

(2013) 04 MAD CK 0080
In the Madras High Court
Case No : S.A. No. 777 of 2011

S. Thirugnanasambandam

APPELLANT

Vs

P. Kaliyaperumal, The Junior Engineer T.N.E.B. and The
Executive Engineer T.N.E.B.

RESPONDENT

Date of Decision : 30-04-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 2(3)
Constitution of India, 1950 — Article 227
Specific Relief Act, 1963 — Section 16(c)

Citation : (2013) 3 CTC 577 : (2013) 4 MLJ 563

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : N. Suresh, for the Appellant; S. Parthasarathy for Mr. K.A. Ravindran for R1 and Mr. V. Viswanathan for R2 and R3, for the Respondent

Final Decision : Allowed

Judgement

P.R. Shivakumar, J.—S. Thirugnanasambandam, namely the first defendant in the Original Suit, is the appellant in the Second Appeal.

Kaliyaperumal, namely the plaintiff in the original suit, is the first respondent herein and the Junior Engineer, TNEB, Kurinjipadi and the Executive

Engineer, TNEB, Kurinjipadi, namely the defendants 2 and 3 in the original suit, are the respondents 2 and 3 in the Second Appeal. The first

respondent herein/plaintiff filed the original suit O.S. No. 2/2005 on the file of Sub Court, Cuddalore for the relief of specific performance based

on the suit agreement for sale dated 19.09.1992 allegedly executed by the appellant herein/first defendant in favour of the first respondent

herein/plaintiff. Subsequently, the respondents 2 and 3 herein were impleaded as defendants 2 and 3 in the original suit with an additional prayer

against them for a permanent injunction restraining them from disconnecting the electricity service connection bearing S.C. No. 1572/chavadi

existing in the suit property. The first respondent herein/plaintiff had filed the suit making the following plaint averments:

The appellant herein/first defendant being the owner of the suit property, agreed to sell the same to the first respondent/plaintiff for a sale

consideration of Rs. 2,00,000/-, received a sum of Rs. 1,90,000/- as advance and part payment of sale consideration, agreed for a time of 10

years for the completion of the sale transaction and executed the suit sale agreement on 19.09.1992. On the date of agreement itself, possession of

the suit property was delivered to the first respondent/plaintiff. On several occasions, the first respondent/plaintiff tendered Rs. 10,000/- being the

balance amount of sale consideration and demanded execution and registration of sale deed in his favour. On all those occasions, the appellant

herein/first defendant, on some pretext, evaded and postponed the performance. Subsequently, when the appellant herein/first defendant made

arrangements to sell the suit property to third parties in the year 2002, the first respondent herein/plaintiff issued a notice dated 12.01.2002 seeking

specific performance and the same evoked a reply notice dated 09.02.2012 containing false and untenable allegations. The appellant herein/first

defendant also tried to forcibly take possession from the first respondent herein/plaintiff. Hence the first respondent herein/plaintiff filed a suit in

O.S. No. 372/2002 on the file of the Additional District Munsif, Cuddalore for injunction against the appellant herein/first defendant not to alienate

the suit property to anyone else than the first respondent herein/plaintiff and not to dispossess him forcibly. The steps taken by the first

respondent/plaintiff through the attestors of the suit sale agreement to make the appellant herein/first defendant complete the transaction proved

futile, since the appellant herein/first defendant demanded a higher price. Therefore, the first respondent herein/plaintiff was constrained to file the

present suit O.S. No. 2 of 2005 on the file of the Sub Court, Cuddalore for specific performance. After the filing of the suit, the earlier suit, namely

O.S. No. 372 of 2002 on the file of the Additional District Munsif, Cuddalore was dismissed as not pressed. Thereafter, the appellant herein/first

defendant instigated the respondents 2 and 3 herein/defendants 2 and 3 to disconnect the electricity connection bearing S.C. No. 1572/chavadi

existing in the suit property. Hence the respondents 2 and 3/defendants 2 and 3 were impleaded with an additional prayer for injunction not to

disconnect the said electricity service connection.

2. Respondents 2 and 3/defendants 2 and 3 in the original suit expressed their inclination to act according to the directions of the court. The

appellant herein/first defendant alone resisted the suit by filing a written statement and additional written statement praying for the dismissal of the

suit. In addition, he also made a counter claim for the recovery of possession of the suit property. The averments made in the written statement,

additional written statement and the counter claim in brief, are, as follows:

The appellant herein/first defendant never agreed to sell the suit property owned by him to the first respondent/plaintiff. The suit agreement for sale

dated 19.09.1992 relied on by the first respondent/plaintiff is a forged one, fabricated with the help of the henchmen of the first respondent/plaintiff,

who figured as attestors of the said agreement. The signature found in the suit agreement for sale is not that of the appellant herein/first defendant.

He did not receive any amount, much less Rs. 1,90,000/- on 19.09.1992 from the first respondent herein/plaintiff. In the former suit filed by the

first respondent herein/plaintiff, namely O.S. No. 372/2002 on the file of the Additional District Munsif, Cuddalore, the suit sale agreement was

referred to a handwriting expert for opinion, since the genuineness of the agreement and the signature found therein were disputed by the appellant

herein/first defendant. The opinion of the handwriting expert went against the first respondent herein/plaintiff and on coming to know that he was

bound to fail in the said suit, the first respondent herein/plaintiff chose to not press the said suit O.S. No. 372 of 2002 on the file of the Additional

District Munsif, Caddalore and accordingly, the said suit was dismissed as not pressed on 20.07.2005. The appellant herein/first defendant never

handed over the possession of the suit property to the first respondent/plaintiff. It had been in the immediate possession of one Chinnarasu

Gounder as a tenant under the appellant/first defendant from 13.06.1987. The said Chinnarasu Gounder was running a business in the name and

style of Sivam Lathe Works. As he committed default in payment of rent, there was a dispute between him and the appellant/first defendant.

Meanwhile, Chinnarasu Gounder died and his legal heirs seem to have inducted

the first respondent/plaintiff into the possession of the suit property.

Hence the appellant/defendant is entitled to recover possession of the suit property from the first respondent/plaintiff and also for damages for use

and occupation from 2000. However, the appellant/first defendant would restrict his claim for damages for use and occupation at the rate of Rs.

1,000/- per month from the date of filing of the suit till recovery of possession.

3. Based on the above said averments, issues and additional issues were framed and they were subsequently recast. The issues, thus recast by the

trial court and issues framed in the counter claim, are as follows:

Recast issues:

1. Whether the suit is not properly valued and proper court fee not paid?
2. Whether the suit is barred by limitation and Order 2 Rule 2 C.P.C.?
3. Whether suit sale agreement is a fabricated document?
4. Whether the plaintiffs are entitled for decree of specific performance as prayed for?
5. Whether the plaintiff is entitled for issuance of permanent injunction as prayed for?

