

IN THE HIGH COURT OF JUDICATURE AT MADRAS**DATED : 05.10.2018****CORAM :****THE HONOURABLE MR.JUSTICE M.S.RAMESH****C.R.P.(PD)No.1951 of 2015
and MP.No. 1 of 2015**

G.Sasikumar ... Petitioner

Vs

Manickavasagam ... Respondent

Prayer:- Civil Revision Petition has been filed under Article 227 of the Constitution of India to set aside the order dated 23.02.2015 passed in I.A. No. 457 of 2014 in O.S. No.16 of 2012 by the District Munsif, Mannargudi and to allow the application I.A. No. 457 of 2014 in O.S. No. 16 of 2012 on the file of the District Munsif, Mannargudi.

For petitioner : Mr.P.Sesubalan Raja
For Respondent : No Appearance

ORDER

The present revision is directed against the order rejecting the petitioner's application in I.A. No. 457 of 2014 in O.S. No. 16 of 2012 filed under Order VI Rule 17 CPC seeking to amend the plaint by entertaining the prayer for mandatory injunction.

2. Heard Mr. P.Sesubalan Raja, learned counsel for the petitioner. Though notice has been served and the name printed in the cause list, none appears on behalf of the respondent.

3. The case of the petitioner is that, pending suit, the respondent herein had forcibly taken the possession of the suit property and this necessitated him to file the present revision.

4. The trial Court by relying upon the judgment of this Court reported in **(2015) 1 TLNJ 201 (Civil) in the case of C.R.Umapathy & others Vs. D.Sathayanarayana Chettiar & others**, held that the relief for mandatory injunction by way of amendment cannot be sought for and that the proper recourse to the petitioner is to file a suit for recovery of possession by paying appropriate court fee.

5. The learned counsel for the petitioner by relying upon the judgments reported in **[1]. 1917 SCC Online Mad 59, [2].1995 1 MLJ 88, [3]. CDJ 2004 BHC 228 and [4]. CDJ 1985 Cal HC 003**, submitted that when the petitioner has been dispossessed from the suit property pending suit, which was filed for permanent injunction, the proper recourse is to seek for mandatory injunction to restore his possession. In view of the aforesaid judgments, the learned counsel for the petitioner submitted that the trial Court was not justified in rejecting the petitioner's application.

6. On a overall perusal of the aforesaid judgments, it is found that, in a case in this nature, when the plaintiff is deprived of his possession over the suit property pending the suit, the proper recourse available to him is either to file an interim application seeking for restoration of possession or for mandatory injunction.

7. The relevant portions of observations reported in the aforesaid judgments reads as follows;

[1]. 1917 SCC Online Mad 59 - M.Kandasawmy Chetti Vs.P.Subramania Chetti

"Upon the question whether Courts in this country have the power by virtue of O. 39, R. 2 of the Code of Civil Procedure, to issue temporary injunctions in a mandatory form we are not prepared to adopt the opinion expressed by Beaman, J. in Rasul Karim v. Pirubhai Amirbhai(1). The description of temporary injunctions in Sect. 53, Specific Relief Act, does not exclude injunctions of a mandatory nature, and in Ismailv. Shamser Rakman(2), upon an application for an interim injunction, pending the disposal of a suit it was ordered that defendant should not only be restrained from further erection of a building but that he should pull down so much of it as he had erected after he became aware of the institution of the plaintiff's suit. We also may observe that Shah, J., did not agree with the opinion of his learned brother in I. L. R., 38 Bom., 381, and that two other Judges of the Bombay High Court took a

different view from Beaman, J., in Chamsee Bhimji & Co. v. Jamna Four Mills Co.(3)."

[2].1995 1 MLJ 88 - D.Gopal Vs. The Kilpauk Muslims Welfare

"6.1 have considered the rival submissions. So far as the declaration relief prayed for in the proposed amendment is concerned, in view of the abovesaid admissions in the plaint as well as in the affidavit in-support of the application, as stated above, that relief cannot be asked for by the plaintiff. But, in so far as the possession relief is concerned, I hold the amendment has to be allowed since all that the plaintiff alleges is that pending suit the 1st defendant has trespassed into the property and forcibly evicted the plaintiff from the property. No doubt this allegation is factually denied by the 1st defendant, whose contention is that the 1st defendant was in possession even prior to the suit, of the suit property including thereon put up by the 1st defendant and that subsequently in 1987, a new building was also put up. But, in considering such an amendment application, the court should not go into the merits of the disputed questions of fact. That could be gone into only at the time of the trial of the suit. But, as I have already stated this principle could be applied only with reference to the possession relief, where there is dispute between the parties. With reference to the declaration relief, even as per the plaintiff's own allegation, he is not having the title to the suit land and even with reference to the

superstructure over the said land, the allegation is that the said superstructure put up by the plaintiff had been completely removed by the 1st defendant. Therefore, the plaintiff cannot have the proposed declaratory relief.

