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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :04.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.DURAI SWAMY
and
THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P (MD) No.14309 of 2018
and
W.M.P (MD) No.12964 of 2018

M.Seeni Mohammed,
Correspondent,
Pallivasal Higher Secondary School,
Mudukulathur,
Ramanathapuram District.

... Petitioner

Vs.

The Executive Officer,
Mudukulathur Town Panchayat,
Mudukulathur,
Ramanathapuram District.
Respondent

...

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari calling for the records relating to the impugned proceedings of the respondent in Na.Ka.No.A1/159/2018 dated 10.05.2018 and the consequential impugned proceedings in Na.Ka.No.A1/159/2018 dated 28.06.2018 and quash the same as illegal.

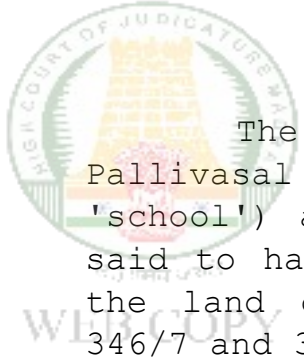
For Petitioner

:Mr.M.Ajmal Khan, senior counsel
for M/s.Ajmal Associates

For Respondent

:Mr.N.Dilipkumar

ORDER



The petitioner is the Correspondent and Secretary of Pallivasal Higher Secondary School, Mudukulathur, (in short 'school') an aided minority educational Institution. The school is said to have been established in the year 1932 and is situated in the land comprised in survey nos.346/2A, 346/2B2, 346/5, 346/6, 346/7 and 346/8 in Mudukulathur Taluk, Ramanathapuram District.

2. Vide communication dated 23.09.1978, an extent of land admeasuring 0.14 acres in survey no.346/10 of Melamudukulathur Village in Ramanathapuram District was placed by the Commissioner of Land Revenue, Land Reforms and Food Production, Madras, at the disposal of the School for its use as a playground. The school was also permitted to construct a compound wall, subject to various conditions that were imposed.

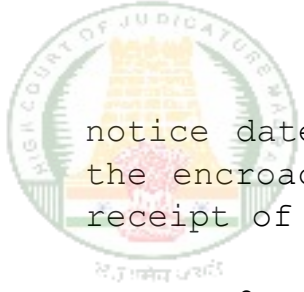
3. The District Revenue Officer, Ramanathapuram, thereafter passed an order dated 04.05.1979 in confirmation of proceedings dated 23.09.1978 placing an extent of 0.14 acres of land comprised in survey no.346/10 at the disposal of the school.

4. The school is in consistent use and enjoyment of the above property since then.

5. While so, the respondent issued a communication dated 10.05.2018 styled as an 'mwptpg;g[' (Notice) and addressed to various alleged encroachers including the petitioner herein. The communication alleged that the petitioner had encroached upon the Saravanapoigai Oorani, (in short 'water body') at survey no.346/4 and called upon it to remove the encroachment within seven days failing which, the respondent would take appropriate action to remove the same with the assistance of the Deputy Superintendent of Police and Tahsildar.

6. The petitioner replied to the above notice on 05.06.2018. The main contention advanced was that the school had been in occupation of land in various survey numbers for decades, 0.14 acres of land in survey no.364/10 had been placed at the disposal of the school as early as in 1978 and as such, there was no encroachment as alleged by the respondent. The petitioner thus urged that the land in question had been placed at its disposal legitimately and the construction of the compound wall thereupon was in the interests of 1000 (approx.) students, who study in the school.

<https://hcservices.ecourts.gov.in/hcservices/> Withstanding the aforesaid reply, an order was passed by the respondent on 28.06.2018 confirming the proposal set out in



notice dated 10.05.2018. The petitioner was called upon to remove the encroachments, within a period of seven days from the date of receipt of the order.

8. Communication dated 10.05.2018 as well as order dated 28.06.2018 have been assailed in the present writ petition before us.

9. Prima facie, we notice that the land placed at the disposal of the school is comprised in survey no.346/10, whereas the survey number stated to have been encroached in the impugned communication/order is survey no.346/4.