Issues framed in the counter claim:

1. Whether the plaintiff is a trespasser in respect of the suit property?
2. Whether the defendant is entitled for decree of delivery of possession as prayed for?
4. Three witnesses were examined as PWs. 1 to 3 and 47 documents were marked as Exs. A1 to A47 on the side of the first respondent

herein/plaintiff. One witness was examined as DW. 1 and 54 documents were marked as Exs. B1 to B54 on the side of the defendants in the suit.

The learned trial judge decreed the suit and dismissed the counter claim by his judgment and decree dated 28.01.2010. When the same was

challenged in A.S. No. 30 of 2010 before the Additional District Judge (Fast Track Court No. 2), Cuddalore, the learned lower appellate judge

dismissed the appeal and confirmed the decree passed by the trial court. As against the decree of the lower appellate court, the present second

appeal has been filed on various grounds set out in the memorandum of grounds of second appeal.

5. The second appeal has been admitted based on the following substantial

questions of law:

1. Whether the present suit filed by the first respondent Kaliyaperumal is barred under Order 2 Rule 2 CPC in view of the earlier suit in O.S. No.

372 of 2002 filed on the file of District Munsif Court, Cuddalore and withdrawn?

2. Whether the courts below have wrongly exercised the discretion in favour of the first respondent/plaintiff in granting the relief of specific

performance?

3. Whether the courts below have erred in holding that the appellant/defendant is not entitled to the relief of recovery of possession of suit property

as per the counter claim made by him?

6. Initially due to the absence of representation on the part of the first respondent herein/plaintiff, the second appeal came to be allowed by an ex-

parte judgment pronounced by another Hon''ble Judge of this court (Hon''ble Justice R.S. Ramanathan) on 09.09.2011. Thereafter, by virtue of

the order dated 28.02.2012 made in M.P. Nos. 2 and 3 of 2011 in this second appeal, the said judgment was set aside and the appeal was

directed to be re-heard. While directing re-hearing of the second appeal, Hon''ble Justice R.S. Ramanathan directed the matter to be listed before

another Hon''ble Judge of this court, since His Lordship had already taken a view on merit in this second appeal. Thus the second appeal came to

be listed before me presently holding the roster.

7. The arguments advanced by Mr. N. Suresh, learned counsel for the appellant, by Mr. S. Parthasarathy, learned senior counsel for Mr. K.A.

Ravindran, counsel on record for the first respondent and by Mr. V. Viswanathan, learned counsel representing the respondents 2 and 3 were

heard. The materials available on record were also perused.

8. Learned counsel for the appellant/first defendant raised an issue that the suit concerned in the present appeal is barred under Order II Rule 2

CPC. It is the contention of the learned counsel for the appellant/first defendant that a previous suit in O.S. No. 372/2002 came to be filed on the

file of the court of District Munsif, Cuddalore for permanent injunction not to alienate the suit property in favour of any third person and not to

interfere with his possession and enjoyment of the suit property; that the said suit was subsequently dismissed as withdrawn without the leave of the

said court to file a fresh suit on the same cause of action or a fresh suit in respect of the very same subject matter of the said suit; that the present suit filed based on the suit agreement for sale can be said to be one based on the same cause of action and it is also in respect of the very same property, which was the subject matter of the earlier suit and that hence the bar provided under Order II Rule 2 CPC would get attracted.

9. On the other hand, the learned senior counsel for the first respondent/plaintiff would contend that the earlier suit was filed for permanent injunction based on the cause of action arising out of the preparations made by the appellant herein/first defendant to alienate the suit property in favour of third parties and for dispossessing the first respondent/plaintiff from the suit property, whereas the present suit has been filed for the relief of specific performance based on the cause of action arising out of the refusal on the part of the appellant herein/first defendant to perform his part of the contract under the suit agreement for sale and that hence the bar provided under Order II Rule 2 CPC shall not get attracted. The further contention of the learned senior counsel for the first respondent/plaintiff is that, since the earlier suit and the present suit had been filed on different causes of action and for different reliefs, the withdrawal of the earlier suit, would not affect the maintainability of the present suit, which came to be filed even before the withdrawal of the earlier suit and that hence even the bar provided under Order 2 Rule 2(3) CPC will not get attracted.

10. Admittedly, the appellant herein/first defendant is the absolute owner of the suit property described in the plaint schedule. The same has been described to be 20 cents out of 40 cents of land comprised in survey No. 94 in Anna Nagar, Kurinjipadi Town, Kurinjipadi Sub-Registration District, Cuddalore Registration District along with a brick built RC Roof building with the measurement of 35" x 34" bearing door No. 12/22 with the following boundaries: On the east by the house of Kumarasamy Padayachi; west by the house of Govindasamy Mudaliar; north by the house of Veerappa Chettiar and south by Cuddalore-Vriddhachalam Main Road. According to the first respondent/plaintiff, the appellant/first defendant agreed to sell the said property for a sum of Rs. 2,00,000/-, received a sum of Rs. 1,90,000/- as advance and part payment of sale consideration and executed the suit sale agreement on 19.09.1992 agreeing for a time of 10 years for completion of the transaction. The said suit agreement for

sale has been produced as Ex. A1. It is also the contention of the first respondent/plaintiff that on the date of agreement itself, possession of the suit property was handed over to him in part performance of the contract for sale. Based on the right derived under the alleged agreement for sale and also the possession allegedly obtained in part performance of the agreement for sale and alleging that the appellant/first defendant was making preparations to sell the property to third parties to defeat the rights of the first respondent herein/plaintiff and also was making preparations to forcibly dispossess the first respondent/plaintiff, he had filed the earlier suit, namely O.S. No. 372/2002 on the file of the Court of District Munsif, Cuddalore, for permanent injunction against the appellant herein/first defendant not to alienate the suit property to anyone else than the first respondent/plaintiff and not to disturb his peaceful possession and enjoyment of the suit property. The suit was resisted by the appellant herein/first defendant denying the genuineness of the suit agreement for sale. While the said suit was pending, the present suit, namely O.S. No. 2/2005 on the file of the Sub Court, Cuddalore, from which the second appeal has arisen, came to be filed by the first respondent herein/plaintiff for specific performance. After the filing of the present suit O.S. No. 2/2005, the earlier suit, namely O.S. No. 372/2002, which had been made over to the Additional District Munsif, Cuddalore came to be dismissed as not pressed. The certified copy of the decree passed in the said earlier suit O.S. No. 372/2002 on the file of the Additional District Munsif, Cuddalore has been produced and marked as Ex. B18. It is seen from Ex. B18 that the said suit was dismissed as not pressed with a direction to the plaintiff therein to pay a sum of Rs. 3,501.50P as cost.

