



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 16.08.2022

Pronounced on : 07.09.2022

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A.No. 1296 of 2004

And

C.M.P.No. 9571 of 2004

R.Kandaswamy ... Appellant/2nd defendant

Vs.

1. Pacha Goundar ... Respondent-1 / Plaintiff
2. Meena
3. Thilak Kumar
4. Thilagavathy
5. Pavithra
6. Mangalammal ... Respondents 2 to 6/Defendants 3 to 7

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Decree and Judgment dated 29.03.2004 in A.S.No. 51 of 2003 on the file of District Court, Nilgiris at Ooty



confirming the decree and Judgment dated 30.07.2003 in O.S.No. 269 of 1996 on the file of Sub Court, Ooty.

For Appellant : Mr. R.Subramanian

For 1st Respondent : Mr. S.K.Raghunathan

JUDGMENT

The second defendant in O.S.No. 269 of 1996 on the file of the Sub Court, Ooty, is the appellant herein.

2. The said suit in O.S.No. 269 of 1996 had been filed by the first respondent Pacha Gounder, seeking specific performance of an agreement of sale dated 10.03.1993 entered into between him and the first defendant J.Guruswamy with respect to the suit schedule property which has been described as lands measuring 0.39 acres in S.No. 311 and 0.48 acres in S.No. 369, totally 0.87 acres together with Tea plants and two labourer quarters at Adigaratty Village, Coonoor in Nilgiris District.



WEB COPY

3. By Judgment dated 30.07.2003, the Sub Judge, Udhagamandalam, had decreed the suit. Thereafter, the second defendant Kandasamy had filed A.S.No. 51 of 2003 before the District Court at Udhagamandalam. By Judgment dated 29.03.2004, the Appeal Suit was dismissed. The second defendant has then filed the present Second Appeal.

4. The Second Appeal had been admitted on the following substantial questions of law:

“i) Whether in law, are not the decree and Judgment of the Courts below vitiated in relying on the recitals in the unregistered lease agreement Ex.A-5 which is inadmissible under Section 49 of Registration Act and Section 35 of Stamp Act?;

(ii) Whether in law have not the Courts below over looked the admission of P.W.3 that Ex.B-2 was executed on 03.03.1993 which is anterior to 10.03.1993 Ex.A-1?”



WEB COPY

5. During the course of arguments, the following two additional substantial question of law had been framed:-

“i) Whether the second suit is barred under Order II Rule (2) Criminal Procedure Code?;

ii) whether the suit is maintainable without including the relief to declare the subsequent sale deed as null and void?.”

O.S.No. 269 of 1996 [Sub Court, Udhagamandalam]:

6. The suit was filed by the plaintiff Pacha Gounder claiming that he and the first defendant J.Guruswamy, had entered into an agreement of sale with respect to the suit property, namely, 0.87 acres of land together with Tea plants and also two labourer quarters at S.Nos. 311 and 369, Adigaratty Village, Coonoor in Nilgiris District. It was stated that the total sale consideration was Rs.1,31,500/- and an advance of Rs.45,000/- had been paid. Since the first defendant tried to dispossess the plaintiff, he had filed O.S.No. 154 of 1993 for permanent injunction



before the District Munsif Court at Coonoor. It was also stated that the plaintiff was ready with necessary amounts to pay the balance sale consideration. However, the first defendant sold the properties to the second defendant by sale deed dated 01.04.1993. It was stated that the second defendant was not a bona fide purchaser. It was therefore stated that specific performance must be directed of the agreement of sale dated 10.03.1993.

7. The first defendant in his written statement stated that he and E.L.Chennaiya jointly owned the suit property. He had entered into a lease deed with the plaintiff on 01.05.1992. The two labourer quarters were not included in the lease deed. There was a dispute which was referred to the Panchayat. The lease agreement was cancelled and the advance amount received was returned. Thereafter, the first defendant entered into an agreement of sale with the second defendant on 03.03.1993. To impress the seriousness of that agreement, he entered into a second agreement of sale with the plaintiff. Chennaiya was the scribe and the attesting witness. Subsequently, the second defendant Kandasamy came forward to purchase the property and in the Panchayat,



the advance amount received from the plaintiff was returned back.

8. It had been stated that he then conveyed the property to the second defendant by sale deed dated 01.04.1993. He stated that the plaintiff had not disclosed the correct facts and it was stated that the suit should be dismissed.

9. The second defendant in his written statement stated that there was no relief sought to set aside the sale deed in his favour. It was therefore stated that the said sale deed is binding on all the parties. It was stated that the suit should be dismissed.

10. The trial Court framed issue relating to specific performance of the agreement and invited the parties to adduce oral and documentary evidence.

