

(2005) 02 MAD CK 0021

In the Madras High Court

Case No : C.R.P. No. 236 of 2004 and VCMF No. 14 of 2005 and CMP No. 1061 of 2004

Enercon (India) Ltd.

APPELLANT

Vs

J.T. Micheal Anjalo and Others

RESPONDENT

Date of Decision : 11-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 7 Rule 11
Constitution of India, 1950 — Article 227
Specific Relief Act, 1963 — Section 41

Citation : (2005) 2 CTC 365

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : R.S. Ramanathan, for the Appellant; P. Jeyapaul, for the Respondent

Final Decision : Dismissed

Judgement

Prabha Sridevan, J.—This revision has been filed under Article 227 of the Constitution India for striking off the suit in O.S.No. 288 of 2004

from the file of the District Munsif, Valliyur, on the ground that the suit is not maintainable.

2. The respondents 1 & 2 filed the above suit for an interim injunction, restraining the third respondent from alienating the suit property till the sale

agreement is subsisting and restraining the petitioner from commissioning the wind energy electrical generator. Pending suit, respondents 1 and 2

prayed for an interim injunction, restraining the petitioner from commissioning the Wind Mill mentioned above. The Court below gave an interim

injunction only with regard to operation of the wind generator. Against this the petitioner herein has filed this revision without filing an appeal which

is there remedy against an order passed in an application under Order 39, Rules

1 & 2 and 151 of the Civil Procedure Code.

3. The learned counsel appearing for the petitioner would submit that though there is an appeal remedy, the petitioner have not availed of it

because the suit itself is an abuse of process of law and must be struck off from the file. According to the learned counsel, the basis on which the

respondents 1 & 2 have filed the suit is the agreement referred to above and even in the; agreement it is clear that possession was not handed over

to the respondents 1 and 2. The pleadings also indicate that the third respondent with whom respondents 1 and 2 entered into an agreement were

put in possession of the property. The learned, counsel for the petitioner submitted that an agreement holder had no right to seek interim injunction

and he was; barred u/s 41(h) of the Specific Relief Act and therefore, suit must be struck off from the file. He further submitted that if at all the

respondents 1 and 2 had a remedy, it was to file a suit for specific performance.

4. The learned counsel for the respondents 1 and 2 submitted that there is another suit pending, in which, an interim injunction has been obtained

restraining the third respondent from alienating the property and for this reason, the respondents 1 and 2 could not file a suit for specific

performance. Further it is submitted that under the agreement, six months' time was given and therefore that was another reason why they could

not file the, suit for specific performance. The learned counsel admitted that respondents 1 and 2 were not in possession. He submitted further that

if interim injunction is not granted, the respondents 1 and 2 would suffer irreparable loss and hardship and would be left with no other remedy.

5. The learned counsel for the respondents relied on the following judgments *Kasthuri and 4 Ors. v. Baskaran and Anr.*, 2004 (1) L.W. 803,

where this Court refused to set aside an order refusing to reject the plaint on an application filed under Order 7, Rule 11, CPC. That case arose in

some what similar circumstances. There also the agreement holder has filed the suit for permanent injunction. It was contended by the defendants

that in view of the bar contained in Section 41(h) of the Specific Relief Act, the plaint must be rejected. The revision further was dismissed on the

ground that the question whether Section 41(h) would apply cannot be decided at that stage.

6. The learned counsel for the respondent also relied on *Sadashiv Chander*

Bhamgare Vs. Eknath Pandharinath Nangude, , where the Full Bench of the Bombay High Court held that a suit for permanent injunction by an agreement holder who is in possession of the property is not barred by Section 41(h).

7. Both the above cited decisions will not help the respondents, since in both the cases, the agreement holder was put in possession pursuant to the agreement. In fact, in the Full Bench judgment of the Bombay High Court it has been held, that even though the plaintiffs plea for specific performance may be barred by Law of Limitation, they are entitled to continue in possession, since Section 53-A of the Transfer of Property it creates equity in his favour. In the judgment cited supra Kasthuri and 4 Ors. v. Baskaran and Anr., 2004 (1) L.W. 803 also, the agreements holders were put in possession.

8. The learned counsel for the petitioner relied on the decision K.S. Balasubramaniam Vs. S. Munuswamy, , where this Court came to the conclusion that while considering the grant of temporary injunction, if the Court feels that prima facie the suit itself is not maintainable, since the decree for permanent injunction cannot be granted in view of the bar u/s 41(h) of the Specific Relief Act it cannot be said that the plaintiff has got a prima facie case.

9. The learned counsel for the petitioner also relied on the judgment Rajendra Kumar Vs. Mahendra Kumar Mittal and others, , where a Division Bench of the Andhra Pradesh High Court held that, the person who alleges that he has purchased a property under an agreement has to get his relief by filing a suit for specific performance and not by filing a suit for injunction and interim injunction cannot be granted.

10. The Learned counsel also relied on the decision Jasmer Singh and others Vs. Kanwaljit Singh and another, , where it was held that a suit for permanent injunction by a person, who claims to have an agreement in his favour is not maintainable.

11. If the petitioner is aggrieved by the order passed under Order 39, Rules 1 and 2, there is an appeal remedy and he can avail, of it. If the petitioner's; case is that the plaint should be rejected, even then, he has his remedy. But unless, the circumstances warrants and the abuse of process of law stares in the face, Article 227 cannot be invoked for striking of a

case from the file. It is in these circumstances, the CRP is dismissed. It is open to the petitioner to raise his objections, in respect of the maintainability of the suit and the bar of Section 41(h) of the Specific Relief Act and since the dismissal of this CRP is not on merits, it shall not be held against the petitioner. When such objections are raised, it will be dealt with by the Court in accordance with law.