11. It is true that the earlier suit, namely O.S. No. 372/2002 on the file of the Additional District Munsif, Cuddalore and the present suit, namely O.S. No. 2/2005 on the file of the Sub Court, Cuddalore, came to be filed in respect of the very same property. Order II Rule 2 CPC mandates that every suit shall include the whole of the claim, which the plaintiff is entitled to make in respect of the cause of action with a rider that the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court and that where the plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of that portion so omitted or relinquished. The

bar for subsequent suit in respect of the portion of the claim omitted or relinquished is provided in sub clause (2) of Rule 2 under Order II of CPC.

For better appreciation Rule 2 of Order II CPC is extracted here-under:

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.

(3) Omission to sue for one of several reliefs. - A person entitled to more than one relief in respect of the same cause of action may sue for all or

any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

A reading of the said provisions will make it clear that omission to sue in respect of a relief or relinquishment of a portion of the claim arising on the

basis of a cause of action incapacitates the plaintiff to file a fresh suit for the omitted portion of the claim or relinquished part of the relief. The said

bar is subject to one exception that in case omission to sue for some of the reliefs when a person is entitled to more than one relief is done with the

leave of the court, then he can afterwards sue for any of the reliefs so omitted. In either of the cases, the claim or part of the claim must be based

on one and the same cause of action. If the relief sought for in the subsequent suit is based on a different cause of action or a new cause of action,

the bar provided under Order II Rule 2 CPC does not get attracted.

12. In this regard, the learned senior counsel for the first respondent/plaintiff relies on a judgment of a learned single judge of this court in M.

Vijayalakshmi Vs. T. Shanmugam and N.E. Soundarajan, , wherein it was held that a suit for injunction not to interfere with the possession of the

plaintiff in respect of the property regarding which he had entered into an agreement for sale with its owner(defendant therein), would not attract

the bar provided under Order 2 Rule 2 CPC for a subsequent suit for the efficacious remedy of specific performance. Of course the said view of

the learned single judge (Justice G. Rajasuria) was based on the observations made by the Hon''ble Supreme Court in Alka Gupta Vs. Narender

Kumar Gupta, holding that a suit for injunction from interfering with the possession of the purchaser under the agreement for sale will not attract the bar provided under Order II Rule 2 for a subsequent suit for specific performance. In Alka Gupta Vs. Narender Kumar Gupta, the Hon''ble

Supreme Court has made the following observations:

The object of Order 2, Rule 2 of the Code is two fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of

action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2, Rule 2 of the

Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs

based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action

The said view was expressed referring to the observations made by the Hon''ble Apex Court in an earlier case, viz. Gurbux Singh Vs. Bhooralal, ,

wherein it had been observed as follows:-

6. In order that a plea of a bar under Order 2 Rule 2(3) of the CPC 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.

13. But, the learned counsel for the appellant/first defendant would contend that the facts of the case in Alka Gupta v. Narender Kumar Gupta can

be differentiated and distinguished from the facts of the case on hand and that in view of the latest judgment of the Hon''ble Supreme Court in

Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd., the view expressed by the Hon''ble single judge in M. Vijayalakshmi v. T.

Shanmugam & Anr. reported in M. Vijayalakshmi Vs. T. Shanmugam and N.E.

Soundarajan, , cannot be said to be reflecting the correct law.

14. It is the contention of the learned counsel for the appellant/first defendant that in Alka Gupta's case, the previous suit was filed for the recovery

of the balance amount of sale consideration under an agreement for sale of undivided share, whereas the subsequent suit was filed based on the

dissolution of partnership, which had been created under a Deed of Partnership dated 05.04.2000; that the cause of action for the previous suit

was the execution of the sale agreement and non-payment of the balance sale consideration whereas the cause of action for the subsequent suit

was the constitution of the partnership and dissolution of the same; that as such both were held to be different causes of action and that the same

was the reason for the Hon''ble Supreme Court in the said case to hold that the second suit for rendition of accounts based on the dissolution of

partnership was barred by previous suit filed for the recovery of the balance sale consideration in respect of a sale transaction. As rightly

contended by the learned counsel for the appellant/first defendant, the said case decided by the Hon''ble Supreme Court in Alka Gupta v.

Narender Kumar Gupta was on facts different from the facts of the case on hand and it can be distinguished from the present case.

15. On the other hand, in a case arising out of a similar situation, the Hon''ble Supreme Court held that previous suit based on an agreement for

sale filed for injunction restraining the defendant from alienating the suit property to any third person, shall constitute a bar for a subsequent suit for

specific performance, in case leave of the court to file a separate suit for other relief, namely specific performance, was not obtained at the time of

filing the previous suit. The case in which the said view was taken by the Hon''ble Supreme Court is Virgo Industries (Eng.) P. Ltd. Vs.

Venturetech Solutions P. Ltd., Two previous suits came to be filed on the original side of this court (Madras High Court) as C.S. Nos. 831/2005

and 833/2005 seeking permanent injunction restraining the defendant therein from alienating, encumbering or dealing with the properties described

in the schedules attached to the plaints to any third party other than the plaintiff therein. The said reliefs were claimed based on two agreements for

sale dated 27.07.2005 to which the plaintiff therein and the defendant therein were parties in respect of two different parcels of immovable

property consisting of land and superstructures. In the said complaints, the plaintiff therein had stated that since the periods of six months fixed for execution of the sale deeds under the agreements in question were not over, the plaintiff was not claiming specific performance of the agreement and accordingly sought the leave of the court to omit to claim the relief of specific performance with liberty to sue for the said relief at a later point of time, if necessary. While the said suits filed by the plaintiff on 28.08.2005 and 09.09.2005 respectively were pending on the original side of this court, the plaintiff therein filed the subsequent suits on 29.05.2007, namely O.S. Nos. 202 and 203 of 2007 on the file of the District Judge, Tiruvallur for specific performance directing execution and registration of sale deeds and for delivery of possession of the property. A plea was made in the subsequent suits that as the plaintiff therein was under a bonafide belief that the defendant would perform the contract under the agreements for sale, it did not claim the relief of specific performance in the earlier suits filed for permanent injunction and that since the defendant therein did not come forward to execute the sale deeds despite issuance of a subsequent legal notice, the suits for specific performance came to be filed. Under the said circumstances, when the defendant in both the suits approached the High Court for striking off the complaints under Article 227 of the Constitution of India on the ground that Order II Rule 2 CPC barred the maintainability of the suit, the High Court took the view that the cause of action to seek the relief of specific performance had not arisen, since the time stipulated in the agreements was not over by the time of filing of the earlier suits and that hence the subsequent suits for specific performance based on the inaction or refusal to execute the sale deed was not barred by Order 2 Rule 2(3) of CPC. When the same was taken on appeal by the defendant therein to the Hon'ble Supreme Court, the Hon'ble Supreme Court, after referring to the observations made by the Apex Court in *Gurbux Singh v. Bhooralal* cited supra, regarding the rationale behind providing a bar under Order II Rule 2(3) CPC, held that the pleadings made in the earlier suit left no room for doubt on the fact that on the dates when the earlier suits were filed, facts and events entitling the plaintiff therein to contend that the defendant had no intention to honour the agreements for sale had taken place and that in the said situation, it was open for the plaintiff therein to incorporate the relief of specific

performance along with the relief of permanent injunction. The Hon"ble Supreme Court was also of the view that the foundation for the relief of

permanent injunction claimed in two previous suits furnished a complete cause of action to the plaintiff therein to sue for the relief of specific

performance also and still the said relief was omitted to be claimed in the previous suit. Adverting to the fact that though a plea had been made in

the previous suit for seeking leave to file a suit for specific performance as and when necessity would arise, no leave was granted by the trial court

