

M/S Virgo Industries (Eng) P.Ltd vs M/S Venturetech Solutions P.Ltd on 7 September, 2012

Equivalent citations: AIRONLINE 2012 SC 542

Author: Ranjan Gogoi

Bench: Ranjan Gogoi, P. Sathasivam

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 6372 of 2012
(Arising out of SLP (Civil) 1088 of 2010)

M/s Virgo Industries (Eng.) P.Ltd. ... Appellant(s)

Versus

M/s.Venturetech Solutions P.Ltd. ... Respondent(s)

With

CIVIL APPEAL No. 6373 of 2012
(Arising out of SLP (Civil) 1184 of 2010)

J U D G M E N T

RANJAN GOGOI, J

Leave granted.

2. Both the appeals are directed against the common judgment and order dated 6.10.2009 passed by the High Court of Madras by which the High Court has refused to interdict the proceedings registered and numbered as OS Nos. 202 and 203 of 2007 pending in the Court of the learned District Judge, Thiruvallur filed by the respondents herein.

3. The brief facts that would be required to be noticed for the purpose

of the present adjudication may now be recapitulated.

The respondent in the two appeals, as the plaintiff, instituted C.S No. 831 of 2005 and C.S. No. 833 of 2005 before the Madras High Court seeking a decree of permanent injunction restraining the appellant (defendant) from alienating, encumbering or dealing with the plaint schedule properties to any other third party other than the plaintiff. The aforesaid relief was claimed on the basis of two agreements of sale entered into by the plaintiffs and the defendant both on 27.7.2005 in respect of two different parcels of immovable property consisting of land and superstructures built on plot No. 65 (old No.43) and plot No. 66 (old No.42), Second Main Road, Ambattur Industrial Estate, Chennai. In each of the aforesaid suits the plaintiff had stated that under the agreements of sale different amounts were paid to the defendants, yet, on the pretext that restrictions on the alienation of the suit land were likely to be issued by the Central Excise Department on account of pending revenue demands, the defendants were attempting to frustrate the agreements in question. In the suits filed by the plaintiff it was also stated that as the period of six months fixed for execution of the sale deeds under the agreements in question was not yet over, the plaintiff is not claiming specific performance of the agreements. The plaintiff, accordingly, sought 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. The two suits in question, i.e., C.S. Nos. 831 and 833 of 2005 were filed by the plaintiff on 28.8.2005 and 9.9.2005 respectively.

4. Thereafter on 29.5.2007, O.S. Nos. 202 and 203 were filed by the plaintiff in the Court of the District Judge, Tiruvallur seeking a decree against the defendant for execution and registration of the sale deeds in respect of the same property and for delivery of possession thereof to the plaintiff. In the aforesaid latter suits it was mentioned by the plaintiff that in respect of the same suit property it had earlier filed suit Nos. C.S. 831 and 833 of 2005 seeking the relief of permanent injunction. As the time for performance of the agreements of sale had not elapsed when C.S. No.831 and 833 of 2005 were instituted and the plaintiff was "under the bonafide belief that the defendants would perform the agreement" the relief of specific performance was not claimed in the aforesaid suits. However, as inspite of a legal notice issued to the defendants on 24.2.2006, the sale deeds had not been executed by the defendant the latter suits i.e. O.S.Nos 202 and 203 were instituted.

5. While the matter was so situated the defendant in both the suits i.e. the present petitioner, moved the Madras High Court by filing two separate applications under Article 227 of the Constitution to strike off the plaints in O.S. Nos. 202 and 203 of 2007 on the ground that the provisions contained in Order II Rule 2 of the Civil Procedure Code, 1908 (for short the 'CPC') is a bar to the maintainability of both the suits. Before the High Court the defendant had contended that the cause of action for both sets of suits were the same, namely, the refusal or reluctance of the defendant to execute the sale deeds in terms of the agreements dated 27.7.2005. Therefore, at the time of filing of the first set of suits i.e. C.S. Nos. 831 and 833 of 2005, it was open for the plaintiff to claim the relief of specific performance. The plaintiff did not seek the said relief

nor was leave granted by the Madras High Court. In such circumstances, according to the defendant-petitioner, the suits filed by the plaintiff for specific performance i.e O.S. Nos. 202 and 203 were barred under the provisions of Order II Rules 2 (3) of the CPC.

