

(2016) 06 MAD CK 0038

In the Madras High Court

Case No : S.A. No. 858 of 2014 and M.P. No. 1 of 2014

Chemplast Sanmar Limited, Chennai 600 086

APPELLANT

Vs

Senthamizhselvi

RESPONDENT

Date of Decision : 30-06-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 7 Rule 11, 100

Citation : (2016) 4 CTC 344 : (2016) 2 MadWN(Civil) 722 : (2016) 6 MLJ 172

Hon'ble Judges : Mr. K. Ravichandra Baabu, J.

Bench : Single Bench

Advocate : Mr. Vijayanarayanan, Sr. Counsel for Mr. R. Parthiban, Advocate, for the Appellant; No appearance, for the Respondent

Final Decision : Allowed

Judgement

1. The plaintiff is the appellant. This Second appeal has arisen out of the order passed in an application filed under Order 7, Rule 11 (d), C.P.C. for rejection of the plaint. The trial court allowed the application and the Appellate Court confirmed the said order.

2. The subject matter suit viz., O.S.No.122 of 2008 was filed by the appellant herein seeking for specific performance of an agreement of sale; for declaration to declare sale deed, dated 24.1.2008 executed by the first defendant in favour of the second defendant as illegal, null and void and for permanent injunction restraining the defendants from interfering with the appellant's peaceful possession and enjoyment of the suit property.

3. Before this suit, the appellant earlier filed a suit in O.S.No.28 of 2008 which was later renumbered as O.S.No.90 of 2010 for permanent injunction restraining the very same defendants from interfering with their peaceful possession and enjoyment of the suit property. The said suit for injunction is still pending. However the plaint in the subsequent suit, seeking for specific performance of agreement of sale and for other reliefs as stated supra, came to be rejected at

the instance of the defendants on the sole ground that the present suit is barred under Order 2, Rule 2 C.P.C.

4. Challenging the concurrent judgment and decree of the both the Courts below, this Second Appeal is filed before this Court and the same was admitted on 15.9.2014 by raising the following substantial question of law.

""Whether the Courts below erred in rejecting the plaint on the basis of disputed questions of fact and law which could only have been decided after letting in evidence at the stage of trial and final disposal ?

5. On admission, notice was ordered to the respondents. Despite service of notice to them, they have chosen not to appear either in person or through their counsel before this Court. The matter is listed today for final hearing, by printing the names of the respondents in the cause list. None appears for them.

6. The learned Senior counsel Mr. Vijaynarayanan appearing for the appellant submitted that both the Courts below have concurrently erred in law in rejecting the plaint on an erroneous view of facts and circumstances and application of law. He contended that the second suit viz., present suit for specific performance and for other reliefs is not hit by Order 2, Rule 2 C.P.C., as the cause of action for both the suits is not one and the same as found by the Courts below. Thus he submitted that the very relief sought for in the second suit including the relief of declaration to declare that the sale deed executed by the first defendant in favour of the second defendant as null and void, would go to show that the second suit is not filed based on the same set of cause of action as claimed in the earlier suit for bare injunction.

7. The learned Senior counsel in support of his submission relied on two decisions of the Apex Court reported in 2014(6) CTC 333 (Rathnavathi & Another v. Kavita Ganashamdas) and 2014(6) CTC 445 (Inbasegaran And Another v. S.Natarajan (Dead) thr. L.Rs.).

8. Heard the learned Senior counsel appearing for the appellant and perused the materials placed before this Court.

9. Since the issue involved in this case as raised in the substantial question of law lies in a narrow compass, it is not necessary for this Court to go into the merits of the claim made by the appellant in both the suits and give a finding on the same as it is for the trial Court to ultimately consider and decide on merits, if this court in this appeal concludes that the rejection of the plaint is bad. Therefore, this Court has to see as to whether the rejection of the plaint of the present suit, which is the one for specific performance and for other reliefs as stated supra, is sustainable in law.

10. It is specific case of the appellant that they entered into an agreement of sale with the first defendant on 24.1.2007 in respect of the suit property and in pursuant to such agreement, the appellant was also put in possession of the same on the very same day. It is contended that the said agreement of sale was

registered followed by execution of an irrevocable Power of Attorney, dated 23.7.2007. It is stated by the plaintiff that during the second week of February, 2008, there was an attempt to interfere with their possession and enjoyment of the suit property by the defendants and therefore, they filed the first suit for bare injunction. It is their further case that subsequent to the execution of the said agreement of sale, the first defendant, in violation of such agreement, executed a sale deed in favour of the second defendant on 24.1.2008. Therefore, they filed the present suit seeking for the reliefs as stated supra.