(High Court dealing with the previous suits), the Hon"ble Supreme Court held that the subsequent suits for specific performance were barred by

Order II Rule 2 CPC. For arriving at such a conclusion, their Lordships of the Hon"ble Supreme Court have referred to the absence of any

provision in the Specific Relief Act, 1963 requiring a plaintiff claiming the relief of specific performance to wait for the expiry of the due date for

performance of the agreement in a situation where the defendant might have made his intention clear by his overt acts. Ultimately, the Hon"ble

Supreme Court in *Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd.*'s struck off the plaints in the subsequent suits for specific

performance.

16. The facts of the above case decided by the Supreme Court are similar to the facts of the case on hand. The ratio decided therein squarely

applies to the facts of the case on hand. In fact the first respondent/plaintiff issued a lawyer"s notice on 12.01.2002 to the appellant herein/first

defendant for specific performance of the suit agreement for sale, which was replied by a reply notice dated 09.02.2002 denying the execution of

the agreement itself. The cause of action for filing the suit for specific performance had arisen then and there itself. In fact the same was provided in

paragraph 4 of the plaint of the earlier suit in O.S. No. 372 of 2002 on the file of the Additional District Munsif, Cuddalore. A copy of the said

plaint has been marked as Ex. A29. The said paragraph is extracted here-under:

4) In meantime the plaintiff started an industry by the name and style of ""Tamil Nadu Feeds"" and obtained the licenses from the Government

authorities with consent of the defendant and further he established so many additions and alteration in the building as well as in the vacant site and

spend more than one Lakh Rupees for the same. So the plaintiff waited quietly

for the defendant and his reply.

A reading of the said paragraph of the plaint in the previous suit would clearly show that the cause of action for filing a suit for the relief of specific

performance had arisen even before the filing of the earlier suit for permanent injunction and that at the time of filing of the earlier suit O.S. No.

372/2002, the first respondent herein/plaintiff could have sought the relief of specific performance also. Furthermore, the earlier suit came to be

filed on 11.10.2002. As per the above said judgment of the Hon''ble Supreme Court, even if the period stipulated in the agreement had not been

over at the time of filing of the earlier suit, when the refusal to perform was manifest, the person intending to seek injunction, should have included

the prayer for specific performance in the suit for injunction itself, when prior permission to file a separate suit for the relief of specific performance

is not obtained from the court, in which the first suit was filed.

17. The case of the first respondent/plaintiff in the case on hand is even worse than the case of the plaintiff in the case in Virgo Industries (Eng.) P.

Ltd. Vs. Venturetech Solutions P. Ltd. Therein by the time of filing the earlier suit for injunction time stipulated in the agreement had not expired

and in the earlier suits for injunction a prayer for leave to file a subsequent suit for specific performance was also incorporated. Still the Hon''ble

Supreme Court held that the prayer for specific performance even before the expiry of time stipulated in the agreement could not be termed

premature; that in such cases, the court cannot throw out the claim holding the claim to be premature, since the time stipulated in the agreement has

not expired and that since the cause of action for filing the suit for the relief of specific performance had arisen on the date of filing of the earlier suit

itself, though a plea had been made in the plaint of the earlier suit seeking the leave of the court to file a separate suit for specific performance, no

leave was granted, the subsequent suit was barred by Order 2 Rule 2(3) CPC.

18. In the case on hand, on the date of filing of the earlier suit, namely O.S. No. 372/2002, the time stipulated in the agreement had expired. In

addition, there was a notice and reply, which exhibit that the claim of the first respondent herein/plaintiff was refuted and denied by the appellant

herein/defendant and the cause of action for filing the suit for specific performance had arisen along with the cause of action for filing of the earlier

suit for permanent injunction. Still the first respondent herein/plaintiff chose to file the earlier suit only for permanent injunction, that too without

seeking the leave of the court under Order II Rule 2(3) to file a separate suit for the relief of specific performance. The ratio decided in Virgo

Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd. squarely applies to the case on hand. In view of the above said judgment of the

Hon'ble Supreme Court, the view expressed by the learned single judge of this court no longer reflects the correct proposition of law. For all the

reasons stated above, this court comes to the conclusion that the present suit for specific performance, namely O.S. No. 2/2005 on the file of

Principal Sub Judge, Cuddalore is barred under Order II Rule 2 CPC because of the filing of the earlier suit, namely O.S. No. 372/2002 on the

file of the Additional District Munsif, Cuddalore. The first substantial question of law is answered accordingly.

19. Even if it is assumed that the suit for specific performance is not barred under Order II Rule 2 CPC in view of the filing of the previous suit

O.S. No. 372/2002 for permanent injunction, as rightly contended by the learned counsel for the appellant/first defendant, the first

respondent/plaintiff is bound to fail in the suit for specific performance, as he has not proved the suit agreement for sale to be genuine. The suit

agreement for sale dated 19.09.1992 has been produced as Ex. A1. According to the first respondent/plaintiff, the said document was executed

by the appellant/first defendant in favour of the first respondent/plaintiff agreeing to sell the suit property for a sum of Rs. 2,00,000/- and after

receiving a sum of Rs. 1,90,000/- out of the said two lakhs as advance and part payment of the sale consideration. The further case of the first

respondent/plaintiff is that, on the date of agreement itself, possession of the property was delivered to him in part performance of the agreement

for sale. The said plea of the first respondent/plaintiff is stoutly denied by the appellant/first defendant to be false. The appellant/first defendant has

taken a categorical and clear stand that he never agreed to sell the suit property to the first respondent/plaintiff and that the signature found in Ex.

A1-agreement is not that of the appellant/first defendant. The said stand taken by the appellant/first defendant in this case is consistent with his

stand taken in the earlier suit O.S. No. 372/2002. As the genuineness of the said document was disputed by the appellant/first defendant, at the

instance of the first respondent/plaintiff, the same was referred to a handwriting expert for his opinion in the former suit, namely O.S. No.