11. During trial, the plaintiff was examined as PW-1 and two other witnesses were examined as PW-2 and PW-3. The first defendant was examined as DW-1 and the second defendant was examined as DW-3.



Four other witnesses were examined as DW-2, DW-4 and DW-6.

12. The plaintiff marked Exs. A-1 to A-10. Ex.A-1 was the agreement dated 10.03.1993, Ex.A-4 was the plaint in O.S.No. 154 of 1993 before the District Munsif Court, Coonoor, Ex.A-6 was the sale deed executed by the first defendant in favour of the second defendant dated 01.04.1993.

13. On the side of the defendants, Exs. B-1 to B-14 were marked. Ex.B-2 was the agreement of sale between the first and second defendants dated 03.03.1993. Ex.B3 was the proceedings of the Thasildar, Coonoor dated 03.06.1993, Exs. B-4 to B-10 were chitta extracts and kists receipts, Exs.B-11 and B-13 were documents relating to O.S.No. 154 of 1993 / District Munsif Court, Coonoor.

14. On the basis of the pleadings, oral and documentary evidence, the District Munsif, Coonoor, held that even prior to the agreement of sale, the plaintiff and the first defendant had an existing relationship by way of Ex.A-4 dated 01.05.1992 / a lease agreement. It was stated that



therefore it was only natural that an agreement of sale is also entered into between the parties. It was also found that the agreement had not been denied by the first defendant. An advance amount has also been paid. The plaintiff had also issued a pre-suit notice.

15. It was found that the sale in favour of the second defendant by the first defendant was not a valid transaction and was entered into only to defeat the rights of the plaintiff. It was further stated that since the agreement with the plaintiff was the prior agreement, he had every right to seek performance of the same and holding as above, the Civil Suit was decreed.

A.S.No. 51 of 2003 [District Court, Nilgiris, Ooty]:

16. The second defendant, who had purchased the property from the first defendant then filed A.S.No. 51 of 2003 before the District Court, Ooty. The District Judge, reappraised the evidence and proceeded to determine whether the plaintiff was entitled to the relief of specific performance. It was specifically found that the first defendant had



entered into a lease deed with the plaintiff on 01.05.1992 under Ex.A-5 and that he had entered into an agreement of sale with the second defendant on 03.03.1993 under Ex.B-2 and that he later entered into another agreement of sale on 10.03.1993 Ex.A-1. It was found that the plaintiff had issued a pre-suit notice, Ex.A-2 dated 31.03.1993 for which there was no reply. It was stated that it had been mentioned in the notice that the plaintiff was ready to settle the entire balance sale consideration. It was also found that the first defendant had not denied execution of the lease deed, Ex.A-5 and the agreement of sale, Ex.A-1. It was also found that the plaintiff had been put in possession of the property. It was also found that the proceedings of the panchayat had not been produced and what has been produced as Exs. A-7 to A-10, did not contain the date, place and under whose Chairmanship, the panchayat had been held. It was also found that the agreement in favour of the second defendant was a created document. Finally, the Appeal Suit was dismissed and the Judgment of the trial Court was upheld by Judgment dated 29.03.2004.

S.A.No. 1296 of 2004:



17. The second defendant then filed the Second Appeal before this Court.

18. The Second Appeal has been admitted on the following two substantial question of law:-

“i) Whether in law, are not the decree and Judgment of the Courts below vitiated in relying on the recitals in the unregistered lease agreement Ex.A-5 which is inadmissible under Section 49 of Registration Act and Section 35 of Stamp Act?;

(ii) Whether in law have not the Courts below over looked the admission of P.W.3 that Ex.B-2 was executed on 03.03.1993 which is anterior to 10.03.1993 Ex.A-1?”

19. Upon hearing the arguments of both the learned counsels and



with consent, the following two additional substantial questions of law have been framed:-

“i) Whether the second suit is barred under Order II Rule (2) Criminal Procedure Code?;

ii) whether the suit is maintainable without including the relief to declare the subsequent sale deed as null and void?.”

20. The parties shall be termed as plaintiff and the defendants. The plaintiff is the first respondent herein. The appellant is the second defendant herein. The first defendant had died and his legal representatives were already on record.

21. The plaintiff instituted the suit before the Sub Court at Udagamandalam, seeking specific performance of an agreement of sale dated 10.03.1993 entered into with him by the first defendant.

22. It was claimed by the plaintiff that even earlier by executing Ex.A-5 dated 01.05.1992, he and the first defendant had entered into a



lease agreement with respect to the very same lands. The lease period was for 5 years. It was claimed that the plaintiff was put in possession pursuant to the lease deed.

