



C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

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RESERVED ON: 07.09.2023

DELIVERED ON: 22.09.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.R.P.(PD)(MD).Nos.2152 to 2157 of 2014

CRP(MD).No.2152 of 2014:

1.M.Thamizharasu

T.A.Durairaj (died)

2.Sri Rangaraja Talkies (P) Ltd.,
Srirangam

3.Gnanam

4.Kannagi

5.Usha

6.V.Geetha

7.Shanthi

8.Ananthakrishnan

9.Mohana

10.K.Gopalan

1/17



C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

11.D.Ravi

...Petitioners

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Vs

1.M.Krishnan

2.Mohan @ Mohanraj

3.M.Bhaskaran

4.Tirupathy Kali Gopuram
Vaikundakoil Mutt.Represented by
Sri Mahant Chand Ramachandra Doss

....Respondents

(Cause title accepted vide order dated 19.09.2014)

PRAYER in CRP(MD).No.2152 of 2014: Civil Revision Petition filed under Article 227 of Constitution of India, to allow this civil revision petition thereby to set aside the fair and decreetal order dated 24.03.2014 made in I.A.No.30 of 1993 in O.S.No.356 of 1991 on the file of the First Additional Subordinate Judge, Trichirappalli and dismiss the same.

(In all revisions)

For Petitioners : Mr.T.Antony Arulraj
For Mr.D.Rajkumar

For R1 : Mr.R.Subramanian

For R2 & R3 : No appearance

For R4 : Mr.H.Lakshmishankar



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C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

COMMON ORDER

The first defendant, defendants 3 to 11 and the legal heirs of the second defendant in O.S.No.356 of 1991 on the file of the I Additional Subordinate Court, Tiruchirappalli are the petitioners in all the revision petitions.

2.The first respondent in the revision petition had filed O.S.No. 356 of 1991 for the relief of recovery of money towards refund of advance amount arising out of a sale agreement dated 12.12.1987. According to the plaintiff, he entered into an agreement on the above said date with the defendants who are the promoters and share holders of Sri Rangaraja Private Limited, Srirangam. The plaintiff had further pointed out that all the share holders of the said private limited company are the family members and they have agreed to transfer their shares to the plaintiff and the defendants have been appointed as their agents for entering into the agreement of sale.

3.Based upon the representation made by the defendants, the plaintiff is said to have entered into an agreement of sale. The plaintiff had further contended that the defendants have agreed to transfer all the shares



for a consideration of Rs.9,00,000/- and the defendants should vacate the lessee of the theatre and hand over actual possession to the plaintiff. On such handing over of actual possession, the balance sale consideration would be paid by the plaintiff.

4.The plaintiff had further contended that the pursuant to the said agreement, he had paid an advance of Rs.55,000/- on 12.12.1987 and further payments were made totalling to a sum of Rs.2,91,000/-. After getting possession from the tenant, the defendants evaded to hand over possession of the theatre and they were not prepared to perform their part of the contract. A legal notice was issued to the defendants on 12.09.1990 and those notices were returned unserved.

5.The plaintiff further contended that he had approached the defendants demanding performance of their part of the contract. The defendants had contended that the other share holders have not signed the agreement and they are not prepared to transfer their shares and they do not consent for transfer of the shares. The plaintiff further contended that the defendants had entered into an agreement by falsely representing that all the share holders have consented for transfer of their shares. Hence, the plaintiff had filed the suit for recovery of advance amount paid by him.



C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

6.The defendants had filed a written statement admitting the receipt of Rs.96,000/- alone. The defendants further contended that the plaintiff had not evinced any interest in transfer of the shares in his name and the plaintiff had committed the breach of terms of the agreement.

7.In the light of the said written statement, the plaintiff had filed the following applications:

(a)I.A.No.776 of 1992 to implead the defendants 3 to 14 who are the other share holders of the private limited company and Thiruppathi Kali Gopuram Vaikundakoil Mutt which is the owner of the land.

(b)I.A.No.30 of 1993 for amending the plaint to insert paragraph Nos.16 to 32 and also to amend the cause of action paragraph. The plaintiff further sought to amend the prayer in order to include the prayer for specific performance.

(c)I.A.No.1194 of 1997 has been filed to amend the petition in I.A.No.776 of 1992 to substitute the representation of the mutt.

(d)I.A.No.1195 of 1997 to amend the cause title in I.A.No.30 of 1993 to substitute the representation of the mutt.



C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

(e) I.A.No.1262 of 2003 to substitute the name of the representation of the mutt in I.A.No.30 of 1993.

(f) I.A.No.1263 of 2003 to substitute the representation of the mutt in I.A.No.776 of 1992.

8.The defendants and the proposed parties objected to these applications contending that the amendment sought for would completely change the cause of action. Once the plaintiff had filed a suit for refund of advance amount, thereafter, he cannot seek to amend the plaint incorporating the prayer for specific performance.