372/2002. The handwriting expert, after making a comparison of the signature found in the disputed document, namely Ex. A1, purporting to be

the signature of the appellant/first defendant and his admitted signature, submitted a report dated 06.04.2005 opining that the person who wrote

the disputed signature was not the person who wrote the admitted signature. As many as five differences in the characteristics found in the

signatures were noted in his report. A certified copy of the forensic report submitted in the previous suit has been produced and marked in the

present case as Ex. B17. The reasons assigned by the handwriting expert are as follows:- The standard signatures have been freely written and

agree in the handwriting characteristics on inter se comparison. The questioned signatures have been partially imitated and they differ significantly

from the standard in the handwriting characteristics. The handwriting expert has also pointed out five characteristic differences in support of his

opinion.

20. It is pertinent to note that the documents were referred to the handwriting expert for comparison and opinion in the month of October 2004.

Only thereafter the present suit came to be filed on 29.12.2004. After the receipt of the report of the handwriting expert in the former suit, the first

respondent/plaintiff has chosen to withdraw the said suit. The report of the forensic expert is dated 06.04.2005. The former suit O.S. No.

372/2002 on the file of the Additional District Munsif, Cuddalore was dismissed as not pressed on 20.07.2005. As rightly pointed out by the

learned counsel for the appellant/first defendant, knowing fully well that the report that would come from the forensic expert would be against his

case, the first respondent/plaintiff chose to file the present suit O.S. No. 2 of 2005 for specific performance and in order to prevent a decision

being made in the former suit constituting a res judicata, the first respondent/plaintiff chose to withdraw the former suit after the receipt of the report

of the forensic expert. That is the reason why the former suit was dismissed as not pressed and at the same time, the first respondent/plaintiff, who

was the plaintiff in the former suit was directed to pay a cost of Rs. 3,501.50P to the appellant herein/first defendant. This is clear from the certified

copy of the decree passed in the former suit produced as Ex. B18. Therefore, the filing of the present suit and withdrawal of the earlier suit can be

viewed as an abuse of process of court on the part of the first respondent herein/plaintiff.

21. Apart from that, when the execution of the agreement for sale marked as Ex. A1 is disputed by the appellant/first defendant, the onus of

proving the same lies heavily on the first respondent herein/plaintiff. In order to prove the same, the first respondent herein/plaintiff examined himself

as PW. 1 and the attestors of the sale agreement as Pws. 2 and 3. The first respondent/plaintiff, who figured as PW. 1, during his cross-

examination stated that the negotiation for the transaction was made directly with the appellant herein/first defendant without any broker as

mediator and that he did not get the suit property measured to find out the actual extent and he did not even choose to verify whether there was

any encumbrance. It is his further evidence that since the appellant/first defendant informed him that a litigation between himself and his brother

regarding the suit property was pending and the same was the reason why ten years time had been stipulated in the agreement for completion of

the transaction, it is quite surprising to note that the evidence of PW. 1 gives an impression that despite the fact that he was informed of the

pendency of a litigation between the vendor under the agreement and his brother, the first respondent herein/plaintiff chose to get the suit agreement

executed paying 95% of the sale consideration. Such a conduct is quite abnormal. It is his further statement in his evidence that though he was

informed that a litigation was pending between the appellant herein/first defendant and his brother regarding the suit property, he did not know

whether such a case was pending or not. It is also his admission that he did not ask the appellant/first defendant, whether any suit was pending in

respect of the suit property or any other property of the appellant/first defendant. Though he has stated that ten years time was stipulated in the

agreement based on the representation of the appellant herein/first defendant that he needed a long time because a suit was pending between

himself and his brother, admittedly, the said reason was not mentioned in the agreement. PW. 1's evidence is to the effect that though he had got

the entire money to be paid as the sale consideration and was ready to get the sale deed executed on the date of agreement for sale itself, only

because the appellant/first defendant was not agreeable for executing the sale deed at that point of time, the suit agreement came to be entered

into. If at all the first respondent/plaintiff was ready to purchase the property despite the fact that a suit was pending between the appellant

herein/first defendant and his brother in respect of the suit property, he could have very well got the sale deed straight away and contested the suit

if any, getting himself impleaded as the purchaser of the suit property. That procedure has not been adopted. Hence the reason assigned by PW. 1

seems to be a make believe story far from being believable.

22. The evidence of PW. 1 in this regard seems to be quite abnormal. He would state that he did not remember whether the appellant herein/first

defendant had taken a stand that the signature found in Ex. A1 was not that of the appellant/first defendant. Furthermore, though the sale

agreement was said to be executed in the office of the Sub Registrar, no attempt was made to get it registered, especially when 95% of the sale

consideration is claimed to have been paid on the date of agreement itself.

23. PW. 2 in his evidence stated that in their presence, a sum of Rs. 1,90,000/- was paid as advance and after receiving the said amount, the

appellant/first defendant put his signature in the agreement. But it is pertinent to note that he is a document-writer having got a license in 1993 itself

in License No. 396/6/1993. PW. 1's evidence is to the effect that the negotiation for the transaction was held two days prior to the date of the

agreement, whereas PW. 2 would say that the entire negotiation for the transaction took place on the date of Ex. A1-agreement and no negotiation

took place prior to the date of Ex. A1. PW. 1 does not state any reason for not getting the agreement registered even though it was executed in the

Sub Registrar's office. PW. 2 would say that though the agreement was executed in the office of the Sub Registrar, it was not registered because a

case was pending. It is his specific statement that it was a working day for the office of the Sub Registrar. However he would state that he could

not remember whether it was in the morning hours or in the afternoon the agreement was executed.

24. Though PW. 3 in his evidence in chief examination in the form of proof affidavit tried to support the evidence of PWs. 1 and 2, during cross

examination, he would admit that he knows only to sign and he did not read the

proof affidavit filed as his testimony in chief examination. It is also his admission that he does not know the boundaries of the suit property. He has also stated that he did not know the contents of Ex. A1 and that he did not know what were the negotiations made prior to the execution of Ex. A1. With such evidence adduced on the side of the first respondent herein/plaintiff, the courts below have come to a conclusion that the suit agreement for sale produced as Ex. A1 has been proved to be genuine and that the signature found therein was that of the appellant herein/first defendant. For arriving at such a conclusion, the courts below have chosen to make an observation that the appellant/first defendant, who denies the execution of Ex. A1-agreement and also his signature found in it, ought to have taken steps to examine the handwriting expert as if the burden of disproving his signature lies on the appellant herein/first defendant. Of course in the normal circumstances when sufficient evidence is adduced through witnesses to the effect that the disputed document was executed by the person who is said to have executed the same, then the burden shall be shifted on the person disputing it to disprove it. In this case, the question that arises is ""whether the first respondent/plaintiff has adduced sufficient evidence to cause shifting of the burden on the appellant herein/first defendant to disprove the signature found in Ex. A1-agreement?"".