7. Coming back to the proposed amendment relating to possession relief the settled law is that in an injunction suit, if the allegation is that the defendant has trespassed into the property, pending suit and taken possession of the property, the court could very well mould the relief and grant the relief of possession even without amendment of the plaint. While so, there can be no bar for granting the proposed amendment seeking the possession relief based on the alleged possessory title of the plaintiff. In view of the abovesaid settled law, I think that order of the court below suffers from material irregularity in the exercise of jurisdiction Section 115 of the Code of Civil Procedure empowers this Court to revise such orders. A. Ha teem v. M.S. Tajudeen (1993)1 L.W. 502 will have no application to the present case. I am also unable to accept the contention of learned Counsel for the 1st respondent that prejudice would be caused to the 1st defendant if the proposed amendment is allowed with reference to possession relief. If really the illegal trespass pending suit is true, then the 1st defendant cannot advance this argument of prejudice. But the question whether there was illegal trespass or not has to be gone into only at the time of the trial of the suit. So, there can

be no bar for allowing the abovesaid amendment relating to possession relief alone. Simply on the ground of delay, the amendment relating to possession relief cannot be refused particularly when it is found that as early as 1987 the plaintiff has taken criminal action for the alleged trespass."

[3]. CDJ 2004 BHC 228 - Indian Cable Company Vs. Sumitra Chakraborty

"10. The learned Subordinate Judge has also relied on an earlier decision of this court in the case of Nandan Pictures Ltd. v. Art Pictures Ltd., in holding that when in the suit the plaintiff has acknowledged dispossession, the plaintiff is not entitled to a mandatory injunction for restoration of possession since dispossession was prior to the suit. Though an observation in the said decision if read not in its context is often cited as an authority for such a proposition, we do not think that the learned Judges really intended to lay down any such absolute proposition in the said decision. Since that observation was made having regard to the earlier authorities on the point, it would be just and proper for me to review these authorities. No doubt the observations of Beaman J. of the Bombay High Court in the Bench decision in the case of Rasul Karim v. Pirbhai Ameerbhai, AIR 1914 Bom 42 appear to support such a view when he observed; "Entertaining the doubt I had, whether in any case the mofussil courts have the power to issue mandatory injunctions on interlocutory applications it appears to me

that upon grounds of general expediency the proper course where applications of the kind are made would be rather to expedite the proceedings than to grant an injunction". But in the Division Bench Shah, J did not agree to such a principle when he in his turn observed : "I am not sure that the Indian Court have not similar powers under Rule 2, Order 39". But the facts remains that the observations of Beamen, J did not find approval in subsequent decisions of different High Courts including the Bombay High Court itself. In a subsequent Bench decision in the case of *Champsey Bhimji & Co. v. Jamna Flour , Mills*, AIR 1914 Bom 195, it was observed by Davan, Acting C. J. as follows: "Having regard to the very clear wrding of Order 39, Rule 2 and to-- the fact that this court has always exercised the power of remedying an injury or wrong by a mandatory injunction on an interlocutory application, I have no doubt whatever that this court has the power to make a mandatory order on an interlocutory application. If the court had no such power, it would be in the power of a party to cause insufferable inconvenience and grave injury to another during the whole time that would elapse between the commission of the wrongful act and the hearing of the suit filed to remedy the wrong and redress the injury". The other learned Judge fully endorsed the view of the learned Acting Chief Justice and this latter view has been approved by the Division Bench of the Madras High Court in the case of *M. Kandaswami Chetti v. P. Subramania*

Chetti, AIR 1918 Mad 588. Persuasive reasons given by a learned single Judge in support of the view in the case of Mdlla Surana v. Somulu, needs careful consideration.

11. English authorities on the point do not support an absolute proposition that the court cannot under any circumstance by an order passed on an interlocutory application, restore any state of things prevailing anterior to the suit. In the case of Thompson v. Park. (1944) 2 All ER 477, the court of appeal granted such an interim order setting aside the decision of Asquith J, in Chambers. There, the plaintiff was the owner of a house into which the defendant whose licence had earlier been withdrawn made forcible entry and the question that was raised was whether in the suit brought subsequent to such wrongful trespass an interim order could be passed for removing the defendant and restoring possession to the plaintiff. In allowing such a prayer it was observed by Goddard C. J. "The status quo that could be preserved was the status that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a court of law that we ought to help me defendant who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the status quo and that it would be a good reason for not granting an injunction." In a case much too similar to the case now under consideration by us, namely Luganda v. Service Hotels Ltd. (1969) 2 All ER

