

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.03.2021

CORAM

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

C.R.P.(PD) No.3657 of 2017
and C.M.P.No.17018 of 2017

Samuthirapandian ... Petitioner

Vs.

Johnson David ... Respondent

Prayer :- Civil Revision Petition is filed under Section 115 of C.P.C., to set aside the order and decreetal order dated 26.04.2017 passed in I.A.No.24 of 2015 in O.S.No.85 of 2014 on the file of the Principal District Court, Villupuram.

For Petitioner : Mr.K.Hariharan

For Respondent : Mr.C.Ramesh

ORDER

This Civil Revision Petition has been filed as against the fair and decreetal order dated 26.04.2017 passed by the learned Principal District Judge, Villupuram, in I.A.No.24 of 2015 in O.S.No.85 of 2014, thereby dismissing the petition for rejection of plaint.

2. The petitioner is the defendant in the suit filed by the respondent in O.S.No.85 of 2014, for recovery of money based on the construction contract dated 14.09.2009. The respondent already filed suit in O.S.No.229 of 2011 for injunction restraining the petitioner from interfering his legal right to retain possession of suit schedule property and also sought for permanent injunction from evicting the respondent from the suit schedule property. Pending the suit, the respondent filed another suit for recovery of money on the very same contract. Therefore, the petitioner filed petition in I.A.No.24 of 2015 for rejection of plaint on the ground that the suit itself directly hit by Order II Rule 2 of C.P.C. The trial Court dismissed the said petition and aggrieved by the same, the present Civil Revision Petition.

3. The learned counsel appearing for the petitioner would submit that the suit is barred as repetition of the earlier suit, illegally inviting the Court to evaluate the facts for the second time, while the earlier suit in O.S.No.299 of 2011 between the very same parties with the same allegations. The earlier suit filed by the respondent based on the very same

contract of work viz., construction of marriage hall dated 14.09.2009. The earlier suit filed with the cause of action that on the strength of the contract dated 14.09.2009, the construction came into existence and by letter dated 20.09.2009, the petitioner requested the respondent to extend the construction area in 8305.31 sq.ft., instead of 5227 sq.ft., when the respondent completed 80% of the building in the ground floor and 60% of work in the first floor on 15.03.2011, the respondent sent letter to settle the amount due. On 21.03.2011 the respondent issued legal notice followed by the rejoinder dated 20.06.2011 and filed suit in O.S.No.229 of 2011. Whereas the second suit also filed for very same cause of action for recovery of money. It is clearly barred under Order II Rule 21 of CPC.

3.1. He further submitted that when the respondent made very same allegations, no one prevent him to seek the prayer of recovery of money in the very same suit for injunction. Even when the first suit was pending, the present suit has been filed by the respondent herein for recovery of money. In fact after filing of the present suit, the earlier suit dismissed by the judgment dated 17.07.2014. Whereas, the respondent filed suit for the very

same cause of action and it cannot give further decision based on the earlier final decision, upon the same dispute and it cannot be continued for subsequent litigation. Therefore, when the respondent had intentionally relinquished and omitted the relief of recovery of money, he shall not file second suit based on such omitted relief under Order 2 Rule 2 of CPC. In fact, the respondent was not entitled to make such claim for the same cause of action including the recovery of money. In the earlier suit, he failed to get the leave of the Court as such, he shall not file the present suit under Order 2 Rule 2 of CPC. In support of his contention he relied upon the following reported judgments :-

- i) **(2014) 2 LW 455 - R. Riyaz Ahmed & others vs J.G. Glass Industries Pvt Ltd,**
- ii) **(2014) 3 LW 898 - S.Thirugnanasambandam vs. P. Kaliyaperumal and Ors.,**
- iii) **(2013) 1 LW 31 - Virgo Industries (Eng.) Private Limited Vs. Venturetech Solutions Private Limited**

4. Per contra, the learned counsel appearing for the respondent would submit that the respondent initially filed suit for injunction as against the petitioner herein restraining him from interfering with the respondent's right to possess the suit schedule property to proceed with the construction

and also permanent injunction from evicting him from the suit property. Whereas the present suit has been filed for recovery of money, in pursuant to the very same contract dated 14.09.2009. The respondent entered into an agreement to construct a marriage hall for the total cost of Rs.37,50,000/- as per the agreement dated 14.09.2009. The agreement was very much in force and the respondent was ready and willing to complete the remaining portion of the construction. But the petitioner forced him not to complete the construction work and refused to make balance amount. When the said agreement has not been terminated in the manner known to law, the respondent is a lawful holder and his possession of the suit property is lawful. Therefore, he filed the above suit with the prayer of injunction.