25. Apart from the discrepancies in the evidence adduced through PWs. 1 to 3, there are also other circumstances, which will show that the courts below were not justified in shifting the burden and casting the burden of disproving the signature found in Ex. A1 on the appellant herein/first defendant. They are:

(i) The execution of the document is surrounded by suspicious circumstances;

(ii) Before the filing of the previous suit, namely O.S. No. 372/2002, the first respondent herein/plaintiff issued a notice on 12.01.2002, a copy of which has been marked as Ex. A13. In the said notice in paragraph 2, it was alleged that the appellant herein/first defendant borrowed a sum of Rs. 5,00,000/- and executed a promissory note in favour of the first respondent/plaintiff for the said amount and the first respondent/plaintiff had decided to take separate legal steps to realise the said amount. The second paragraph in the said notice is extracted hereunder:

2. After that my client is ready and willing to perform the contract and also

tendered the sale balance of Rs. 10,000/- to you on many occasions but you evaded to execute the sale deed in my client's favour. And further you have borrowed a sum of Rs. 5,00,000/- and executed a pronote in favour of my client and my client has decided to take separate legal steps to realise the amount." The same was replied by a reply notice dated 09.02.2002, marked as Ex. A15. In Ex. A15, the appellant herein/first defendant has denied not only the execution of the suit sale agreement and receipt of Rs. 1,90,000/- as advance and part payment of the consideration, but also the averment that he borrowed a sum of Rs. 5,00,000/- and executed a promissory note. The said reply notice was issued on 09.02.2002. The previous suit was filed on 11.10.2002. Nothing was mentioned about the said loan transaction and the promissory note. No suit was filed for recovery of the said amount even after the denial made by the appellant herein/first defendant in the reply statement. However, the plaintiff as PW. 1 has taken a novel stand, which is unbelievable, that the said amount covered by the promissory note was subsequently repaid by the appellant herein/first defendant. It is very peculiar to note that he has pleaded loss of memory as to whether he had stated in Ex. A13-notice about the borrowal of Rs. 5,00,000/- from him by the appellant/first defendant. However, he has stated that the said amount lent by him had been repaid. It is further surprising to note that he would state that he does not remember whether the amount was repaid by the appellant/first defendant before the issuance of the notice or subsequent to the issuance of notice.

(iii) Abnormal period has been prescribed for completion of transaction even though 95% of the sale consideration was said to be paid. There is no reason found in the agreement as to why a period of 10 years has been stated to be the time for performance of contract.

(iv) The appellant/first defendant has taken a definite plea that the suit property had been rented out to one Chinnarasu Gounder, who was running a business in the name and style of Sivam Lathe Works and that due to the default committed by him in payment of rent, a dispute arose between him and the appellant/first defendant and taking advantage of the dispute, the legal heirs of the said Chinnarasu Gounder seem to have put the first respondent/plaintiff in possession of the suit property illegally in or around 2000

after the death of Chinnarasu Gounder.

26. In this regard, the appellant herein/first defendant as DW. 1 has deposed in tune with his pleadings. Except PW. 1, other witnesses examined

on the side of the plaintiff, do not touch the said aspect. PW. 1 in his evidence does not deny the fact that the property had been given on lease to

Chinnarasu Gounder in 1987. The answer given by him for the question put to him relating to the said aspect is extracted in the vernacular.

1987***

On the other hand, the appellant/first defendant has produced Ex. B6-rental agreement dated 13.06.1987. There is no evidence to show that the

said Chinnarasu Gounder had vacated the property prior to the date of Ex. A1-agreement. On the other hand, the first respondent herein/plaintiff

has chosen to produce Exs. A2 to A11, TNGST receipts and Ex. A12-Sales Tax permit to show that he was in possession. The registration

number noted in Exs. A1 to 3 is different from the registration numbers noted in Exs. A4 to A11. The TNGST permit itself was issued on

13.11.2006. The permit number is noted as 48/2000-2001 and the registration number is noted as T/4400696. When the registration with the

Commercial Tax department was made only on 03.11.2000, it is quite surprising how the said registration number is found in the receipts bearing

dates prior to the said date of permit. Therefore, we have to accept the contention of the learned counsel for the appellant/first defendant that the

above said documents Exs. A2 to A11 and also Exs. A20, 21, 40, 41, 42, 43, 44, 45 and 46 should have been created for the purpose of the

case and Ex. A12 should have been obtained only after getting the possession of the property from the legal heirs of Chinnarasu Gounder. Demand

notices and the telephone bills produced by the first respondent/plaintiff as Exs. A16 to A19 pertain to the year 2002 onwards. The same will not

prove the plaintiff's possession of the suit property prior to 2000. The photographs with negatives produced as Exs. A22 to A27 and A31 to A33

were taken only on 21.02.2003 after the filing of the suit as evidenced by Ex. A28-bill issued by the photo studio. It is not in dispute that from

2000 onwards the plaintiff was in possession of the suit property after having been inducted by the legal heirs of the erstwhile tenant Chinnarasu

Gounder. Therefore, there is no wonder in the first respondent/plaintiff being

seen in the photographs to show that the suit property is in his possession. The same is the reason why the appellant/first defendant has chosen to make a counter-claim for the recovery of possession of the suit property from the first respondent/plaintiff.

27. Copies of the plaint and the written statement filed in the previous suit have been marked as Ex. A29 and Ex. A30. The first

respondent/plaintiff has also produced Exs. A34 and A35 - Kist receipts dated 22.10.2003 and 21.04.2003. There is nothing in the said receipts

to show that the same relates to the suit property. In Ex. A34, patta numbers have been noted as 769 and 1773, whereas in Ex. A35, patta

number has been noted as 568. The said receipt shows that kist paid by him as pattadar in respect of the patta numbers noted therein. There is

nothing to show that the same relates to the suit property. Even otherwise, it is not the case of the first respondent herein/plaintiff that he became

the absolute owner of the suit property. On the other hand, it is his case that he had got an agreement for sale and got the possession of the suit

property in part performance of the agreement. That being so, patta could not have been issued in his name till a full-fledged sale takes place.

Therefore, those two documents are not helpful for the proof of the first respondent/plaintiff's case that he had got possession of the suit property

in part performance of the agreement for sale.

28. Ex. A36 is a receipt dated 26.04.2004 for payment of Rs. 4,000/- to Tamil Nadu Electricity Board for getting electricity service connection in

the name of the first respondent/plaintiff to the suit property. It shows that the amount was paid for a new commercial service connection. Ex. A37

is the meter reading card for the new connection provided to the suit property bearing service connection S.C. No. 1572/chavadi. Exs. A38 and

39 are the bills for payment of electricity charges for the said service connection for the months of September 2004 and November 2004. From

Exs. A36 to A39, it is seen that the plaintiff obtained a new service connection only after the filing of the previous suit O.S. No. 372/2002 and paid

the electricity consumption charges. If we verify under what circumstances the said service connection was obtained, it will show that the first

respondent/plaintiff by using his influence with the officials of the Electricity Board and also with the Village Administrative Officer, chose to get the

service connection on the basis of an ex-parte decree obtained in the previous suit O.S. No. 372/2002, even after the said ex-parte decree came

to be set aside and the land owner, namely the appellant herein/first defendant had raised a strong objection for providing a service connection to

the suit property.

