

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.08.2016

CORAM

THE HONOURABLE MR.JUSTICE C.T.SELVAM

Civil Revision Petition (PD) Nos.4223 & 4224 of 2015
and
M.P.Nos.1 & 1 of 2015

Rajeswari
W/o.Palani

... Petitioner in both revisions

vs

1.G.Subramanian
S/o.Gopal

2.C.Hariramakrishnan
S/o.Chellaiah

3.E.Palani
S/o.Elumalai

... Respondents in both revisions

Civil Revision Petitions filed under Article 227 of the Constitution of India against the orders of learned Additional Subordinate Judge, Chengalpattu, passed in I.A.Nos.136 of 2014 and 181 of 2013 in O.S.No.294 of 2007 on 24.07.2015.

For Petitioner : Mr.C.R.Rukmani

For Respondents : Mr.V.V.Sairam [R1]

COMMON ORDER

These revisions arise against orders of learned Additional Subordinate Judge, Chengalpattu, passed in I.A.Nos.136 of 2014 and 181 of 2013 in O.S.No.294 of 2007 on 24.07.2015.

2. First respondent/plaintiff has filed O.S.No.294 of 2007 on the file of learned Additional Subordinate Judge, Chengalpattu, seeking a declaration of title over 'A' schedule suit property and other consequential reliefs. He moved I.A.No.91 of 2008 seeking interim injunction. He moved a further application in I.A.No.181 of 2011 seeking appointment of an Advocate Commissioner and the same was allowed under orders dated 13.06.2011. Pursuant thereto, the Advocate Commissioner visited the property and filed his report on 24.06.2011. I.A.No.91 of 2008 was closed on 01.07.2011 pursuant to an undertaking made on behalf of petitioner/third defendant. Such undertaking was signed both by learned counsel for petitioner/third defendant as also her husband. It may be mentioned that at such stage the petitioner had not been impleaded as third defendant in the suit. Alleging breach of undertaking and seeking punishment of the petitioner, first respondent/plaintiff moved I.A.No.136 of 2014. The Court below under orders dated 24.07.2015, informed that the petitioner/third

defendant, having undertaken not to put up any construction in the suit property, could not contend that it was only an undertaking and it could not be treated as an order of injunction. Pursuant to filing of report by the Advocate Commissioner informing construction on the suit property, I.A.No.91 of 2008 was closed based on the undertaking given by third defendant. Subsequently, upon the direction of the Court, the same Advocate Commissioner has revisited the suit property and filed his report informing further construction on the suit property. Reasoning that the third defendant has acted against the undertaking by putting up construction on the suit property and such action amounts to violation of its order, Court below allowed the application and directed payment of 'civil arrest batta in a week'. C.R.P.(PD) No.4223 of 2015 is preferred against such order.

3. First respondent/plaintiff moved I.A.No.181 of 2013 in O.S.No.294 of 2007 seeking amendment of the plaint towards including a prayer for mandatory injunction. Such application was allowed by the Court on the reasoning that the reports of the Advocate Commissioner reveal that the third defendant has acted against her undertaking and thus, violated the order passed in I.A.No.91 of 2008 and that the subsequent developments made

necessary the amendment sought. Against such order, C.R.P.(PD) No.4224 of 2015 has been filed.

4. Learned counsel for petitioner/third defendant submitted that first respondent/plaintiff had made vague allegations of violation of undertaking by petitioner/third defendant informing of such conduct during the vacation period without informing any specific date. Learned counsel submitted that first respondent/plaintiff despite knowledge of petitioner's purchase of the suit property and putting up of construction by her, chose to file a suit only against two defendants and purposely did not implead the petitioner as defendant in the action. It was only long after the written statement of defendants 1 and 2 were filed that the petitioner was impleaded as a party defendant and an Advocate Commissioner was appointed to note down the physical features. Petitioner/third defendant purchased the property in April 2007, the suit was filed on 22.10.2007 i.e., six months after the purchase. On such date, petitioner/third defendant had put up a house and tenanted the premises. The suit has been filed against the Power of Attorney of vendors by deliberately avoiding to make petitioner a party defendant. Along with the suit, first respondent/plaintiff had filed an interim injunction application but no order