4.1. In the earlier suit, the respondent filed petition for injunction in which the petitioner filed his counter stating that the contract was terminated and the respondent has received the entire amount. Therefore, the petitioner committed breach of contract and the respondent issued legal notice on 25.03.2014 and filed the suit for recovery of money for a sum of Rs.38,66,145/-. Therefore, there is no bar under Order 2 Rule 2 of C.P.C., to

file another suit for different set of cause of action. He further submitted that both the complaints must be read as a whole to identify the cause of action, which is necessary to establish the claim of the respondent. When the cause of action for both suits are different and distinct and the evidences to support the relief in the two suits are also different, then the provisions under Order 2 Rule 2 of C.P.C., will not apply. In support of his contention, he relied upon the following reported judgments:-

- i) (2015) 8 SCC 331 - P.V. Guru Raj Reddy and another vs. P. Neeradha Reddy and others*
- ii) (2014) 3 LW 898 - S.Thirugnanasambandam vs. P. Kaliyaperumal and Ors.,*

5. Heard Mr.K.Hariharan, learned counsel appearing for the petitioner and Mr.C.Ramesh learned counsel appearing for the respondent.

6. The respondent is the plaintiff and he filed suit in O.S.No.85 of 2014 for recovery of money as against the petitioner herein. He already filed suit in O.S.No.229 of 2011 for injunction for the following cause of action:-

"25. The case of action for the suit arose on 14.09.2009, when the plaintiff and the defendant

entered into unregistered agreement regarding construction of marriage hall, on 20.09.2009 when the plaintiff as per the request of the defendant agreed and started to construct the building covering an area of 8305.31 Sq.ft. instead of the original construction area of 5227 Sq.ft., on 15.03.2011 when the plaintiff issued a letter to the defendant, on 21.03.2011 and 20.06.2011, when the legal notices were issued by the plaintiff's counsel to the defendant, the 1st week of June 2011 and on 27.08.2011, when the defendant repeated his unsuccessful attempts to interfere with the plaintiff's possession of the suit property and to evict him forcibly, all at Tindivanam Town, Firka and Taluk [where the schedule of property situate], within the jurisdiction of this Hon'ble Court."

7. When the said suit was pending, the respondent filed the present suit for recovery of money with the following cause of action:-

"iv. The cause of action for the suit arose on and from 14.09.2009 when a construction contract came into existence between the plaintiff

and defendant on 20.09.2009 when the defendant requested the plaintiff to extend the construction in excess of 5227 Sq.ft., to 8305.31 Sq.ft., at the end of February, 2011 when the plaintiff completed 80% of construction work in the ground floor and 60% in the first floor, except roofing, on 15.03.2011 when the plaintiff sent a letter to the defendant requesting him to settle the amount 'due', on 21.03.2011 when the plaintiff sent a lawyer's notice to the defendant, on 20.06.2011 when a corrigendum notice was sent to the defendant, on 29.08.2011 when the plaintiff filed a civil suit in O.S.No.299 of 2011 on the file of the Principal District Munsif, Tindivanam, on 22.11.2011 when the defendant filed a counter to I.A.1359/2011, repudiating the contract for the first time by contending that the contract was terminated and that the plaintiff has received the entire amount, thus committing BREACH OF CONTRACT, on 25.03.2014 when the plaintiff sent a fresh legal notice to the defendant, which was acknowledged by the defendant and continues de diem at Tindivanam where the disputed property is situated and where the construction

contract came into existence, within the jurisdiction of this Hon'ble Court."