29. Exs. B1 to B4 were produced by the defendants 2 and 3 and were marked during the cross-examination of PW. 1 on his admission. Ex. B1 is

the file containing the application and the documents enclosed along with the application for getting a new commercial service connection to the suit

property. The first respondent/plaintiff claimed to be in possession by virtue of the suit agreement for sale. He had also produced a xerox copy of a

certified copy of the decree dated 21.03.2003 made in O.S. No. 372/2002 on the file of the Additional District Munsif, Cuddalore. The same was

an ex-parte decree. In addition, he had also produced a document issued by the Village Administrative Officer, Kurinjipadi North titled ""certificate

of title"" to the effect that the suit property belonged to the first respondent/plaintiff. The same is contrary to records. The application itself was

made on 26.04.2004. The affidavit of undertaking given by the first respondent/plaintiff for getting the service connection is found in Ex. B2. Ex.

B3 is the Inspection Report. Ex. B4 is the communication addressed by the Junior Engineer, TNEB, Kurinjipadi to the first respondent/plaintiff on

16.11.2005. From the said communication, it is found that the service connection was given on 20.08.2005. Since the service connection was

given based on the ex-parte decree obtained in the previous suit and it was brought to the notice of the TNEB officials by the appellant herein/first

defendant that the said decree had been set aside and that the suit itself came to be dismissed as not pressed, the said communication came to be

issued informing the first respondent/plaintiff that as per the undertaking affidavit given by him, the service connection would be disconnected, since

the property did not belong to him. Ex. B7 is the copy of the notice sent to TNEB officials, Kurinjipadi by the appellant herein/first defendant

through his lawyer on 18.05.2004 informing them that the first respondent/plaintiff had applied for service connection even during the pendency of

a dispute in O.S. No. 372/2002 on the file of the District Munsif Court, Cuddalore and that he raised an objection as the owner of the property.

Exs. B8 to 10 are the acknowledgment cards. Ex. B11 is the reply dated 21.05.2004 sent by the Junior Engineer, TNEB, Kurinjipadi to the

lawyer of the appellant/first defendant. Curiously in the said reply, he had chosen to state that by a decree dated 21.03.2003 made in O.S. No.

372/2002 on the file of the District Munsif Court, Cuddalore, the property was vested with the first respondent herein/plaintiff and that the

appellant herein/first defendant, who objected to the grant of service connection, should produce a certificate obtained from the Tahsildar to show

his title to the suit property within seven days from the date of receipt of the said reply.

30. Admittedly the original suit O.S. No. 372/2002 was filed only for an injunction not to disturb his possession and the same was not a suit for

declaration of title and even the ex-parte decree passed therein did not recognise his title to the suit property. Still the Junior Engineer, TNEB had

chosen to issue such a reply assuming that the title of the first respondent/plaintiff had been confirmed by the court in the said case. A rejoinder

came to be issued to the Junior Engineer, TNEB, Kurinjipadi on 26.05.2004. A copy of the said rejoinder notice and the postal receipts for

despatching the same to the Assistant Executive Engineer, Junior Engineer and Executive Engineer, TNEB, Kurinjipadi have been produced as Ex.

B12. Exs. B13, B14 and B15 are the acknowledgment cards. In the said rejoinder, it had been clearly informed that the ex-parte decree dated

21.03.2003 made in O.S. No. 372/2002 had been set aside by an order dated 24.09.2003 made in I.A. No. 763/2003 and that pending suit,

with ulterior motive, the Electricity Board officials seem to have directed him to obtain a certificate from the Tahsildar regarding his title, that too

within seven days, whereas his title to the property itself had not been denied and the first respondent/plaintiff had claimed only a right to purchase

the same under the suit agreement for sale, in the said rejoinder itself an averment had been made that the Electricity Board officials were taking

efforts to give electricity service connection to the suit property in the name of the first respondent/plaintiff against law and that if they would

venture to do so they would be held responsible for all consequences. It is obvious that even after such a notice and rejoinder, and despite the fact

that a suit was pending and the ex-parte decree had been set aside, service connection was effected to the suit property in the name of the first

respondent/plaintiff on 20.08.2005.

31. It is pertinent to note that in the previous suit O.S. No. 372/2002, the disputed document was referred to the forensic expert and the forensic expert gave his report (Ex. B17) dated 06.04.2005 opining that the signature found in Ex. A1 did not tally with the admitted signature of the appellant/first defendant. After the receipt of the same, the first respondent/plaintiff seems to have not pressed the said suit and the said suit was dismissed as not pressed directing the plaintiff therein/first respondent herein to pay cost to the defendant therein/appellant herein. Certified copy of the decree passed in O.S. No. 372/2002 has been produced as Ex. B18. It should be noticed that the said decree dismissing the said suit as not pressed, was passed on 20.07.2005. As per the recitals found in Ex. B4, service connection to the suit property was effected in the name of the first respondent/plaintiff on 20.08.2005 after the dismissal of the said suit. After effecting the service connection, the Electricity Board officials seem to have chosen to send Ex. B4-communication to the first respondent/plaintiff. Exs. B19 to B35 are the property tax receipts pertaining to the suit properties in the name of the appellant/first defendant. Exs. B36 to B41 are the house tax receipts in the name of the appellant/first defendant and Exs. B42 to B54 are the receipts for payment of electricity charges to the service connection bearing S.C. No. 276 in the name of the appellant/first defendant. Of course the property tax receipts, house tax receipts and electricity charges were pertaining to the period anterior to the suit agreement for sale. Simply because the appellant/first defendant, who is admittedly the owner of the suit property, has not produced the property tax receipts, house tax receipts etc. for the subsequent period, one cannot assume that the property was in the possession of the first respondent/plaintiff.