has been passed therein. First respondent/plaintiff subsequently moved an interlocutory application towards impleading the petitioner and thereupon the petitioner/third defendant had filed her written statement on 24.05.2012. First respondent/plaintiff had moved I.A.No.91 of 2008 alleging that the petitioner/third defendant was attempting to put up a pucca house on the suit scheduled property and had prayed for temporary injunction. In her counter thereto, the petitioner/third defendant had informed the correct position viz., that having purchased the property under a sale deed dated 24.01.2007, the property had been sub-divided and patta had been issued in her favour. She had also completed construction of her house and the compound wall thereto. Her building had also been assessed to property tax and she has also obtained electricity service connection. She had informed that allegations of her attempting to construct a pucca house was false since the construction was already complete. Though the written statement of the first defendant dated 21.03.2008 and that of the second defendant dated 20.06.2008 disclosed the sale of property in favour of petitioner and of her putting up a house thereon, first respondent/plaintiff leisurely had moved application to implead the petitioner as a party defendant only very much later.

5. Petitioner/third defendant's vendor as also the vendor of first respondent/plaintiff inform title under a common document and despite knowledge of the factual position that petitioner/third defendant duly had purchased property and put up construction thereon, first respondent/plaintiff had moved the action without making her a party defendant. First respondent was guilty of approaching the Court with unclean hands. In I.A.No.181 of 2013, first respondent/plaintiff had sought amendment of the plaint towards including a prayer for mandatory injunction to 'demolish the illegal construction and deliver possession in the suit scheduled property'. In an additional counter filed thereto, first defendant had informed the correct position regards purchase of the property by petitioner/third defendant and putting up of construction thereon by her, the failure on the part of first respondent/plaintiff to include her as a party to the suit, that the existence of a building which was already in possession and enjoyment of the petitioner/third defendant since her date of purchase and of the same being adjacent to the new construction, of such old building being in the occupation of the tenant of petitioner/third defendant, of the admission of first respondent/plaintiff in cross that he had sought a relief of declaration of title to property held by petitioner/third defendant, that he had not sought relief of possession there regards, that both

in the plaint and proof affidavit, the first respondent/plaintiff had informed of the property being in his possession and contended that the reliefs claimed by way of amendment were time barred. Learned counsel submitted that first respondent/plaintiff had sworn to an affidavit in support of the petition for amendment of plaint on 12.06.2013 but had then not moved a petition seeking action against the petitioner/third defendant for alleged violation of undertaking but had informed the very same allegations and sought civil arrest of the petitioner by way of I.A.No.136 of 2014, the supporting affidavit whereof was dated 04.07.2014. Learned counsel submitted that it is pertinent to note that in both applications the date of putting up of illegal construction has not been informed.

6. Learned counsel referred to the decision of the Apex Court in ***L.C.Hanumanthappa v. H.B.Shivakumar [2015 (6) CTC 562]*** to contend that the relief for mandatory injunction towards demolition of construction put up by petitioner was time barred as on the date of I.A.No.181 of 2013 and the doctrine of relation back whereunder the amendment sought and allowed would have to be read as prayed for on the date of the suit, would not be applicable. Learned counsel relied on the judgment of the Bombay High Court

in *Mohanbhai Ishwarbhai Patel v. Indian Council of Basic Education* [AIR 2006 Bombay 36] wherein the view that the breach of an undertaking would not fall within the ambit of Order 39 Rule 2A CPC was taken. Learned counsel submitted that the Engineer entrusted with the construction and his family members had suffered huge losses and had all committed suicide. It was only because that the Engineer could not wait any longer that construction of building had been gone ahead with despite the undertaking. So submitting, learned counsel relied on the judgment of the Apex Court in *Niaz Mohammad and others v. State of Haryana and others* [1994 (6) SCC 332] and submitted that disobedience was found to be under compelling circumstances and the contemner was not liable to be punished for contempt. Learned counsel submitted that as a person residing in a rural area, the petitioner/third defendant would not have visited the site. Learned counsel further relied on the decision of this Court in *Nazeema Parveen and others v. A.Zubeidha Bee* [2009 (5) CTC 543] to contend that unless the conduct of the petitioner complained of is willful and deliberate, no action for contempt would lie on technical violation or probabilities.