692, Lord Denning upheld an interim order directing restoration of possession in the court of appeal. There, the plaintiff was a contractual licensee who enjoyed the protections under the Rent Act of 1965. He was wrongfully dispossessed from the room in a building by the licensor when the licensor in the absence of the plaintiff took over possession of room by changing the lock. On an interlocutory application filed by the plaintiff in the suit brought by him Cross, J, granted him an injunction restoring him to possession of the room. That order being challenged was upheld by the court of appeal. It was observed by Denning, J. "counsel for the defendants submitted, as the plaintiff was not now in occupation, no mandatory order could be made to put him back. He suggested that such an order would require the constant superintendence of the court which the court would not do. He cited *Ryan v. Mutual Tontine Westminster Chambers Association* (1893 (1) Ch. 116). I look on the case quite differently. The plaintiff is prima facie entitled by the statute to security of tenure of this room. It was unlawful for the defendant to look him out of it; see Section 30 of the Rent Act, 1965. They were wrong to take the law into their own hands. If the defendants had not changed the lock-- and the plaintiff was still in occupation -- I am sure that the court would have granted an injunction to prevent the defendants from locking him out. They should not be in a better position by wrongfully locking him out. As Lord Uthwatt said in *Winter Garden*

Theatre (London) Ltd. v. Millenium Products Ltd. (1947 (2) All ER 331) "In a court of equity wrongful acts are no passport to favour", we must see that the law is observed. To do this, we should I think, order that the plaintiff should be restored to his room". The same principle was reaffirmed under similar circumstances in the case of Warder v. Cooper (1970)1 All ER 1112, and also in the case of Esso Petroleum Ltd. v. King Wood Motors Ltd. (1973) 3 All ER 1057. Recognising the court's power to grant such interim orders in exceptional cases, it was held that the case in which the court might be expected properly to grant a mandatory injunction on an interlocutory application is where the defendant is found to be "stealing a march" on the plaintiff.

12. Strong reliance has been placed by Mr. Chakrabarti on an observation of Chakrabarti, C. J. in the case of Nandan Pictures Ltd. v. Art Pictures Ltd., . The observation so relied on is as follows :-- "It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state which existed at the date when the suit was instituted". This observation though purported to be based on earlier authorities, those authorities just reviewed do not lay down any absolute proposition. Mr. Kapoor had rightly drawn my attention to a subsequent Division Bench decision of this Court in the case of Lachmandas Daswani V. Phillis Berry D. Crus (A.

F. O. O. No. 243 of 1972, O. S. disposed of on May 17, 1974). Mitra, J, in explaining the aforesaid observation of Chakrabarti, C.J. observed : "The observations quoted above do not warrant a proposition that once an injury has been caused by a wrongful act, if a suit is filed after the wrongful act has been completed, no relief by a mandatory injunction can be granted with regard to the wrongful act complained of". Mr. Kapoor has also drawn my attention to another Division Bench decision of this court in the case of Gobinda Ram Goenka v. Mahamaya Dey (Appeal from Original Order No. 207 of 1979, O. S. disposed of on September 16, 1982) where also the case of Nandan Pictures was distinguished by Chief Justice Ghose in upholding an interlocutory order directing removal of a third party transferee of a share in the dwelling house who had been put into possession thereof on such transfer. In the case of Bhuturia Brothers v. Danwarilal Purusottamdas, (1982) 1 Cal LJ 208, a Division Bench of this Court to which I was a party held that the court is entitled to grant interim orders in mandatory form for restoration of possession anterior to the suit in a case where the defendant has changed the status quo anticipating the suit and forestalling any order that may be passed therein, it was observed: "In a sense such an order in substance directs maintenance of status quo as on the date of the suit the defendant having forestalled the suit itself".

[4]. CDJ 1985 Cal HC 003 - Anwar Faramosh Khan Vs. Mahendrakumar Jugalkishore Gupta and others.

"17. In the facts and circumstances, it would be just, convenient and appropriate to pass interim orders for appointment of a receiver with direction to appoint the plaintiff as agent of the receiver. I am conscious of the fact that this order is similar to the order in the nature of mandatory injunction of restoration of possession at the interlocutory stage. In Dora Cawasji Warden v. Coomi Sorao Warden and Ors. , the Supreme Court, of course in a different context, has held that orders in the nature of mandatory injunction can be passed even at interlocutory stage. In that case, one of the co-owners of the property sold his undivided share in the property and the purchaser was put in possession. Even though the purchaser was put in possession, the Court by an interlocutory mandatory order restored possession to the co-owner by ordering eviction of the stranger at the interlocutory stage. The Court made no distinction between a negative injunction and a mandatory order while passing an order at an interlocutory stage. The Court held that mandatory injunctions are granted for the purpose of maintenance of status quo which prevailed at the date of the suit or immediately preceding thereto. A message must be sent, loud and clear, that Courts of law are not helpless when a person is dispossessed, by another person taking law in his own hand and the

judicial delays would not prevent restoration to a person when it is found that the person has been dispossessed without due course of law. It is well established law of this country where a person is in settled possession of the property, even on an assumption that he has no right to appear on the property, he cannot be dispossessed even by the true owner of the property except by due recourse to law. In Krishna Ram Mahale v. Mrs. Shobha Venkat Rao , the Apex Court quoted with approval the observations made by the Privy Council in Midnapur Zamindary Co. Ltd v. Naresh Narayan Roy AIR 1924 PC 144 to the effect :

"In India, persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court."