11. Now the issue for consideration based on the substantial question of law framed is as to whether the present suit is hit by Order 2, Rule 2 C.P.C. as held by the courts below. For answering such question, it is better to refer and find out whether the cause of action disclosed in both the suits is one and the same or not. For such purpose, the cause of action as referred to in the plaint filed in O.S.No.28 of 2008 (renumbered as O.S.No.90 of 2010) and O.S.No.122 of 2008 are extracted as hereunder:

""O.S.No.28 of 2008:

The cause of action for the suit arose on 24th January, 2007 when the plaintiff entered into an agreement for sale at Cuddalore, on 26th March when the defendant executed an irrevocable power of attorney in favour of the plaintiff, on 7th September, 2007 when the sale agreement was registered, on and from the second week of February, 2008 when the defendants have been attempting to interfere with the plaintiff's peaceful possession and enjoyment of the suit property and on all dates when the threat of dispossession continues and at Cuddalore within the jurisdiction of this Court.

O.S.No.122 of 2008:

The cause of action for the suit arose on and from 24th January 2007 when the first defendant entered into the Agreement for sale with the plaintiff on 26th March, 2007 when the first defendant executed the irrevocable Power of Attorney in favour of the plaintiff and when the payments were made under the Agreement for sale. On 7th September, 2007 when the agreement for sale was registered on 24th January, 2008 when the sale deed was executed by the first defendant in favour of the second defendant, on and from the 2nd week of February 2008 when the plaintiff came to know of the impugned sale deeds, and on all dates when the first defendant has failed to perform her part of the contract and at Thyagavalli Village, Cuddalore District within the jurisdiction of this Court."

12. Perusal of the above cause of action in both the suits and the circumstances under which they are filed and the reliefs sought for therein would go to show without any doubt that both the suits were not filed on the same cause of action even though part of such cause of action in the latter suit may be one and the same. Needless to say that for deciding the issue as to whether the subsequent suit is hit by Order 2, Rule 2 , C.P.C., that too while considering the application

filed under Order 7, Rule 11 CPC, the facts and circumstances as well as the cause of action set out in the plaint of both the suits alone should be taken into consideration. It is also well settled that the grounds for rejection of the plaint as contemplated under Order 7, Rule 11 must be evident apparent on the face of the plaint and not to be culled out from the case of the defendant as projected by him.

13. The learned Senior counsel for the appellant pointed out that the plaintiff's case in the first suit is that in pursuant to the agreement of sale followed by handing over the possession of the suit property, a threat was made to interfere with their possession of the suit property. Thus it is evident that the suit for bare injunction was filed based on such cause of action that was available on the date of filing the said suit. Moreover, plaintiff has also specifically stated in the plaint of the first suit that they are reserving their right to file specific performance suit latter against the first defendant. It is the case of the plaintiff in the second suit that during the pendency of the agreement, the first defendant executed the sale deed in favour of the second defendant on 24.1.2008 and therefore, apart from seeking the relief of specific performance of agreement of sale, dated 24.1.2007 they also sought the relief of setting aside the sale deed dated 24.01.2008 executed by the first defendant in favour of the second defendant. Considering the above stated circumstances as set out in the plaint, it is evident that the second suit was on different set of cause of action except on the relief of injunction is concerned. Both the Courts below have failed to consider this aspect and erroneously allowed the application and rejected the plaint. Even otherwise, I am of the firm view that the question as to whether the subsequent suit is hit by Order 2, Rule 2 C.P.C. is not a simple question of law and on the other hand, it is a mixed question of law and fact which under normal circumstances, only has to be gone into at the time of trial, unless the plaint on the face of it, discloses that the second suit is hit by Order 2, Rule 2 C.P.C.

14. The learned Senior counsel for the appellant relied on the decision of the Apex Court reported in 2014(6) C.T.C. 333 (supra) in support of his contentions.