8. Now the point for consideration is that, whether on the date of filing of the earlier suit, the respondent was in possession to file the suit for recovery of balance amount due under the construction agreement and also whether the cause of action would have permitted the respondent to claim recovery of money?

9. The provision under Order 2 Rule 2 of C.P.C., reveals that it applies to cases where the plaintiff omits to sue a portion of the cause of action on which the suit is based either by relinquishing the cause of action or by omitting a part of it. If the cause of action is separate and distinct, the plaintiff can always open to file fresh suit. On perusal of the cause of action for filing the suit, after filing the earlier suit, the petitioner filed his counter stating that the construction contract was terminated and as such, the respondent caused legal notice, claiming balance due. On the said cause of action, the respondent filed the present suit for recovery of money. Whereas

the earlier suit was filed for injunction. Therefore, both cause of action are different and both reliefs are distinct one.

10. In this regard, the learned counsel appearing for the petitioner relied upon the judgment reported in **(2014) 2 LW 455** in the case of **R. Riyaz Ahmed & others vs J.G. Glass Industries Pvt Ltd**, which reads as follows:-

"12. On a careful consideration of the materials available on record, the submissions made by the learned counsel on either side and taking into consideration the judgments relied upon by the learned counsel on either side, it could be seen that it is not in dispute that earlier, the plaintiffs filed a suit in O.S.No.171 of 2003 on the file of the Principal Sub Court, Chengalpet, for specific performance of the Sale Agreement dated 27.10.1990, on the basis of agreement between their father viz., Abdul Rasheed and Sadagopan in respect of 7 = grounds of lands. The plaintiffs also obtained an order of injunction not to disturb their possession and the order of injunction was in force till 04.04.2006. During the pendency of the

said suit, the plaintiffs filed the present suit, which was filed on 31.03.2006 and in the present suit, they have claimed title over the suit property by adverse possession. In the present suit also, on 31.03.2006, they obtained an order of injunction not to disturb their possession. On 04.04.2006, the plaintiffs withdrew the earlier suit. Therefore, it is clear that the plaintiffs obtained and enjoyed two interim orders from 31.03.2006 to 04.04.2006 on the basis of two inconsistent pleas against the same defendants. It is also pertinent to note that without obtaining leave under Order 2 Rule 2 of the Code of Civil Procedure, the plaintiffs have filed the present suit, which is barred under Order 2 Rule 2 of the Code of Civil Procedure. The judgment reported in (2013) 1 Supreme Court Cases 625 [Virgo Industries (Eng.) Private Limited Vs. Venturetech Solutions Private Limited] relied upon by the learned counsel for the respondents squarely applies to the facts and circumstances of the present case. Therefore, the act of the plaintiffs in obtaining two interim orders against the defendants in two different suits on the basis of two inconsistent pleas is clearly

abuse of process of law and the Courts below rightly rejected the plaint on this ground."

11. He also relied upon the judgment of this Court reported in **(2014) 3 LW 898** in the case of ***S.Thirugnanasambandam vs. P. Kaliyaperumal and Ors.***, which held as follows :-

"12. It is true that the earlier suit, namely O.S.No.372/2002 on the file of the Additional District Munsif, Cuddalore and the present suit, namely O.S.No.2/2005 on the file of the Sub Court, Cuddalore, came to be filed in respect of the very same property. Order II Rule 2 CPC mandates that every suit shall include the whole of the claim, which the plaintiff is entitled to make in respect of the cause of action with a rider that the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court and that where the plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of that portion so omitted or relinquished. The bar for subsequent suit in respect of the portion of the claim omitted or relinquished is provided in sub clause (2) of Rule 2 under Order

II of CPC. For better appreciation Rule 2 of Order II CPC is extracted here-under:

" 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."

A reading of the said provisions will make it clear that omission to sue in respect of a relief or relinquishment of a portion of the claim arising on the basis of a cause of action incapacitates the

plaintiff to file a fresh suit for the omitted portion of the claim or relinquished part of the relief. The said bar is subject to one exception that in case omission to sue for some of the reliefs when a person is entitled to more than one relief is done with the leave of the court, then he can afterwards sue for any of the reliefs so omitted. In either of the cases, the claim or part of the claim must be based on one and the same cause of action. If the relief sought for in the subsequent suit is based on a different cause of action or a new cause of action, the bar provided under Order II Rule 2 CPC does not get attracted.