The observations made in the aforesaid orders are self explanatory.

8. The proposition laid down above goes to show that when a party is deprived of his possession pending suit, it was well within the powers of the trial Court to entertain the application, seeking for prayer of mandatory injunction in order to restore his possession and put him in a state, which existed at the time of filing of the suit.

9. The trial Court by relying upon the judgment of this Court reported in 2015 1 TLNJ 201 (Civil) had rejected the petitioner's request for such an amendment. On a perusal of the said judgment, it is seen that the relief of possession in that case was inadvertently omitted at the time of filing of the suit and therefore such prayer to include relief of possession was sought for. It is in these circumstances that this court had held that since injunction and possession are destructive pleas to each other, when the relief of injunction is sought for, the relief of possession cannot be claimed.

10. In the instant case, the petitioner was very much in possession of the suit property at the time of filing of the suit and during pendency of the suit, he was illegally dispossessed from the suit property. As such, the finding of this Court in the aforesaid judgment as relied upon the trial Court may not be relevant.

11. In the light of the above observations, I am of the view that the trial Court ought not to have rejected the petitioner's application seeking for an amendment by including the relief of mandatory injunction.

13. In the result, the order dated 23.02.2015 passed in I.A. No. 457 of 2014 in O.S. No. 16 of 2012 by the District Munsif, Mannargudi is set aside. Consequently, the petitioner's prayer in I.A. No. 457 of 2014 stands allowed. The present revision is ordered accordingly.

05.10.2018

Internet : Yes/No
Index : Yes/No
Speaking order/Non speaking order

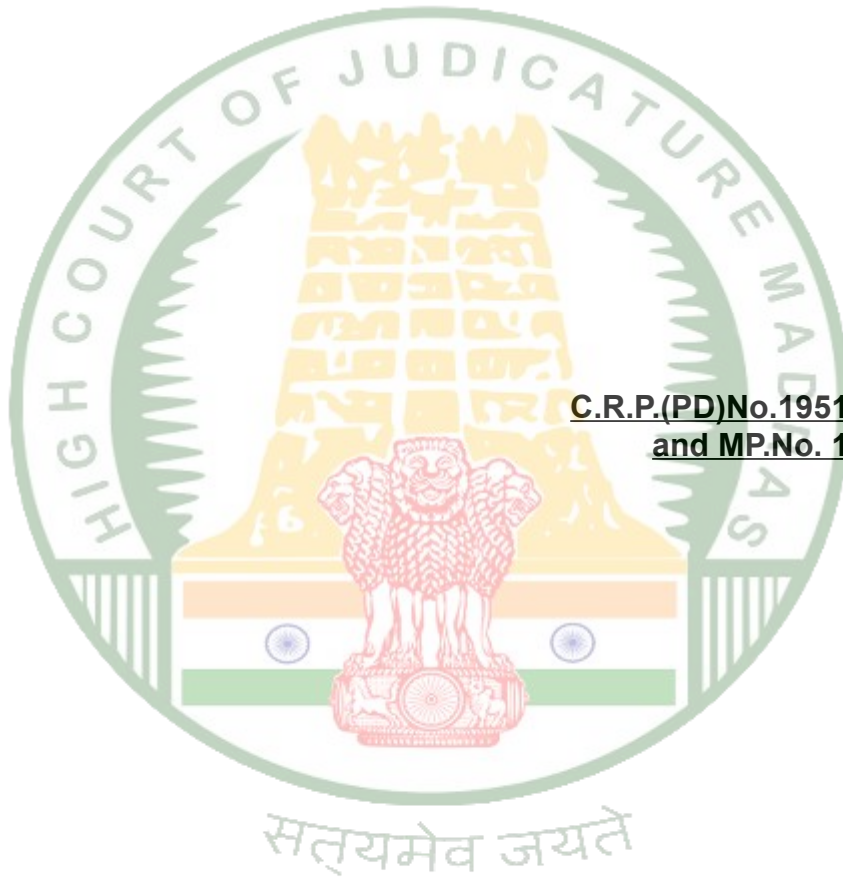
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M.S.RAMESH, J.

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