15. A perusal of the facts and circumstances of the above said case would show that they are almost similar to the facts and circumstances of the present case. In that case also the first suit was filed for bare injunction and second suit was filed for specific performance of agreement of sale. The Apex Court rejected the contention of the defendants that the second suit is hit by Order 2, Rule 2 C.P.C. One more additional fact in that case is that both the suits were entertained by the trial Court and thereafter, judgment and decree were passed in both the suits after trial which came upto the Honourable Supreme Court wherein the above decision was rendered. For proper appreciation, the following paragraphs of the above decision are relevant to be quoted:

"9. On 07.01.2000, the plaintiff filed a civil suit being OS No.223/2000, initially against 3 defendants for seeking permanent injunction restraining the defendants jointly and severally from interfering in plaintiff's possession over the

suit house. In substance, case of the plaintiff was that she entered into an agreement on 15.02.1989 with defendant no. 2 to purchase the suit house for Rs. 3,50,000/- and paid a sum of Rs. 50,000/- to defendant no. 2 by way of advance towards the sale consideration. It was alleged that the plaintiff was accordingly placed in actual physical possession of the suit house and since then she has been in possession of the suit house.....It was alleged that defendant no. 1, who is a total stranger to the suit house and having no right, title and interest in the suit house, on 2.1.2000 visited the suit house along with defendant no. 2 and some other unwanted elements and threatened the plaintiff to dispossess her from the suit house.

10. On seeing the hostile attitude of defendant nos. 1 and 2 and their associates, the plaintiff immediately lodged a complaint in the concerned police station. Since police authorities did not take any action, which was required of, the plaintiff filed the aforesaid civil suit for permanent injunction restraining the defendants from interfering in her peaceful possession over the suit house. The plaintiff also averred that she reserved her right to file a suit for specific performance of agreement against the defendants.

12. On 31.03.2000, the plaintiff filed another civil suit being OS No. 2334 of 2000 in the Court of City Civil Judge, Bangalore against the defendants for specific performance of agreement dated 15.02.1989 in relation to the suit house.

16. The defendants also contested the suit on two legal grounds. Firstly, it was contended that the suit was not maintainable, as the bar contained in Order 2, Rule 2 of Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") did not permit the plaintiff to file the suit for specific performance of agreement in question against the defendants. It was alleged that relief to claim specific performance of agreement was available to the plaintiff when she filed the first suit (OS No.223/2000) for permanent injunction against the defendants. Yet, the plaintiff failed to claim the relief in the first suit, consequently, the second suit filed to claim specific performance of agreement in question is hit by rigor contained in Order 2, Rule 2 of CPC. It is now barred and hence liable to be dismissed as not maintainable.

17. The trial court consolidated both the suits for trial. Issues were framed. Parties adduced evidence. The trial court vide judgment/decreed dated 25.8.2009 though answered some issues in plaintiff's favour but eventually dismissed the civil suits. It was held that the agreement dated 15.02.1989 was executed between the plaintiff and defendant no. 2 for sale of suit house; that the plaintiff was not placed in possession of suit house pursuant to agreement in question; that the plaintiff was not ready and willing to perform her part of the agreement; that suit is barred by limitation; that the plaintiff was not entitled to claim the relief for specific performance of agreement; that the plaintiff was not entitled to claim the relief for grant of permanent injunction; that defendant no. 1 is a bona fide purchaser of the suit house for value; that the plaintiff was not entitled to challenge the sale deed dated 9.2.1998, that the suit was hit by the bar

contained in Order 2, Rule 2 of CPC because the plaintiff did not obtain leave to file second suit for specific performance while filing the first suit for grant of permanent injunction against the defendants in relation to the suit house.

26. Coming first to the legal question as to whether bar contained in Order 2, Rule 2 of CPC is attracted so as to non suit the plaintiff from filing the suit for specific performance of the agreement, in our considered opinion, the bar is not attracted.

27. At the outset, we consider it apposite to take note of law laid down by the Constitution bench of this Court in *Gurbux Singh v. Bhooralal*, AIR 1964 SC 1810, wherein this Court while explaining the true scope of Order 2, Rule 2 of CPC laid down the parameters as to how and in what circumstances, a plea should be invoked against the plaintiff. Justice Ayyangar speaking for the Bench held as under:

"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."