23. Perusal of the document, Ex.A5, lease deed, shows that it had been executed on a Rs.5/- stamp paper. It had not been registered. The total consideration under the lease deed was Rs.25,000/-. It was for five years. It was the claim of the first defendant that before the panchayat, the document had been cancelled and the amount had been returned. Either way the document must be registered. In the absence of registration, the document is inadmissible.

24. Section 17 of the Registration Act, 1908 is as follows:-

“17. Documents of which registration is compulsory.—(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the



Indian Registration Act, 1877, or this Act came or comes into force, namely:—

(a);

(b).....;

(c)

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

.....”

25. Section 49 (c) of the Registration Act is as follows:-

“49. Effect of non-registration of documents required to be registered.—No document required by section 17 1[or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—

© be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: [Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as



WEB COPY



evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.]

26. Section 35 of the Indian Stamp Act 1899 is as follows:-

“ 35. Instruments not duly stamped inadmissible in evidence, etc.—No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped: Provided that—

(a) any such instrument shall, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion



thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b)

(c)

(d);

(e) ”

27. Ex.A-5 lease deed is neither adequately properly stamped nor registered. It is inadmissible in evidence. Both the Courts below had committed grave error in law in examining the terms of Ex.A-5 and proceeding to decide issues in the suit on the same. With respect to the first substantial question of law, I hold that the Judgment and Decree of both the Courts below are vitiated for placing reliance on the recitals in Ex.A-5.

28. A further perusal of the facts show that the first defendant had pleaded negotiations under the aegis of a panchayat. Evidence to this regard has been advanced by PW-3. Documents cannot be executed and cancelled at the whims and fancies of any panchayat. Ex.A-5 lease deed



was said to have been so cancelled. But the document itself is inadmissible in evidence. The evidence of PW-3 becomes insignificant. The second substantial question of law is answered accordingly.

29. The facts further reveal that the plaintiff had earlier filed O.S.No. 154 of 1993 seeking permanent injunction to protect possession of the very same lands. That suit was filed before the District Munsif Court, Coonoor. The second defendant in that suit is the appellant herein and even in the plaint, it had been stated that the property was said to have been sold to the second defendant. That plaint also substantially states about the entering into the lease and entering into the agreement with the first defendant. The cause of action for seeking the relief of specific performance had arisen since the first defendant had, in violation of the agreement with the plaintiff sold the property to the second defendant. In that suit, the relief of specific performance was not sought. Leave was also not sought or granted reserving right to sue later for the relief of specific performance. The suit from which the present Second Appeal has emanated, namely, O.S.No. 269 of 1996 is therefore clearly barred under Order II Rule 2 Code of Civil Procedure.



30. Order II Rule 2 of is 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.”

31. In (2013) 1 SCC 625 [*Virgo Industries (Eng.) Private Ltd.,*

Vs. Venturetech Solutions Private Ltd.,] the Hon'ble Supreme Court stated as follows:-

“9. Order 2 Rule 1 requires every suit to



include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order 2 Rule 2 CPC makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order 2 Rule 2(2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the court is contemplated by Order 2 Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the court had been obtained. It is, therefore, clear from a conjoint



reading of the provisions of Order 2 Rules 2(2) and (3) CPC that the aforesaid two sub-rules of Order 2 Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit proved that at the time of omission to claim the particular relief he had obtained leave of the court in the first suit. ”

32. In 2020 14 SCC 110 [Vurimi Pullarao Vs. Vemari Vyankata Radharani and another], the Hon'ble Supreme Court had held as follows:-

“ 15. Order 2 Rule 2(1) is premised on the foundation that the whole of the claim which a plaintiff is entitled to make in respect of a cause of action must be included. However, it is open to the plaintiff to relinquish any portion of the claim in



WEB COPY



order to bring the suit within the jurisdiction of the court. Order 2 Rule 2(1) adopts the principle that the law does not countenance a multiplicity of litigation. Hence, a plaintiff who is entitled to assert a claim for relief on the basis of a cause of action must include the whole of the claim. A plaintiff who omits to sue in respect of or intentionally relinquishes any portion of the claim, shall not afterwards be entitled to sue in respect of the portion omitted or relinquished. This is the mandate of Order 2 Rule 2(2). Order 2 Rule 2(3) stipulates that a person who is entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs. However, a plaintiff who omits to sue for all the reliefs, without the leave of the court, shall not afterwards sue for any relief so omitted. The leave of the court will obviate the consequence which arises under Order 2 Rule 2(3). In the absence of leave being sought and granted, a plaintiff who has omitted to sue for any of the reliefs to which they were entitled to sue in respect of the same cause of action would



WEB COPY



be barred from subsequently suing for the relief which has been omitted in the first instance. The grant of leave obviates the consequence under Order 2 Rule 2(3). But equally, it is necessary to note that Order 2 Rule 2(2) does not postulate the grant of leave. In other words, a plaintiff who has omitted to sue or has intentionally relinquished any portion of the claim within the meaning of Order 2 Rule 2(2), shall not afterwards be entitled to sue in respect of the portion so omitted or relinquished.

