

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.02.2018

Coram

THE HONOURABLE Mr. JUSTICE K.K.SASIDHARAN

AND

THE HONOURABLE Mr. JUSTICE P.VELMURUGAN

W.A.Nos.239 and 149 of 2012 &

C.R.P.(NPD) Nos.1390 and 1391 of 2011 &

M.P.Nos.1/2012, 1/2012, 1/2013 and 1/2013

W.A.No.239 of 2012:

1.The Revenue Divisional Officer
Salem, Salem District.

2.The Tahsildar
Salem, Salem District.

3.The Inspector of Police
Attayampatti Police Station
Salem District.

.. Appellants

Vs.

1.K.Shanmugam
2.Ponnuvel

.. Respondents

W.A.No.149 of 2012:

K.Ponnuvel

.. Appellant

Vs.

1.K.Shanmugam

2.The Revenue Divisional Officer
Salem, Salem District.

3.The Tahsildar
Salem, Salem District.

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4.The Inspector of Police
Attayampatti Police Station
Salem District.

.. Respondents

CRP (NPD) No.1390 of 2011:

1.Kandasamy
2.Shanmugam

.. Petitioners

Vs.

Ponnuvel

.. Respondent

CRP (NPD) No.1391 of 2011:

1.Kandasamy
2.Shanmugam

.. Petitioners

Vs.

1.Ponnuvel
2.Sivapragasam @ Kumar
3.Sekar
4.Nallusamy

.. Respondents

Writ Appeals filed under Clause 15 of Letters Patent to set-aside the order dated 28.10.2011 made in W.P.No.19122 of 2011, on the file of this Court.

Writ Petition filed under Article 226 of the Constitution of India forbearing the respondents 1 & 2 from in any way interfering with the possession and enjoyment in particular, in closing the compound wall in Survey No.119/1 in Byroji Agraharam, Pudupalayam Village, Salem Taluk and District, by way of Safety to the petitioner's residential premises.

Civil Revision Petitions filed under Section 115 of Civil Procedure Code against the order in I.A.Nos.56 and 114 of 2010 in A.S.No.50 of 2009 dated 13.12.2010 and 31.01.2011 respectively on the file of the Principal Subordinate Judge, Salem.

W.A.No.239 of 2012:

For Appellant : Mrs.A.Sri Jayanthi
Special Government Pleader

For R1 : Mr.Vediappan
for M/s C.S.Associates

For R2 : No appearance

W.A.No.149 of 2012:

For Appellant : Mr.I.Abrar Mohamed Abdullah

For R1 : Mr.Vediappan
for M/s C.S.Associates

For R2 to R4 : Mrs.A.Sri Jayanthi
Special Government Pleader

CRP (NPD) No.1390 of 2011:

For petitioners : Mr.Vediappan
for M/s C.S.Associates
For respondent : Mr.I.Abrar Mohamed Abdullah

CRP (NPD) No.1391 of 2011:

For petitioners : Mr.Vediappan
for M/s C.S.Associates
For R1 : Mr.I.Abrar Mohamed Abdullah

C O M M O N J U D G M E N T

[Judgment of the Court was delivered by K.K.SASIDHARAN, J.]

The appellant in W.A.No.149 of 2012 filed a suit for declaration, permanent injunction and mandatory injunction against the first respondent before the First Additional District Munsif, Salem in O.S.No.438 of 2003. The suit was in respect of a compound wall put up by the first respondent, which according to the appellant would obstruct his pathway. The suit was decreed after contest. The first respondent, after passing the decree dated 13 December, 2010 by the First Additional District Munsif, Salem, filed a writ petition in W.P.No.19122 of 2011 before the writ court for issuance of a writ of mandamus to restrain the official respondents from interfering with the possession and enjoyment of the compound wall erected by him in S.No.119/1 in Byroji Agraharam, Pudupalayam Village, Salem.

2. The learned single Judge allowed the writ petition with an observation that the appellant in W.A.No.149 of 2012 ought to have filed an Execution Petition for executing the decree of mandatory injunction. The order dated 28 October, 2011 in W.P.No.19122 of 2011 is under challenge at the instance of the State in W.A.No.239 of 2012 and the private respondents in the writ appeal in W.A.No.149 of 2012.

3. The first respondent filed a statutory appeal before the Principal Subordinate Judge, Salem in A.S.No.50 of 2009. Before the appellate Court, the first respondent filed two applications, one for staying the judgment and decree passed by the trial Court during the currency of the appeal and another for appointment of an Advocate Commissioner. The learned Single Judge dismissed both the applications by orders dated 13 December, 2010 and 31 January, 2011 respectively.

4. The order in I.A.No.56 of 2010, declining to stay the operation of the judgment and decree dated 01 February, 2010 in O.S.No.438 of 2003 is challenged in CRP (NPD) No.1390 of 2011.