10. When a specific query was put to Mr.Ajmal Khan in this regard, he sought to clarify the same stating that what was originally survey no.346/10 has been re-numbered as survey no.346/4 and the two numbers denote one and the same piece of land. We will advert to this presently.

11. Heard Mr.M.Ajmal Khan, learned senior counsel for Ajmal Associates for the petitioner and Mr.N.Dilip Kumar, learned counsel for the Executive Officer, Mudukulathur Town Panchayat, Ramanathapuram District, the sole respondent.

12. Various contentions have been raised in the writ petition. Firstly, it is contended that no show-cause notice was issued in terms of section 7 of the Tamil Nadu Land Encroachment Act, 1905 which contemplates that an order of eviction in terms of section 6 thereof, is to be proceeded by a show-cause notice under section 7 of the Act. In the present case, the very first communication dated 10.05.2018 calls upon the alleged encroacher to remove the encroachment within seven days and though styled as a notice, is apparently only an order.

13. Secondly, it is pointed out that an order of eviction in terms of section 6 of the Act, could have been passed only by a District Collector, Tahsildar or Deputy Tahsildar and not by an Executive Officer of a Town Panchayat, as in the present case.

14. Thirdly, Mr.Ajmal Khan argues that the alleged encroachment being of a tank could be sought to be removed, if at all, only invoking the provisions of the Tamil Nadu Protection of Tanks and Eviction of Encroachment Act, 2007 (in short 'Tank Act'), which provides for the removal of encroachments by the designated officers of the Public Works Department and not the Land Encroachment Act in terms of which the



present impugned proceedings have been taken.

15. Mr.Dilip Kumar, learned counsel appearing for the Executive Officer, circulates a sketch of the entire property depicting the placement of the water body, the offending construction, being a compound wall and urinal, the school and other constructions in the vicinity, with which we are not presently concerned.

16. According to him, the submission of Mr.Ajmal Khan to the effect that survey No.346/10 has been re-numbered as 346/4, is factually incorrect. He states that the entire property as seen in the sketch comprises survey no.346 and what was placed at the disposal of the school in 1978 was only part thereof, being survey no.346/10. The water body itself is of an extent of 1.98.5 hectares and is comprised in s.no.346/4. According to the survey taken, the petitioner has encroached upon the water body to the extent of 585 sq mts constructing a urinal and compound wall upon a portion of the water body itself.

17. Prima facie, we cannot but note that the submission of Mr.Khan relating to re-fixation of survey numbers figures neither in the reply of the school dated 05.06.2018 nor in the writ affidavit itself.

18. Moving on, according to Mr.Dilip Kumar, the offending construction in survey no.346/4, which is upon the water body itself, would necessarily have to go in the light of the decision of the Full Bench of this Court in the case of *T.K.Shanmugam, Secretary, C.P.I(M) North Chennai District Committee v. State of Tamil Nadu and others* (2015(6) CTC 369). He also presses into service the decisions of the Division Bench of this Court in the case of *G.Radhakrishnan v. President, Edayakottai Panchayat, Dindigul District* (2008 1 MLJ 1132), *L.Krishnan v. State of Tamil Nadu and others* (2005 (4) CTC 1) and *S.Kamaraj and others v. Government of Tamil Nadu and others* (AIR 2002 Madras 311).

19. Specific reliance is placed in this regard upon the conclusion of the Full Bench in the case of *T.K.Shanmugam* (supra) at paragraph 45 extracted below:

'...

45. In the light of the above, we answer

the reference on the following terms:

'The provisions of the Tamil Nadu



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Protection of Tanks and Eviction of Encroachment Act, 2007, does not in any manner dilute the Observations/Directions issued in L.Krishnan v. State of Tamil Nadu, 2005(4) CTC 1, as quoted with the approval by the Hon'ble Supreme Court in Jagpal Singh v. State of Punjab, 2011 (11) SCC 396, and the observations contained in Paragraph 20(d)(e) of the Judgment of the Division Bench in T.S.Senthil Kumar, v. Government of Tamil Nadu, 2010 (3) MLJ 771, and that the Tanks which do not fall within the purview of the Tamil Nadu Protection of Tanks and Eviction of Encroachment Act, 2007, also require protection from encroachment and any encroachment made in such Tanks or Water bodies have to be removed by following the provisions of the Tamil Nadu Land Encroachment Act, 1905."