6. The High Court, on consideration of the cases of the parties before it, took the view that on the date of filing of C.S. Nos. 831 and 833 of 2005 the time stipulated in the agreements between the parties for execution of the sale deeds had not expired. Therefore, the cause of action to seek the relief of specific performance had not matured. According to the High Court it is only after filing of the aforesaid suits and on failure of the defendants to execute the sale deeds pursuant to the legal notice dated 24.2.2006 that the cause of action to seek the aforesaid relief of specific performance had accrued. The High Court, accordingly, took the view that the provisions of Order II Rule 2 (3) of the CPC were not attracted to render the subsequent suits filed by the plaintiff i.e. O.S. Nos. 202

and 203 non-maintainable. The High Court also took the view that the provisions of Order II Rule 2 (3) of the CPC would render a subsequent suit not maintainable, only, if the earlier suit has been decreed and the said provisions of the CPC will not apply if the first suit remains pending. In arriving at the aforesaid conclusion the learned Single Judge of the High Court considered himself to be bound by the decision of a Division Bench of the same High Court in the case of R.Vimalchand and M.Ratanchand v. Ramalingam, T.Srinivasalu & T. Venkatesaperumal[1]. The High Court also held that though the application filed by the defendant under Article 227 of the Constitution was not maintainable as the defendant had the remedy of approaching the learned trial court under Order VII Rule 11 of the CPC, yet, in view of the elaborate discussions that have been made and findings and conclusions recorded it would be appropriate to decide the issues raised on merits. It is the correctness of the aforesaid view of the High Court that has been assailed in the present appeals.

7. We have heard Mr. C.A. Sundaram, learned senior counsel for the appellants and Mr. S.Gurukrishna Kumar, learned counsel for the respondent.

8. The necessary discussions that will have to follow may be initiated by extracting the provisions of Order II Rule 2 of the CPC:

"ORDER II

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.

Explanation-For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

9. Order II Rule 1 requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order II Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order II Rule 2 of CPC makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order II Rule 2 (2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the Court is contemplated by Order II Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. It is, therefore, clear from a conjoint reading of the provisions of Order II Rule 2 (2) and (3) of the CPC that the aforesaid two sub-rules of Order II Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit provided that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit.

10. The object behind enactment of Order II Rule 2 (2) and (3) of the CPC is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons. The situations where the bar under Order II Rule 2 (2) and (3) will be attracted have been enumerated in a long line of decisions spread over a century now. Though each of the aforesaid decisions contain a clear and precise narration of the principles of law arrived at

after a detailed analysis, the principles laid down in the judgment of the Constitution Bench of this Court in *Gurbux Singh v. Bhooralal*[2] may be usefully recalled below:

"In order that a plea of a bar under O. 2. r. 2(3), 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."

The above principles have been reiterated in several later judgments of this Court. Reference by way of illustration may be made to the judgments *Deva Ram & Anr. v. Ishwar Chand & Anr.*[3] and *M/s. Bengal Waterproof Ltd. v. M/s Bombay Waterproof Manufacturing Co. & Anr.*[4]

11. The cardinal requirement for application of the provisions contained in Order II Rule 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression, i.e. cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in the *Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee*[5]. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in *Halsbury's Law of England*, (4th Edition). The following reference from the above work would, therefore, be apt for being extracted hereinbelow:

"Cause of Action" has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

12. In the instant case though leave to sue for the relief of specific performance at a later stage was claimed by the plaintiff in C.S. Nos. 831

and 833 of 2005, admittedly, no such leave was granted by the Court. The question, therefore, that the Court will have to address, in the present case, is whether the cause of action for the first and second set of suits is one and the same. Depending on such answer as the Court may offer the rights of the parties will follow.

13. A reading of the complaints filed in C.S. Nos. 831 and 833 of 2005 show clear averments to the effect that after execution of the agreements of sale dated 27.7.2005 the plaintiff received a letter dated 1.8.2005 from the defendant conveying the information that the Central Excise Department was contemplating issuance of a notice restraining alienation of the property. The advance amounts paid by the plaintiff to the defendant by cheques were also returned. According to the plaintiff it was surprised by the aforesaid stand of the defendant who had earlier represented that it had clear and marketable title to the property. In paragraph 5 of the complaint, it is stated that the encumbrance certificate dated 22.8.2005 made available to the plaintiff did not inspire confidence of the plaintiff as the same contained an entry dated 1.10.2004. The plaintiff, therefore, seriously doubted the claim made by the defendant regarding the proceedings initiated by the Central Excise Department. In the aforesaid paragraph of the complaint it was averred by the plaintiff that the defendant is "finding an excuse to cancel the sale agreement and sell the property to some other third party."