(Emphasis supplied)

29. In the instant case when we apply the aforementioned principle, we find that bar contained in Order 2, Rule 2 is not attracted because of the distinction in the cause of action for filing the two suits. So far as the suit for permanent injunction is concerned, it was based on a threat given to the plaintiff by the defendants to dispossess her from the suit house on 2.1.2000 and 9.1.2000. This would be clear from reading Para 17 of the plaint. So far as cause of action to file suit for specific performance of agreement is concerned, the same was based on non performance of agreement dated 15.2.1989 by defendant no. 2 in plaintiff's favour despite giving legal notice dated 6.3.2000 to defendant no. 2 to perform her part.

30. In our considered opinion, both the suits were, therefore, founded on different causes of action and hence could be filed simultaneously. Indeed even the ingredients to file the suit for permanent injunction are different than that of the suit for specific performance of agreement."

16. The above categorical finding rendered by the Apex Court and the law laid down therein under similar circumstances clearly supports the case of the appellant herein.

17. The next decision relied on by the learned Senior counsel for the appellant is reported in 2014(6) C.T.C. 445 (supra) wherein at paragraph 26, it has been observed by the Apex Court 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.

18. In fact, I myself considered the very same issue in a Civil revision petition wherein, by following the decision of the Apex Court in Rathnavathi case, 2014(12) SCALE 386, it was held that the subsequent suit is not hit by Order 2, Rule 2 C.P.C. The said decision is reported in 2015(1) LW 161, T.P. Natarajan v. P. Selvakumar. In another decision reported in 2015(3) CTC 259, P. Shyamala v. Ravi, a learned Single Judge of this court has observed at paragraph No.13 as follows:

"13. The main submission made by the learned Senior Counsel appearing for the Defendant that the present suit is hit by Order 2, Rule 2, CPC is only a technical bar and as such, as to whether the suit is hit by Order 2, Rule 2, C.P.C. has to be decided only at the time of trial. In fact, the judgments relied on by the learned counsel appearing for the defendant in this regard are not on an Application filed under Order 7, Rule 11, C.P.C., except two judgments relied upon by the learned Senior Counsel appearing for the plaintiff reported in N.V. Srinivasa Murthy and others v. Mariyamma (dead) by proposed LR's. and another, 2005(5) SCC 548 and State Bank of India v. Gracure Pharmaceuticals Limited, 2014(3) SCC 595. A careful reading of the said judgments would show that on a perusal of the pleadings found in the plaint, the Hon'ble Supreme Court has come to the conclusion that the suits are hit by Order 2, Rule 2, C.P.C. and since from the averments made in the plaint in those cases themselves would show that the plaintiffs in that suit have relinquished a portion of their claim in the earlier suits though the cause of action for making such a claim was available to the plaintiff while filing the earlier suits. In the instant case, absolutely no such averment is available in the plaint. Unless the averment in the plaint shows that

the plaintiff has deliberately omitted to make a claim in the earlier suit in spite of the fact that the cause of action for making such a claim was available even at the time of filing of the earlier suit, the plaint cannot be rejected on the ground that the suit is hit by Order 2, Rule 2, CPC based on the defence taken by the defendants."

19. In this case, I do not find any deliberate omission on the part of the plaintiff to make a claim in the earlier suit. Further, in a case of this nature wherein the possession of the suit property is said to have been handed over to the agreement holder, it is not an unusual situation of sudden interference by the land owner warranting the agreement holder to file a suit for bare injunction. Therefore if any such situation arises, the agreement holder cannot be precluded from claiming or seeking an immediate and emergent relief first in order to prevent further damage or abuse. Therefore, filing of such suit for bare injunction also by reserving the right to file a comprehensive suit later cannot be construed or considered as the one arising out of same cause of action in order to bring it under the hammer of Order 2, Rule 2 C.P.C.

20. Considering the above stated facts and circumstances and considering the case laws discussed as above, I am of the firm view that the rejection of the plaint by the trial Court which was confirmed by the appellate Court is totally erroneous and against law.

21. Accordingly, the substantial question of law raised in the appeal is answered in favour of the appellant. It is made clear that this Court is not expressing any view on the merits as claimed by the appellant as it is for the appellant to establish the same before the trial Court in both the suits.

22. Consequently, the Second Appeal is allowed and the plaint in O.S.No.122 of 2008 is restored. The trial Court is directed to take up the suit in O.S.No.122 of 2008 and try along with O.S.No.90 of 2010 and decide the matter on merits and in accordance with law within a period of six months. Connected miscellaneous petition is closed. No costs.