5. The order dated 31 January, 2011 dismissing the application in I.A.No.114 of 2010 filed for appointment of Advocate Commissioner is under challenge in CRP (NPD) No.1391 of 2011.

W.A.Nos.149 and 239 of 2012:

6. The first respondent in these two intra court appeals after suffering a decree in O.S.No.438 of 2003 filed the writ petition to prevent the execution of the decree. The compound wall appears to have been demolished by the revenue officials. The writ petition was filed for issuing a mandamus to restrain the appellants from interfering with the enjoyment of the compound wall. The learned Single Judge having found that without even filing an application for execution of the decree in O.S.No.438 of 2003, the official respondents have demolished the compound wall, issued a Mandamus. The first respondent suffered a decree in O.S.No.438 of 2003. The trial Court granted the decree of declaration as well as mandatory injunction. It is true that the decree can be executed only by filing execution petition before the Executing Court. The appellants have taken up a contention that the compound wall was in a dilapidated condition and as such, it was removed notwithstanding the decree in O.S.No.438 of 2003 and without reference to the said decree. In any case, the first respondent having suffered a decree from a Civil Court ought to have filed an appeal and obtained interim orders. It is also a matter of record that the first respondent filed a statutory appeal before the Civil Court at Salem and failed to obtain interim order of stay of operation of the judgment and decree in O.S.No.438 of 2003. When a party failed to obtain relief from the appellate Court, it would not be proper to issue a writ by exercising equity jurisdiction and that too during the pendency of the first appeal filed against the decree in O.S.No.438 of 2003. We are, therefore, of the view that the order passed by the learned Single Judge is liable to be set aside.

7. The order dated 28 October, 2011 is set aside. The writ petition in W.P.No.19122 of 2011 is dismissed.

CRP (NPD) No.1390 of 2011:

8. The petitioners filed First Appeal in A.S.No.50 of 2009 before the Principal Subordinate Court, Salem, challenging the judgment and decree in O.S.No.438 of 2003 on the file of the First Additional District Munsif, Salem. The petitioners, along with the said appeal, filed interlocutory application for stay of execution of the decree in O.S.No.438 of 2003. The learned Principal Subordinate Judge, Salem, having found that the compound wall has already been demolished, opined that it would be in the interest of both the parties to take up the appeal itself, instead of deciding the interlocutory application. The application was dismissed. The said order is under challenge in this civil revision petition.

9. We are informed that the appeal is now ripe for hearing. We are, therefore, of the view that a direction should be given to the learned Principal Subordinate Judge, Salem, to dispose of the appeal early. We direct the learned Principal Subordinate Judge, Salem, to dispose of the First Appeal in A.S.No.50 of 2009, as expeditiously as possible and in any case, within a period of three months from the date of receipt of a copy of this order.

CRP (NPD) No.1390 of 2011:

10. The petitioners filed an application in I.A.No.114 of 2010 before the appellate Court in A.S.No.50 of 2009 for appointment of an Advocate Commissioner, to report about the alternative way available to the first respondent.

11. The learned appellate Judge, dismissed the application on the ground that no such application was taken before the trial Court. It was also pointed out that an Advocate Commissioner was appointed at the instance of the respondents. However, there was no objection filed by the petitioners to the report submitted by the Advocate Commissioner.

12. We have perused the order passed by the learned District Munsif. It is found that at the instance of the respondents, Advocate Commissioner was appointed by the trial Court. Even in the written statement filed by the petitioners, a plea was taken that the first respondent is having an alternative pathway. Nothing prevented the petitioners from giving a work memo to the Advocate Commissioner appointed by the trial Court to identify the pathway and file a report and plan accordingly. The plea regarding alternative pathway has to be pleaded and proved by the petitioners. However, the petitioners miserably failed to prove the essential fact during the currency

of the suit. We are, therefore, of the view that the appellate Judge was justified in dismissing the application in I.A.No.114 of 2010.

13. The intra court appeals in W.A.Nos.149 and 239 of 2012 are allowed. The civil revision petition in CRP (NPD) No.1390 of 2011 is disposed of with the direction. The civil revision petition in CRP (NPD) No.1391 of 2011 is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(Audit)

//True Copy//

Sub Assistant Registrar

To

1. The Principal Subordinate Judge,
Salem.

2.The Revenue Divisional Officer
Salem, Salem District.

3.The Tahsildar
Salem, Salem District.

4.The Inspector of Police
Attayampatti Police Station
Salem District.

+2cc to Mr. Advocate, S.R.No. 3621 & 13622
+1cc to the Government Pleader, S.R.No. 13666

W.A.Nos.239 and 149 of 2012 &
C.R.P.(NPD) Nos.1390
and 1391 of 2011

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