7. Learned counsel for first respondent submitted that in answer to the charge of contempt, petitioner by way of counter had contended as follows:

“7. On the date of commissioner's visit the extended building was up to lintel level. Since the building contractor could not wait till the disposal of litigation and he asserted that he will withdraw from the contract, this respondent had to complete the construction to avoid wastage and loss of building materials and damage claim proposed by the contractor. In any event the petitioner can demolish the construction if he succeeds in the suit as he has sought for demolition. In as much as the petition for amendment seeking for mandatory injunction is still pending this application is not maintainable.”

The contentions totally were untenable. Submitting that learned counsel for petitioner/third defendant was seeking to confuse issues, learned counsel referred to the evidence of first respondent/plaintiff to point out that at the time of petitioner/third defendant's purchase, the property housed a building but the action complained of by first respondent/plaintiff was regards a fresh construction put up to the west of such building. Learned counsel referred to the counter of petitioner/third defendant in I.A.No.136 of 2014 wherein she had contended as follows:

“6. This respondent has been reiterating from the beginning that she is in possession of the suit property in her own

right and title by letting out the old house that has been existing for long time and by constructing in the remaining portion adjoining the old house as an extension.”

8. Learned counsel submitted that rightly read, the same would amount to an admission of first respondent/plaintiff's contention. In the changed circumstances, the amendment as ordered by Court below became necessary. Learned counsel referred to the following observations in the decision of the Apex Court in **Prem Bakshi v. Dharam Dev [AIR 2002 SC 559]**:

“7. Now the question is whether the order in question has caused failure of justice or irreparable injury to respondent No.1. It is almost inconceivable how mere amendments of pleadings could possibly cause failure of justice or irreparable injury to any party. Perhaps the converse is possible i.e. refusal to permit the amendment sought for could in certain situations result in miscarriage of justice. Afterall amendments of the pleadings would not amount to decisions on the issue involved. They only would serve advance notice to the other side as to the plea, which a party might take up. Hence we cannot envisage a situation where amendment of pleadings, whatever be the nature of such amendment, would even remotely cause failure of justice or irreparable injury to any party.”

As regards the action of breach of undertaking complained of, the same

Advocate Commissioner had twice visited the property and the subsequent report informed putting up of construction and violation of undertaking.

9. This Court has considered the rival submissions.

10. In sum and substance, the plea of petitioner is not of her not having violated the undertaking given before Court below but of her being justified in doing so. Even so, given the rival submissions, this Court is of the view that it would be appropriate to put the petitioner on costs instead of directing civil arrest.

Accordingly, this Court orders as follows:

- (i) C.R.P.(PD) No.4223 of 2015 is disposed of directing petitioner to pay a sum of Rs.50,000/- (Rupees fifty thousand only) to the Chief Justice Relief Fund within a period of two months from the date of receipt of this order and produce proof thereof before Court below. In the event of petitioner failing to do so, Court below may proceed further in I.A.No.136 of 2014 in O.S.No.294 of 2007 and from the stage the same stood before it.

(ii) Following the rationale of the judgment of Apex Court in ***Prem Bakshi v. Dharam Dev*** [AIR 2002 SC 559], C.R.P.(PD) No.4224 of 2015 shall stand dismissed.

(iii) This Court makes it clear that the present order is not to be read as one informing any view on the merits of rival cases. Direction to petitioner to pay costs is made in particular circumstances of the case and shall not be read against her. As informed by Apex Court allowing of an amendment of pleadings would not amount to a decision on the issue involved. To reiterate, Court below shall deal with the case strictly on merits.

Connected miscellaneous petitions are closed.