In the aforesaid paragraph of the complaint, it was further stated that "in this background, the plaintiff submits that the defendant is attempting to frustrate the agreement entered into between the parties."

14. The averments made by the plaintiff in C.S. Nos. 831 and 833 of 2005, particularly the pleadings extracted above, leave no room for doubt that on the dates when C.S. Nos. 831 and 833 of 2005 were instituted, namely, 28.8.2005 and 9.9.2005, the plaintiff itself had claimed that facts and events have occurred which entitled it to contend that the defendant had no intention to honour the agreements dated 27.7.2005. In the aforesaid situation it was open for the plaintiff to incorporate the relief of specific performance alongwith the relief of permanent injunction that formed the subject matter of above two suits. The foundation for the relief of permanent injunction claimed in the two suits furnished a complete cause of action to the plaintiff in C.S. Nos. 831 and 833 to also sue for the relief of specific performance. Yet, the said relief was omitted and no leave in this regard was obtained or granted by the Court.

15. Furthermore, according to the plaintiff, which fact is also stated in the complaints filed in C.S. Nos. 831 and 833, on the date when the aforesaid two suits were filed the relief of specific performance was premature inasmuch as the time for execution of the sale documents by the defendant in terms of the agreements dated 27.7.2005 had not elapsed. According to the plaintiff, it is only after the expiry of the aforesaid period of time and upon failure of the defendant to execute the sale deeds despite the legal notice dated 24.2.2006 that the cause of action to claim the relief of specific performance had accrued. The above stand of the plaintiff found favour with the High Court. We disagree. A suit claiming a relief to which the plaintiff may become entitled at a subsequent point of time, though may be termed as premature, yet, can not per se be dismissed to be presented on

a future date. There is no universal rule to the above effect inasmuch as "the question of a suit being premature does not go to the root of the jurisdiction of the Court" as held by this Court in Vithalbhai (P) Ltd. v. Union Bank of India[6]. In the aforesaid case this Court has taken the view that whether a premature suit is required to be entertained or not is a question of discretion and unless "there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event", the Court must weigh and balance the several competing factors that are required to be considered including the question as to whether any useful purpose would be served by dismissing the suit as premature as the same would entitle the plaintiff to file a fresh suit on a subsequent date. We may usefully add in this connection that there is no provision in the Specific Relief Act, 1963 requiring a plaintiff claiming the relief of specific performance to wait for expiry of the due date for performance of the agreement in a situation where the defendant may have made his intentions clear by his overt acts.

16. The learned Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in the case of R.Vimalchand and M.Ratanchand v. Ramalingam, T.Srinivasalu & T. Venkatesaperumal (supra) holding that the provisions of Order II Rule 2 of the CPC would be applicable only when the first suit is disposed of. As in the present case the second set of suits were filed during the pendency of the earlier suits, it was held, on the ratio of the aforesaid decision of the Division Bench of the High Court, that the provisions of Order II, Rule 2(3) will not be attracted. Judicial discipline required the learned Single Judge of the High Court to come to the aforesaid conclusion. However, we are unable to agree with the same in view of the object behind the enactment of the provisions of Order II Rule 2 of the CPC as already discussed by us, namely, that Order II Rule 2 of the CPC seeks to avoid multiplicity of litigations on same cause of action. If that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully subserved by holding that the provisions of Order II Rule 2 of the CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit. Rather, Order II, Rule 2 of the CPC will apply to both the aforesaid situations. Though direct judicial pronouncements on the issue are somewhat scarce, we find that a similar view had been taken in a decision of the High Court at Allahabad in Murti v. Bhola Ram[7] and by the Bombay High Court in Krishnaji v. Raghunath[8].

17. In the light of the above discussions we are of the view that the present appeals deserve to be allowed. Accordingly we allow the same and set aside the judgment and order dated 6.10.2009 passed by the High Court of Madras in C.R.P.PD. Nos. 3758 and 3759 of 2007. Consequently, we strike off the plaint in O.S.Nos.202 and 203 of 2007 on the file of District Judge, Thiruvallur.

.....J.
[P. SATHASIVAM]

.....J.
[RANJAN GOGOI]

New Delhi,
September 07, 2012.

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[1] 2002 (3) MLJ page 177 [2] AIR 1964 SC 1810 [3] 1995 (6) SCC 733 [4] AIR 1997 SC 1398 [5] JT
2012 (6) SC 149 [6] 2005(4) SCC 315 [7] (1894) ILR 16 All 165 [8] AIR 1954 BOM 125