.....

19. In the case on hand, on the date of filing of the earlier suit, namely O.S.No.372/2002, the time stipulated in the agreement had expired. In addition, there was a notice and reply, which exhibit that the claim of the first respondent herein/plaintiff was refuted and denied by the appellant herein/defendant and the cause of action for filing the suit for specific performance had arisen along with the cause of action for filing of the earlier suit for permanent injunction. Still

the first respondent herein/plaintiff chose to file the earlier suit only for permanent injunction, that too without seeking the leave of the court under Order II Rule 2(3) to file a separate suit for the relief of specific performance. The ratio decided in Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd. squarely applies to the case on hand. In view of the above said judgment of the Hon'ble Supreme Court, the view expressed by the learned single judge of this court no longer reflects the correct proposition of law. For all the reasons stated above, this court comes to the conclusion that the present suit for specific performance, namely O.S.No.2/2005 on the file of Principal Sub Judge, Cuddalore is barred under Order II Rule 2 CPC because of the filing of the earlier suit, namely O.S.No.372/2002 on the file of the Additional District Munsif, Cuddalore. The first substantial question of law is answered accordingly"

This Court following the judgment of the Hon'ble Supreme Court of India reported in (2013) 1 LW 31 in the case of **Virgo Industries (Eng.) Private Limited Vs. Venturetech Solutions Private Limited** and held that the

subsequent suit is not permissible when the cause of action for latter 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 omitted relief. Further held that on the same cause of action, bar of filing of subsequent suit under Order 2 Rule 2 of CPC. Therefore, filing of second suit and the withdrawal of the earlier suit is abuse of process of Court.

12. In the case on hand, the respondent filed first suit for injunction restraining the petitioner from interfering with the respondent's possession of the suit property only to proceed with the construction. In the said suit, in the interim injunction petition, the petitioner filed his counter stating that construction agreement was terminated. Therefore, the respondent filed the present suit for recovery of money, in pursuant to the construction agreement, after issuance of fresh notice. Therefore, the cause of action as well as the relief sought for in both the suits are different with distinct relief as such the judgment cited by the learned counsel appearing for the petitioner are not helpful to the case on hand.

13. The learned counsel appearing for the respondent relied upon the very same judgment reported in **(2014) 3 LW 898** in the case of

S.Thirugnanasambandam vs. P. Kaliyaperumal and Ors., in which this

Court held as follows

"13. In this regard, the learned senior counsel for the first respondent/plaintiff relies on a judgment of a learned single judge of this court in M. Vijayalakshmi v. T. Shanmugam & Anr. reported in AIR 2011 MAD 88, wherein it was held that a suit for injunction not to interfere with the possession of the plaintiff in respect of the property regarding which he had entered into an agreement for sale with its owner(defendant therein), would not attract the bar provided under Order 2 Rule 2 CPC for a subsequent suit for the efficacious remedy of specific performance. Of course the said view of the learned single judge (Justice G. Rajasuria) was based on the observations made by the Hon'ble Supreme Court in Alka Gupta v. Narender Kumar Gupta AIR 2011 SC 9 : (2010) 10 SCC 141) holding that a suit for injunction from interfering with the possession of the purchaser under the agreement for sale will not attract the bar provided under Order II Rule 2 for a subsequent suit for specific performance. In

Alka Gupta v. Narender Kumar Gupta reported in (2010) 10 SCC 141), the Hon'ble Supreme Court has made the following observations:

The object of Order 2, Rule 2 of the Code is two fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2, Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action

The said view was expressed referring to the observations made by the Hon'ble Apex Court in an earlier case, viz. Gurbux Singh v. Bhooralal reported in AIR 1964 SC 1810, wherein it had been observed as follows:-

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 for the application of the bar."