16. The rationale underlying in Order 2 Rule 2 has been dealt with in several judgments including in the decision of the Privy Council in *Mohd. Khalil Khan v. Mahbub Ali Mian* [*Mohd. Khalil Khan v. Mahbub Ali Mian*, 1948 SCC OnLine PC 44 : (1947-48) 75 IA 121] , the Privy Council held : (SCC OnLine PC)

“(1) The correct test in cases falling under Order 2 Rule 2, is ‘whether the claim in the new suit is, in fact, founded upon a cause of



WEB COPY



action distinct from that which was the foundation for the former suit'. ...

(2) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment. ...

(3) If the evidence to support the two claims is different, then the causes of action are also different. ...

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical. ...

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour."

(emphasis in original)

17. In order to attract the applicability of the bar enunciated under Order 2 Rule 2, the cause of action on which



WEB COPY



the subsequent claim is founded ought to have arisen to the plaintiff when enforcement of the first claim was sought before the court. ”

33. It is clear that the cause of action for instituting the suit seeking specific performance had arisen even when filing the earlier suit for injunction owing to the fact that the first defendant had sold the property to the second defendant.

34. Thus the plaintiff should have sought permission to institute a suit for specific performance at a later date. He has to suffer the consequences for not seeking that relief. The third substantial question of law is answered that the suit is barred by under Order II Rule 2 of the Code of Civil Procedure.

35. When the property had already been sold and such sale had been effected even prior to the institution of that suit since that document created a cloud over the title of the plaintiff, a relief should have been sought to set aside that sale deed. Even if it is stated that such sale deed



is not binding on the plaintiff, still, the relief to cancel the sale deed should have sought by the plaintiff. In **2021 (4) SCC 786 [Deccan Paper Mills Company Ltd., Vs. Regency Mahavir Properties and Others]**, the Hon'ble Supreme Court had placed reliance on a Full Bench Judgment of the Madras High Court reported in **AIR 1960 Madras 1 [Muppudathi Pillai v. Krishnaswami Pillai]** and had held as follows:-

*“17. When it comes to Section 31(1), the important expression used by the legislature is “any person against whom a written instrument is void or voidable...”. An instructive judgment of the Full Bench of the Madras High Court reported as **Muppudathi Pillai v. Krishnaswami Pillai**.*

This judgment, after referring to Section 41, then referred to Section 39 of



WEB COPY



the Specific Relief Act, 1877 (which is the pari materia provision to Section 31 of the 1963 Act). The Court then went on to notice the distinction between Section 35 (which is the pari materia provision to Section 27 of the 1963 Act) and Section 39 of the Specific Relief Act, 1877 as follows :

“11. ... It may be noticed that the above section applies not merely to the case of an instrument which is voidable but also one that is void. Section 35 provides for the case of rescission of voidable contracts. It is evident that Section 39 covers not only a case contemplated under Section 35, but also a wider field, that is, a case of a void document, which under the law need not be set aside.”

36. The pronouncement of law is very clear. In view of the fact that the plaintiff did not seek the relief to set aside the sale deed in favour of the second defendant, the suit itself is not maintainable. The fourth substantial question of law is answered accordingly.



WEB COPY

37. In view of the above, I hold that both the Sub Judge, Udhagamandalam and the Principal District Judge, Udhagamandalam, had erred in granting the decree of specific performance overlooking basic fundamental principles enunciated in law. The suit as framed does not stand the scrutiny of this Court.

38. The Judgment and Decree of both the Courts have to be interfered with and are interfered with.

39. In result,

i) The Second Appeal is allowed with costs;

ii) The Judgment and Decree dated 29.03.2004 in A.S.No. 51 of 2003 on the file of District Court, Nilgiris at Ooty and the Judgment and Decree dated 30.07.2003 in O.S.No. 269 of 1996 on the file of Sub Court, Ooty, are set aside; and the suit stands dismissed.

iii) Consequently, connected Civil Miscellaneous Petition is closed.

07.09.2022
(2/2)

Index :Yes/No
Internet:Yes/No
vsg

To

1. The District Judge, Nilgiris at Ooty.
2. The Sub Judge, Ooty.



WEB COPY



27

C.V.KARTHIKEYAN, J.

vsg

**Pre-Delivery Judgment made in
S.A.No. 1296 of 2004
And
C.M.P.No. 9571 of 2004**

**07.09.2022
(2/2)**