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THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.7.2024

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE R.SAKTHIVEL
A.S.No.357 of 2017
and C.M.P.No.13535 of 2017

E.Sathish Kumar (Died)
Rukmani

...Appellant

Vs.

1.S.Murugesan
2.Murugar Selvi
3.Dhina Easwar
[R3 declared as major and his mother
- Mrs.Murugar Selvi - R2 discharged
from guardianship vide Court dated
23.08.2022 made in CMP.No.13921
of 2022 by MDJ and SMJ]

...Respondents

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure read with Order XLI Rule 1 of the Code of Civil Procedure, praying to set aside the order and decretal order dated 21.12.2015 made in I.A.No.1636 of 2009 in O.S.No.946 of 2004 passed by the Principal District Judge, Coimbatore.

(Prayer amended vide order of this Court dated 14.03.2023 made in C.M.P.No.3968 of 2023 in A.S.No.357 of 2017 by SVNJ & RKMJ)

For Appellant	:	Mr.P.Valliappan, SC for M/s P.V.Law Associates
For Respondent No.1	:	Mr.Umasuthan
For Respondent Nos.2 & 3	:	Mr.L.Mouli

J U D G M E N T(Judgment was delivered by **R.SUBRAMANIAN,J**)

This appeal is as against the order of the learned Principal District



Judge, Coimbatore dated 21.12.2015 made in I.A.No.1636 of 2009 in O.S. No.946 of 2004 rejecting the plaint on the ground that the suit is barred under Order II Rule 2 of the Civil Procedure Code (for short, the CPC).

2. The suit is for specific performance of the agreement of sale dated 02.6.2000, in and by which, the first defendant had agreed to sell the suit property for a consideration of Rs.1,50,00,000/- and received an advance amount of Rs.1,00,000/-.

3. The essential terms of the said agreement are as follows:

(i) The first defendant should negotiate with Vijaya Bank and determine the amount payable by him to the bank for the borrowing of a sum of Rs.50,00,000/- to run M/s.Gokulam Spinners and the plaintiff should discharge the debt, which was determined at Rs.71 lakhs as on that date, within a period of one month from the date of intimation of the amount due to the bank by the first defendant.

(ii) The defendant should pay the debts due to the seven 3rd party creditors totalling to a sum of Rs. 45,13,302/- along with interest.

(iii) The defendant should also clear all the debts that were not mentioned in the agreement incurred prior to 02.6.2000 and the debts incurred by the plaintiff after 02.6.2000 would not bind the defendant; and

(iv) The total period for performance of all these acts was fixed as 96 days. Within 96 days, if the all the debts were cleared



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and if the first defendant failed to execute the sale deed, the plaintiff would be entitled to be put in possession to the suit property. On the contrary, if the plaintiff failed to clear the debts within the said 96 days, the agreement would stand cancelled automatically, which included forfeiture of the advance amount paid.

4. The plaintiff instituted the suit on 28.01.2001 praying a decree for specific performance. Subsequently, the plaint was amended on 14.12.2009 to incorporate the relief of refund of advance. As per the amendment made in I.A.No.1668 of 2009 dated 14.12.2009, the relief of refund of advance amount was incorporated on 14.12.2009.

5. The first defendant filed the written statement on 19.3.2003. The main contention made in the written statement was that the present suit was barred under Order II Rule 2 of the CPC, the plaintiff already filed two other suits namely (i) O.S.No.85 of 2001 on the file of the Subordinate Court, Coimbatore seeking a decree for mandatory injunction directing the Tamil Nadu Electricity Board to restore the service connection to the suit property and (ii) O.S.No.277 of 2001 on the file of the Second Additional District Munsif Court, Coimbatore seeking a decree for permanent injunction restraining the first defendant from interfering with the plaintiff from running the textile mill smoothly.



6. During the pendency of the present suit, the plaintiff died and his legal heirs were brought on record. It is relevant to note that defendants 2 and 3/respondents 2 and 3 are none other than the wife and the son of the original plaintiff – Mr.E.Sathishkumar.

7. According to the first defendant, the plaintiff had the cause of action for filing the present suit for specific performance even on the date of filing the first suit namely O.S.No.85 of 2001, which was instituted in January 2001 and therefore, the suit for specific performance filed later is hit by the provisions of Order II Rule 2 of the CPC. An application under Order II Rule 2 of the Code of Civil Procedure 1908 was also filed by the defendant seeking rejection of the plaint in I.A.No: 1636/2009. The said application was resisted by the plaintiff contending that the cause of action for the suit for specific performance being completely different from the cause of action for the earlier suits for injunction, there is no question of the suit being barred under Order II Rule 2 of the Code of Civil Procedure 1908.