32. On the other hand, it is the clear case of the appellant/first defendant that the suit property had been rented out to one Chinnarasu Gounder in 1987 and after his death in the year 2000, the legal heirs of Chinnarasu Gounder inducted the first respondent/plaintiff in possession of the suit property and pursuant to the collusion between them, the suit agreement for sale was fabricated and the earlier suit as well as the present suit came to be filed. The rental agreement between the appellant/first defendant and

Chinnarasu Gounder has been produced as Ex. B6. It has been pointed out supra that the first respondent herein/plaintiff, who figured as PW. 1, did not deny that the suit property had been leased out to Chinnarasu Gounder in 1987. When such is the case, the first respondent/plaintiff who claims that he got possession of the suit property in part performance of the agreement for sale should be in a position to show, when the previous tenant Chinnarasu Gounder vacated the suit property? In this regard, the evidence adduced on the side of the first respondent/plaintiff seems to be not trustworthy. On the other hand, the evidence of DW. 1 is quite natural and believable. It is his clear case that the said Chinnarasu Gounder was in arrears of rent, due to which a dispute arose between him and the appellant/first defendant; that in view of the said dispute, the legal heirs of Chinnarasu Gounder colluded with the first respondent herein/plaintiff and inducted the first respondent/plaintiff in possession and that pursuant to the same, Ex. A1-suit sale agreement came to be fabricated for the purpose of suit. In this regard, the story propounded by the appellant/first defendant as to how the first respondent/plaintiff came to be in possession is more probable than the story of the first respondent/plaintiff, who filed the previous suit for bare injunction, chose to file the present suit O.S. No. 2/2005 on 07.12.2004 knowing fully well that the opinion was going to be against him, after the disputed document and the documents containing the admitted signatures of the appellant/first defendant were referred to the forensic department for the opinion of the forensic expert and after receipt of the report of the forensic expert, chose to not press the previous suit O.S. No. 372/2002 as evident from Exs. B14 and B18 and proceeded with the present suit, which had been instituted subsequent to the reference made to the forensic expert for opinion. The same, as pointed out earlier, is a glaring example of abuse of process of court.

33. When the execution of the document is disputed by the appellant/first defendant and the disputed document was also referred to a forensic expert for opinion through court and a report containing the opinion of the expert to the effect that the disputed signatures found in Ex. A1 do not tally with the admitted signatures of the appellant/first defendant had been received in the court, the first respondent/plaintiff ought to have

summoned the expert as a witness and made an attempt to show that his opinion was not correct. He also could have caused the disputed and admitted signatures compared by any other expert of his choice and adduced evidence through him. He has not done it and on the other hand, in order to nullify the effect of the forensic report submitted in the previous suit filed by him, he has chosen not to press the previous suit. The same will give rise to the drawal of an adverse inference against the first respondent/plaintiff.

34. All the above said facts were not properly dealt with by the courts below and the courts below, without considering the quality of the evidence adduced on the side of the plaintiff and without evaluating the evidence in proper perspective, had simply arrived at a perverse finding that the suit agreement for sale marked as Ex. A1 was the one executed by the appellant/first defendant and the signatures found therein were that of the appellant/first defendant. The said finding has led to a further perverse finding that the possession of the first respondent/plaintiff was in part performance of Ex. A1-agreement for sale. As the said findings of the courts below are perverse, the said findings are liable to be interfered with and reversed by this court. Accordingly, this court sets aside the findings rendered by the courts below to the effect that Ex. A1-agreement is genuine and the first respondent/plaintiff got possession in part performance of Ex. A1-agreement. This court hereby holds that Ex. A1-agreement is not proved to be genuine and the first respondent/plaintiff was not put in possession in part performance of the suit agreement for sale; that the legal heirs of Chinnarasu Gounder, who had got the property on lease, due to the dispute regarding arrears of rent, have inducted the first respondent herein/plaintiff into possession and that based on the collusion between them, the suit agreement for sale came to be fabricated and the present suit O.S. No. 2/2005 on the file of the Sub Court, Cuddalore as well as the earlier suit O.S. No. 372/2002 came to be filed as an abuse of process of court. In line with the said finding, this court comes to the conclusion that the decree granted by the trial court for specific performance is liable to be set aside.

35. The first respondent/plaintiff who claims to have entered into an agreement for sale with the appellant/first defendant chose to file a suit on the

file of the District Munsif Court, Cuddalore as O.S. No. 372/2002 for bare injunction even after the pre-suit notice sent by him was replied

denying the agreement for sale alleged to have been executed by the appellant/first defendant. From the very fact that he had not chosen to file a

suit for specific performance even after the refusal to perform and chose to file the present suit after a lapse of more than two years from the date

of filing of the earlier suit, that too after the disputed document was referred for the opinion of a forensic expert, will show absence of readiness

and willingness on the part of the first respondent/plaintiff at least during the said period. In view of the finding of this court that the suit agreement

for sale is not genuine and a further finding that the first respondent/plaintiff has not proved his readiness and willingness in accordance with the

mandate provided u/s 16(c) of the Specific Relief Act, the suit for specific performance filed by him should have been dismissed by the courts

below. The courts below, on erroneous appreciation of evidence, adopted a wrong approach, rendered perverse finding and based on such

perverse finding granted the relief of specific performance. Hence the decree of the trial court, which was confirmed by the lower appellate court

granting the relief of specific performance in favour of the first respondent/plaintiff deserves to be set aside and the suit for specific performance is

liable to be dismissed. In view of the reasons assigned for the above said findings that the first respondent/plaintiff suit is liable to be dismissed, this

court also comes to the conclusion that the appellant/first defendant, the owner of the suit property, having not lost his title, is entitled to recover

possession of the suit property from the first respondent/plaintiff as per the counter claim made by him and that part of the decree of the trial court,

which was confirmed by the appellate court dismissing the counter-claim made by the appellant/first defendant is also liable to be reversed and set

aside. The appellant herein/first defendant had also made a claim for recovery of damages for use and occupation. Though, according to him he

was entitled to such damages from the year 2000 onwards, he had restricted his claim to damages for use and occupation at the rate of Rs.

1,000/- per month from the date of plaint till recovery of possession. In line with the findings of this court that the suit agreement for sale is not

genuine and the plaintiff was not put in possession in part performance of the agreement for sale and that he had been inducted in possession by the

legal heirs of the erstwhile lessee, this court comes to the conclusion that the appellant/first defendant is entitled to recover damages for use and occupation from the date of plaint till recovery of possession. However, since there is no evidence as to what would have been reasonable income derived from the property if it was let out and since Ex. B6-Rent Deed recites only a sum of Rs. 450/- as monthly rent, the damages for future use and occupation is allowed at the rate of Rs. 450/- per month from the date of plaint till the date of delivery of possession. The second and third substantial questions of law are answered accordingly in favour of the appellant/first defendant and against the first respondent/plaintiff.

In the result, the second appeal is allowed. The decree of the lower appellate court dated 29.03.2011 made in A.S. No. 30 of 2010 confirming the decree passed by the trial court is set aside. The decree of the trial court dated 28.01.2010 made in O.S. No. 2 of 2005 decreeing the suit for specific performance and dismissing the counter-claim is also set aside. The original suit O.S. No. 2 of 2005 is dismissed. The counter claim of the appellant/first defendant is allowed and the first respondent/plaintiff is directed to hand over vacant possession of the suit property to the appellant/first defendant and also to pay damages for use and occupation at the rate of Rs. 450/- per month from the date of plaint till delivery of possession. The appellant/first defendant shall be entitled to recover his cost of litigation from the first respondent/plaintiff throughout.
