legal Vs. Baldev Raj Walia and Another*** reported in 2018 (6) SCC 733

29.3. Third, when both 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.

ii) ***Inbasagaran and another Vs. S. Natarajan (Dead) through legal representatives*** reported in (2015) 11 SCC, 12

26. In the light of the principles discussed and the law laid down by the Constitution Bench as also other decisions of this Court, we are of the firm view that if the two suits and the relief claimed therein are based on the same cause of action then only the subsequent suit will become barred under Order 2 Rule 2 CPC. However, when the precise cause of action upon



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which the previous suit for injunction was filed because of imminent threat from the side of the defendant of dispossession from the suit property then the subsequent suit for specific performance on the strength and on the basis of the sale agreement cannot be held to be the same cause of action. In the instant case, from the pleading of both the parties in the suits, particularly the cause of action as alleged by the plaintiff in the first suit for permanent injunction and the cause of action alleged in the suit for specific performance, it is clear that they are not the same and identical.

27. Besides, the above, on reading of the plaint of the suit for injunction filed by the plaintiff, there is nothing to show that the plaintiff intentionally relinquished any portion of his claim for the reason that the suit was for only injunction because of the threat from the side of the defendant to dispossess him from the suit property. It was only after the defendant in his suit for injunction disclosed the transfer of the suit property by the Housing Board to the defendant and thereafter denial by the defendant in response to the legal notice by the plaintiff, the cause of action arose for filing the suit for specific performance.

He also relied on the following judgment for the proposition that when claiming bar under Order 2 Rule 2 C.P.C., defendant has to produce the pleadings in the previous suit by way of evidence and Court is required to go



into pleadings of the previous suit and compare it with pleadings in the present suit to arrive at a conclusion as to the identity of causes of action. However, under Order 7 Rule 11 CPC the Court is enjoined only on looking at the averments made in the present suit and not travel to the written statement or other documents filed by the defendant.

i) ***Suresh Kakkar and Another Vs. Mahendra Nath Kakkar & Ors.*** reported in 2008 (105) DRJ 211

17. In the light of the above discussion, it is clear that before the bar under Order 2 Rule 2 CPC., can be set up, the defendant has to produce the pleadings in the previous suit by way of evidence and the court is required to go into the pleadings of the previous suit and compare it with the pleadings in the present suit to arrive at a conclusion as to the identity of the cause of action. However, under Order 7 Rule 11, CPC, the Court is enjoined only to look at the averments made in the plaint of the present suit and not travel to the written statement or other documents filed by the defendant. The plaint by itself must disclose that the suit is barred by law. The Constitution Bench in the case of Gurbux Singh (supra) has settled the issue that the inference as to the identity of the causes of action between the present suit and the earlier suit cannot be culled out from the plaint in the subsequent suit. It is, therefore, abundantly clear that in an application under Order 7 Rule 11, CPC can be raised by the defendant in the



written statement and, if so raised, an issue can be framed in respect thereof. The Court would then be in a position to conclusively determine the identity of the causes of action between the earlier suit and the later suit and rule in the basis of evidence led by the parties. But, such a course of action is not permissible under Order 7 Rule 11, CPC. As a result, this application is rejected.

5. In reply, learned counsel for the petitioners submitted that as per Order 7 Rule 11 (d), where the suit appears from the statement in the plaint to be barred by any law, the plaint can be rejected. In support of this proposition the learned counsel for the petitioners relied on the judgment ***Sasan Power Limited Vs. North American Coal Corporation (India) Private Limited*** reported in (2016) 10 SCC 813, wherein it is observed that if a suit is barred by law, Court is bound to take note of the bar whether such question is raised by parties are not.

6. He also relied on the judgments reported in (2013) 1 SCC 625 (***Virgo Industries (Eng.) Private Limited Vs. Venturetech Solutions Private Limited***) and (2020) 5 CTC 435 (***Antony Moses Vs. Roselin.@. Dhanalakshmi and others***) for the proposition that subsequent suit is not permissible when the



cause of action for later suit is same as in the first suit, unless leave of Court is obtained in first suit as to filing of subsequent suit for the omitted relief. This portion apply equally when both the cases are pending. The judgment reported in **2021 (4) CTC 439 (Gunasekar Vs. Balasubramaniam)** is pressed into service in support of the case of the petitioners that in identical situation, the subsequent suit was rejected.

i). Virgo Industries (Eng.) Private Limited Vs. Venturetech Solutions Private Limited reported in (2013) 1 Supreme Court Cases 625.