9.The proposed parties contended that when they were not signatories to the alleged agreement dated 12.12.1997, they cannot be made parties to the suit. They have also contended that the defendants in their individual capacity had received part of the sale consideration from the plaintiff and the company has not received any consideration whatsoever. The mutt which was sought to be impleaded had contended that they are not parties to the agreement and the mutt properties can never be the subject matter of the specific performance suit without permission from the statutory authorities. The trial Court however proceeded to allow all these applications. Challenging the same, the present civil revision



C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

petitions have been filed.

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10.The learned counsel for the revision petitioners had contended that only two individuals are parties to the sale agreement and there are no records to establish that the company had ever entered into an agreement with the plaintiff. That apart, when the plaintiff had abandoned his prayer for specific performance and proceeded to file a suit for recovery of advance amount, thereafter by way of amendment he cannot be permitted to again seek for specific performance.

11.The learned counsel for the revision petitioners had further contended that the shares belong to the individual share holders and therefore, unless they are made parties to the agreement, their shares cannot be the subject matter of an alienation by the company. They further pointed out that there are no records to establish that the company had resolved to sell away the shares of the individual. The shares being movable properties of the individual, it is for the respective individuals to enter into a sale agreement. But in the present case, two share holders have chosen to enter into an agreement with the plaintiff which is not binding upon the other share holders.



C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

12.The learned counsel for the petitioners had further contended that the alleged sale consideration is said to have been paid only to the original defendants and not to the company or other share holders who were not parties to the sale agreement. Therefore, at this length of time, the other share holders who were not parties to the sale agreement cannot be impleaded and the prayer for specific performance cannot be sought for as against them.

13.The learned counsel for the petitioners had relied upon the judgment of this Court reported in(**2010**) **7 MLJ 665 (Kochukunjan Pillai Vs. Sathiadhas)** and the judgment of the Hon'ble Supreme Court reported in **(1989) 1 SCC 76 (Jawahar Lal Wadhwa and another Vs. Haripada Chakroberty)** to impress upon the Court that once the plaintiff had chosen to abandon his prayer for specific performance and proceeded to file a suit for refund of advance amount, thereafter by way of amendment, the prayer for specific performance cannot be introduced. Hence, they prayed for allowing the revision petitions.

14.Per contra, the learned counsel appearing for the respondents/plaintiffs had contended that the merits of the amendment cannot be considered at the time of allowing the amendment petition.



C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

Whether proposed parties are necessary parties or not could be ascertained only during trial. He relied upon the agreement dated 12.12.1987 to contend that there is a specific reference about board resolution which permitted the original defendants to enter into an agreement on behalf of other share holders. The validity or genuineness of the said resolution has to be analysed only during trial. Merely because a suit for refund of advance amount was filed, it does not take away the right of the agreement holder to file a suit for specific performance on a later point of time.

15.The learned counsel for the respondents had also relied upon a judgment of the Hon'ble Supreme Court reported in **(1989) 1 SCC 76 (Jawahar Lal Wadhwa and another Vs. Haripada Chakroberty)** to contend that it is the option of the agreement holder to keep the agreement alive and to seek for specific performance provided he establishes his readiness and willingness. Hence, he prayed for dismissal of the revision petitions and to sustain the orders passed by the trial Court.

16.I have considered the submissions made on either side and perused the material records.

17.Admittedly, the lands belonging to the one of the proposed parties namely Thirupathy Kali Gopuram Vaikundakoil Mutt. Sri



C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

Rangaraja Private Limited had taken the said property on lease from the mutt and they have put up a theatre and running a business therein. They have leased out the theatre to a third party. The plaintiff is said to have entered into a sale agreement on 12.12.1987 with two original defendants who are the promoters and the share holders of Sri Rangaraja Private Limited.

18.As per averments in the plaint, the original defendants had informed the plaintiff that all the share holders are their close relatives and family members and they have agreed to transfer their shares. However, after a legal notice was issued for specific performance of the agreement, the original defendants have informed that the other share holders were not willing to sell their shares. Paragraph Nos. 11 to 14 of the plaint, is extracted as follows:

“11.The plaintiff approached the defendants and demanded them to perform their part of the contract. But they say, the value has been increased and that they are not prepared to transfer the share unless an enhanced price is given. They took shelter for that stating that the other Directors have not signed the agreement and that they are not prepared to transfer their shares and they do not have consent for transfer of the shares. The company being a private limited company, transfer



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of shares cannot be effected without the consent of all shareholders.

12.The defendants entered into the agreement by falsely representing that all the shareholders have consented for transfer of their shares.

13.The plaintiff submits that even though he was ready and willing to perform his part of the contract, now to wriggle out the situations, the defendants are giving out that the other shares are not willing for transfer.