This Court held that in the case of ***M.Vijayalakshmi v. T. Shanmugam & Anr*** reported in ***AIR 2011 MAD 88***, a suit for injunction not to interfere with the possession of the plaintiff in respect of the property regarding which he had entered into an agreement for sale with its owner, would not attract the bar provided under Order 2 Rule 2 of CPC for subsequent suit for the efficacious remedy of specific performance.

14. It was held only on the observations made by the Hon'ble Supreme Court of India, the case of ***Alka Gupta Vs. Narender Kumar Gupta*** reported in ***AIR 2011 SC 9*** holding that the suit for injunction from interfering with the possession of the purchaser under the agreement for sale will not attract the bar provided under Order II Rule 2 for a subsequent suit for specific performance. In the same judgment, the Hon'ble Supreme Court of India held that the object of Order 2, Rule 2 of the Code is two fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2, Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.

15. The above observations are squarely applicable to the case on hand, since the present suit has been filed on the different and distinct cause of action and not barred under Order 2 Rule 2 of CPC. In view of the above

discussions, this Court does not find any infirmity or illegality in the order passed by the Court below. However the trial Court viz., learned Principal District Judge, Villupuram, is directed to dispose the suit within a period of nine months from the date of receipt of copy of this Order.

16. Accordingly, this Civil Revision Petition stands dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

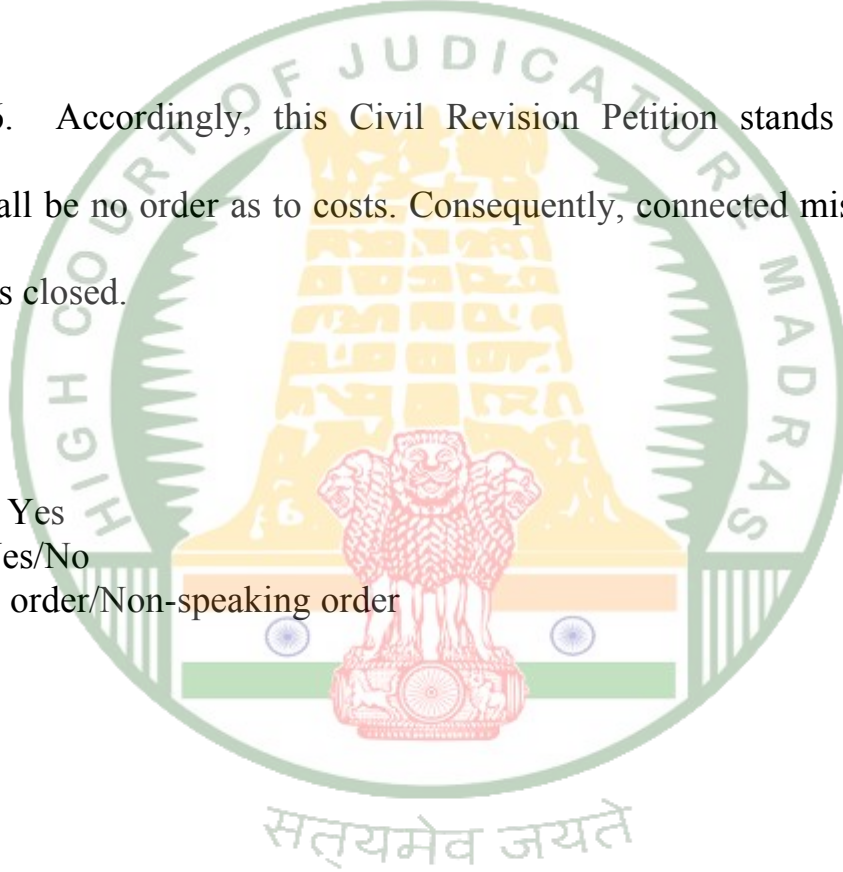
08.03.2021

Internet : Yes

Index : Yes/No

Speaking order/Non-speaking order

rts



WEB COPY

G.K.ILANTHIRAIYAN, J.

rts

To

1. The Principal District Judge,
Villupuram.
2. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.



C.R.P.(PD) No.3657 of 2017
and C.M.P.No.17018 of 2017

WEB COPY

08.03.2021