01.08.2016

Note to office :
Issue order copy by 07.09.2016

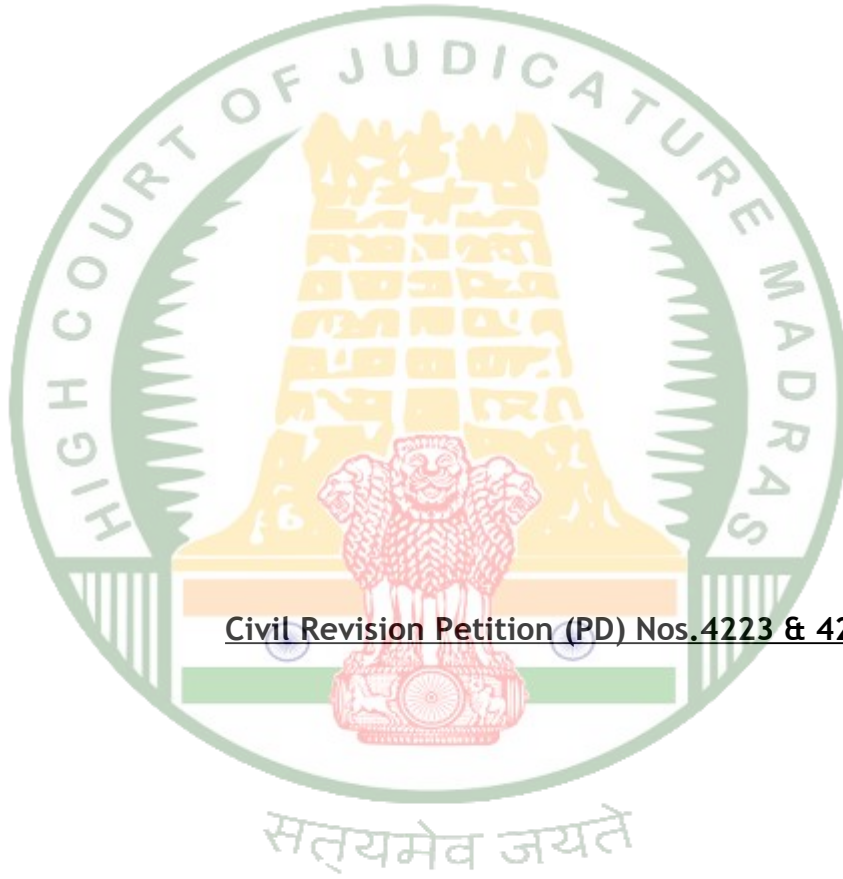
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To
The Additional Subordinate Judge,
Chengalpattu.

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C.T.SELVAM, J

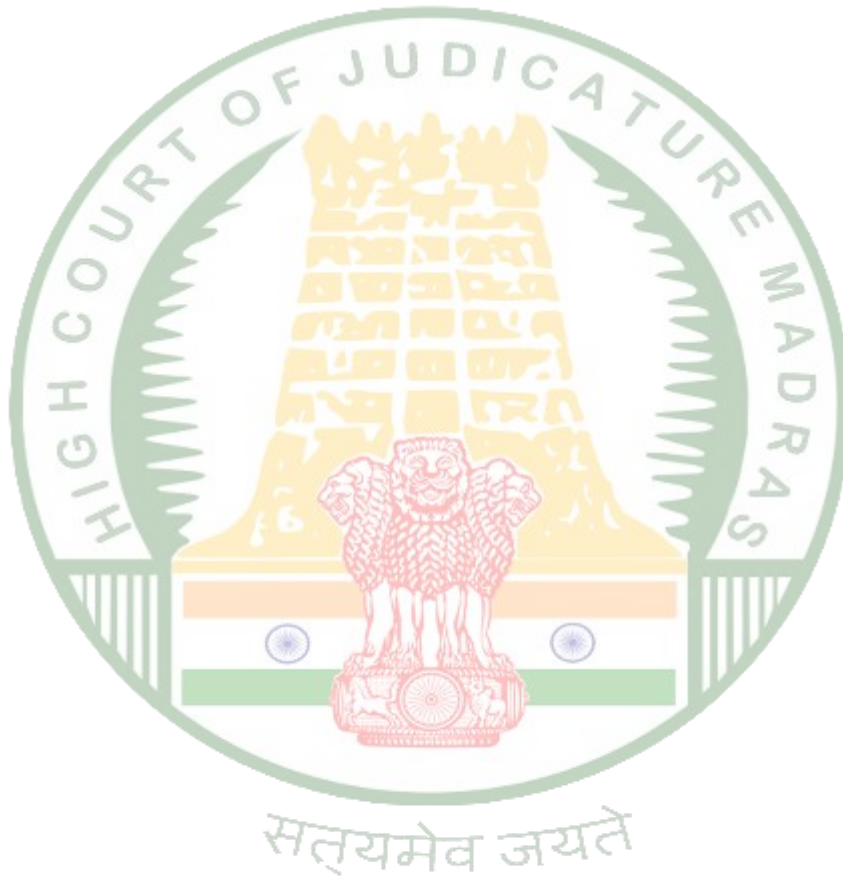
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