14.Hence, the plaintiff has no other option except to file this suit for recovery of the amounts advanced by him.”

19.A perusal of the plaint averments in the above said paragraphs will clearly establish that the plaintiff had reconciled and agreed with the contentions of the original defendants to the effect that the other share holders (who are not signatories to the agreement) are not prepared to transfer their shares. The plaintiff had further alleged that by false representation, the original defendants have entered into an agreement. This clearly reveals that the plaintiff had accepted the factual situation namely breach of contract by the original defendants and he wanted to recover the advance amount from the original defendants.



20.The Hon'ble Supreme Court in a judgment reported in **(1989)**

1 SCC 76 (Jawahar Lal Wadhwa and another Vs.Haripada Chakroborty) in Paragraph No.4 has held as follows:

“4.....It is settled in law that where a party to a contract commits an anticipatory breach of the contract, the other party to the contract may treat the breach as putting an end to the contract and sue for damages, but in that event he cannot ask for specific performance. The other option open to the other party, namely, the aggrieved party, is that he may choose to keep the contract alive till the time for performance and claim specific performance but, in that event, he cannot claim specific performance of the contract unless he shows his readiness and willingness to perform the contract.....”

21.The Hon'ble Division Bench of our High Court in a judgment reported in **1983 (1) MLJ 467 (H.G.Krishna Reddy and Co., Vs. M.M.Thimmiah and another)** in Paragraph No.35 has held as follows:

“35.----- We therefore hold that assuming Ex.P1 constituted a concluded contract for sale, the acceptance of the refund amount of Rs.13,000 by the first respondent waived his right to enforce the contract and that his right cannot be



C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

WEB COPY

preserved merely because he had accepted the amount ' without prejudice' to his right. ”

22.A learned Single Judge of this Court in a judgment reported in **2006 (1) CTC 809 (E.A.Thirugnanam Vs. V.P.Rajagopal)** in Paragraph No.28 has held as follows:

“28. Now I have to consider the effect of filing the suit by the plaintiff seeking refund of the advance amount paid by him and whether it will amount to abandoning his right in the agreement of sale to seek specific performance of the agreement. As stated above, the plaintiff had filed the suit in O.S. No. 474 of 1988 for refund of the advance amount on untenable grounds and he had not accepted the offer of the defendant to execute the sale deed. This in my considered view, will amount to abandoning the right of the plaintiff under the agreement to seek specific performance of the same.....”

23.A learned Single Judge of this Court in a judgment reported in **2010 (2) MWN (Civil) 168 (Kochukunjan Pillai Vs. Sathiadhas)** after following the judgment of the Hon'ble Supreme Court reported in **(1989) 1 SCC 76 (Jawahar Lal Wadhwa Vs.Haripada Chakroborty)** had proceeded to hold that once the plaintiff had elected his remedy to claim the return of advance, he cannot be permitted to amend the plaint and to



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include a prayer for specific performance.

24.A careful perusal of the judgments cited above will clearly indicate that once the plaintiff /agreement holder had decided to claim the refund of the advance amount by way of filing a money suit, it clearly reflects the mind of the plaintiff that he has abandoned his prayer for specific performance. This would also reveal that the plaintiff had not only terminated the contract but also he is not ready and willing to perform his part of the contract in view of certain unforeseen circumstances.

25.Once the prayer for specific performance is not prayed and the prayer for refund of advance alone is sought for, thereafter, the plaintiff cannot amend the plaint in order to incorporate a prayer for specific performance which he had already abandoned. In the present case, a combined reading of paragraph Nos.11 to 14 of the plaint will clearly indicate that the plaintiff had accepted the contention of the defendants that the other share holders are not willing to sell their shares and proceeded to file a suit for recovery of advance amount.

26.All the other applications mentioned in the preceding paragraphs are on the basis of amendment of plaint for seeking a prayer of specific performance. If the said prayer could not be granted, the



C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

impleading of the other share holders and the mutt would not arise. It is not the case of the plaintiff that the shares belong to the company. It is evident that the shares are held by the individual share holders. When the individual share holders were not parties to the sale agreement, they can never be compelled to sell their shares. Though the agreement dated 12.12.1987 speaks about the resolution passed by the company authorising the original defendants to deal with the shares, no such document has been placed on records.

27. In view of the above said deliberations, this Court is of the view that the trial Court had erroneously allowed these applications which completely change the cause of action. The orders impugned in all the revision petitions are set aside. All the revision petitions stand allowed. No costs.

22.09.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

To

1. The I Additional Subordinate Court,
Tiruchirappalli
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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C.R.P.(PD)(MD).Nos. 2152 to 2157 of 2014

R.VIJAYAKUMAR, J

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Pre-delivery common order made in
C.R.P.(PD)(MD).Nos.2152 to 2157 of 2014

22.09.2023