8. In support of his contentions, reliance was placed by the learned counsel who appeared for the plaintiff before the Trial Court on the judgments of this Court (i) in the case of ***Periyasamy Vs. Lakshmi Nadesan*** [reported in 2010 (2) CTC 184] and (ii) in the case of ***Kumarayee Ammal***



Vs. M.Ramanathan rep. by his Power Agent S.P.Kathiresan [reported in 2007 (4) MLJ 1145].

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9. However, the Trial Court accepted the claim of the first defendant and rejected the plaint on the ground that the suit is barred under Order II Rule 2 of the CPC.

10. The question of bar for filing a suit for specific performance under Order II Rule 2 of the CPC is no longer *res integra*.

11. This issue was considered by the Hon'ble Supreme Court in the case of ***Inbasegaran vs. S.Natarajan (Dead) through legal representatives*** [reported in **AIR 2015 SC (Supp.) 1591**] wherein the Hon'ble Supreme Court held in Paragraph Nos. 26 and 33 as follows:

"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 of the CPC. However, when the precise cause of action upon 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.

*33. Further, taking into consideration all these facts, we are of the considered opinion that the conclusion arrived at by the High Court that the suit is barred under **Order 2 Rule 2 CPC** cannot be sustained in law."*

12. The same issue was considered in the case of ***Rathinavathi vs. Kavitha Ganashamdas*** [reported in **(2015) 5 SCC 223**] wherein the Hon'ble Supreme Court observed as follows:

*"26. One of the basic requirements for successfully invoking the plea of **Order II Rule 2 of CPC** is that the defendant of the second suit must be able to show that the second suit was also in respect of the same cause of action as that on which the previous suit was based. As mentioned supra, since in the case on hand, this basic requirement in relation to cause of action is not made out, the defendants (appellants herein) are not entitled to raise a plea of bar contained in*



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Order II Rule 2 of CPC *to successfully non suit the plaintiff from prosecuting her suit for specific performance of the agreement against the defendants.*

27. *Indeed when the cause of action to claim the respective reliefs were different so also the ingredients for claiming the reliefs, we fail to appreciate as to how a plea of Order II Rule 2 could be allowed to be raised by the defendants and how it was sustainable on such facts.*

30. *Since the plea of Order II Rule 2, if upheld, results in depriving the plaintiff to file the second suit, it is necessary for the court to carefully examine the entire factual matrix of both the suits, the cause of action on which the suits are founded, reliefs claimed in both the suits and lastly the legal provisions applicable for grant of reliefs in both the suits."*

13. Again, the very same issue was considered by the Hon'ble Supreme Court in the case of ***Sucha Singh Sodhi (Dead) through Legal Representatives vs. Baldev Raj Walia*** [reported in (2018) 6 SCC 733] wherein the Supreme Court held that mere filing of the suit for permanent injunction would not operate as a bar for filing a suit for specific performance. Since the judgment of the learned Principal District Judge is



dated 21.12.2015 and the attention of the learned Principal District Judge was not drawn to the pronouncements of the Supreme Court in the cases of ***Inbasegaran and Rathinavathi***, the learned Principal District Judge had chosen to follow the judgments of this Court, which are no longer good law.

14. The learned counsel for the first respondent would draw our attention to the judgment of the Supreme Court in the case of ***State Bank of India vs. Gracure Pharmaceuticals Limited*** [reported in 2014 (3) SCC 595].

15. The judgment in the case of ***Gracure Pharmaceuticals Limited*** is not related to the suit for specific performance. Therefore, it may not apply to the facts of this case.

16. Similarly the judgment of the Hon'ble Supreme Court in the case of ***Virgo Industries (Eng.) P. Ltd. vs. Venturetech Solutions P.Ltd.*** [reported in (2012) 5 CTC 359], relied upon by the learned counsel for the first respondent also is of no help to the contention of the first respondent.

17. In view of the subsequent pronouncements of the Hon'ble Supreme Court, we are unable to sustain the order of the learned Principal District Judge.

18. Accordingly, the appeal stands allowed and the order of the learned Principal District Judge, Coimbatore in I.A.No.1636 of 2009 in



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O.S.No.946 of 2004 is set aside. The suit in O.S.No.946 of 2004 shall stand restored to the file of the learned Principal District Judge, Coimbatore and the same shall be disposed of on merits and in accordance with law.

No costs. Consequently the connected miscellaneous petition is closed.

(R.S.M., J.) (R.S.V., J.)
03.7.2024

msv
Index : Yes
Internet : Yes
Neutral Citation : Yes
Speaking order

To
The Principal District Judge,
Coimbatore.

R.SUBRAMANIAN,J
and
R.SAKTHIVEL,J

msv



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