10. "6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court, omitted to sue for the relief for which the second suit had been filed, From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope of the application of the bar."



ii). **Anotny Mosses Vs. Roselin. 2. Dhanalakshmi. 3. K.Vijayalakshmi.**

4.Shyam Sundar reported in 2020 (5) CTC 435

This Court is of the considered opinion that Order 2, 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 2.6.2005 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 O.S.No.236 of 2008 in 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.

iii) **Gunasekar Vs. Balasubramaniam** reported in 2021 (4) CTC 439.

10. In the case on hand, it is quite clear that those



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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 8.2.2003. 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 of the strength of the Agreement for Sale, dated 8.2.2003. 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 8.2.2011.

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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 14.7.2004 and it was duly replied by the Petitioner, dated 22.7.2004. Even thereafter, the Respondent did not file any Suit for Specific Performance and the present Suit has been laid only on 7.2.2009. 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.



WEB COPY 7. Considered the rival submissions and perused the records.

8. Admittedly the earlier suit in O.S.No.39 of 2004 was filed only for the relief of permanent injunction to protect the possession of respondent. Only in O.S.No.279 of 2004 the respondent prayed for the relief of the specific performance of the contract. Both the suits have been filed on the basis of the sale agreement dated 28.01.1991. However, the first suit was filed primarily to protect the possession of respondent when the defendants in the suit tried to dispossess the possession and attempted to damage the suit properties. In the judgment reported in *(2015) 11 SCC, 12 (Inbasagaran and another Vs. S. Natarajan (Dead) through legal representatives)* it was observed that when precise cause of action upon which previous suit for injunction was filed because of imminent threat from the side of the defendant of dispossession from the suit property, then subsequent suit for specific performance on the strength and on the basis of sale agreement cannot held to be the same cause of action. We have identical case here. In the first suit the immediate cause of action for filing the suit was the defendants' attempt to dispossess the respondent from the possession of the suit property and damage the suit property. In the subsequent suit, the cause of action was the refusal by the



defendants to execute the sale deed. Therefore, it is apparent that the cause of action for both the suits are different.

9. There is no qualm over the proposition that the subsequent suit is not permissible when the cause of action for later suit is same as in the first suit unless leave of the Court is obtained in first suit as to filing of subsequent suit for the omitted relief. The judgments relied on by the learned counsel for the petitioners *Virgo Industries (Eng.) Private Limited Vs. Venturetech Solutions Private Limited* reported in (2013) 1 Supreme Court Cases 625 and *Antony Moses Vs. Roselin.@. Dhanalakshmi. and others* reported in (2020) 5 CTC 435 came to be delivered in Civil Appeal Cases after conclusion of the trial. Issue of readiness and willingness was also considered while disposing the case in *Gunasekar Vs. Balasubramaniam(cited supra)*. What you have to consider is whether the principle of bar of the suit under Order 2 Rule 2 CPC can be considered in an application filed under Order 7 Rule 11 CPC.

10. It has been held in judgment reported in **2008 (105) DRJ 211 (Suresh Kakkar and another Vs. Mahender Nath Kakkar & others)**, that when considering the bar of subsequent suit under Order 2 Rule 2 CPC, the pleadings in the previous suit by way of evidence and pleadings in the



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subsequent suit have to be compared to come to a conclusion. However, in an enquiry under Order 7 Rule 11 CPC only the plaint averments have to be taken into consideration and not the written statement or other documents. The issue is whether the suit is barred under Order 2 Rule 2 CPC is mixed question of fact and law and required to be enquired on the production of relevant documents, evidence and examination of parties. Therefore, this Court finds the learned II Additional District and Sessions Judge, Salem has rightly dismissed the petition and this Court finds no reason to interfere with the order of the learned II Additional District and Sessions Judge, Salem and the order is confirmed. However, the petitioners are permitted to raise the issue of bar of subsequent suit under Order 2 Rule 2 CPC. On such issue is being raised, the learned II Additional District and Sessions Judge, Salem is directed to frame appropriate issue and decide the case on merits and in accordance with law.

11. Accordingly, this Civil Revision Petition is dismissed. No costs. Consequently connected miscellaneous petition is closed.

02.11.2021

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Index: Yes/ No

Speaking Order / Non-Speaking Order



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To

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The II Additional District Judge,
Salem,
Salem District.



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G.CHANDRASEKHARAN, J.,

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Pre-delivery order in
C.R.P.(PD)No.2284 of 2021

Dated: 02.11.2021