.....'

20. Having heard the detailed submissions, the dispute in regard to critical factual aspects is apparent. While the basis of the petitioners' case is that the land in question has been placed at the disposal of the petitioner school by the Board of Revenue as early as in 1978 and does not constitute an encroachment, there is a discrepancy between the survey number of the property given to the school and that mentioned in the impugned communications/orders, that begs an answer. The explanation offered as a re-fixation of survey numbers is unsupported by any evidence as of now and is also disputed by Mr.Dilipkumar.

21. One thing is clear. Once a construction is clearly established as an encroachment in a water body, no mercy need be shown and action to remove the same may be taken invoking the provisions of either the Land Encroachment Act or the Tank Act, as relevant and applicable. The decision of the Full Bench is clear on this aspect and extends protection under the Land Encroachment Act 1905 to those water bodies not coming under the coverage of the Tank Act 2007.

22. The categoric assertion of Mr.Dilip Kumar is to the effect that the water body, the Saravanapoigai oorani, vests in the Town Panchayat and hence the provisions of the Land Encroachment Act would be available for invocation against the petitioner. Thus, in a situation where the respondent is in a position to establish



encroachment by the petitioner in the water body, the provisions of the Land Encroachment Act 1905 are well available to be invoked. The legal position canvassed by Mr. Dilip Kumar in regard to the applicability of the Tamil Nadu Encroachments Act to those water bodies not coming under the protection of the Tank Act is accepted. We however hasten to add that no evidence has been placed before us in regard to the factum of vesting of the water body itself in the present case, and we have expressed no opinion in this regard whatsoever.

23. In the light of the disputed facts that present itself before us, we are of the view that the proper course of action in this case would be to relegate the petitioner to the statutory appeal remedy provided under section 10 of the Act. We have indicated our mind in court and this approach is acceptable to both parties before us.

24. As far as the ground relating to lack of prior notice in terms of section 7 of the Act is concerned, no doubt, communication dated 10.05.2018 suffers on account of two defects. Firstly, nowhere is there a reference to Section 7 of the Act and secondly, the communication calls upon the petitioner to remove the encroachment without putting it to notice or granting it an opportunity.

25. However, the petitioner has filed a response to the notice on 05.06.2018 and has thus, by conduct, treated communication dated 10.05.18 only as a notice. Furthermore, though the communication threatens coercive action if the encroachment is not removed within 7 days, it is a fact that no action along those lines was taken in pursuance thereof and the proceedings culminated in order dated 28.06.18 after receipt of the petitioners' reply. Thus, when the petitioner has itself treated communication dated 10.05.20178 as a notice, it cannot be seen to complain about the non-issue of one. This ground is rejected.

26. In fine, the petitioner is permitted to challenge order dated 28.06.2018 by way of statutory appeal under the provisions of section 10 of the Act. Such appeal, if any, shall be filed within a period of two weeks from the date of receipt of a copy of this order, before the District Collector. The appeal shall be disposed of after affording opportunity to the petitioner and all other concerned parties, within a period of four weeks from the date of filing of appeal, in accordance with law. We make it clear that all ~~the facts and circumstances in the course of this order are prima facie and shall not stand in the way of the parties in the appeal proceedings~~



except in respect of those issues specifically identified and answered by us as either 'rejected' or 'accepted'.

27. Coming to the question of interim protection, Mr.Dilip Kumar requests that the respondent may be permitted to remove the offending encroachment forthwith in the light of the prima facie case made out by him. We are however not inclined to accept his request seeing as the appeal itself has been directed to be disposed of within a time frame. Also, and more importantly, the construction alleged to be offending includes a compound wall. We are of the view that the presence of the compound wall cannot be dispensed with when the property it encloses includes a school where we are told more than a thousand children study, proximate in location to the water body.

28. In these circumstances we direct the parties to maintain status-quo till the date of disposal of appeal by the District Collector as aforesaid.

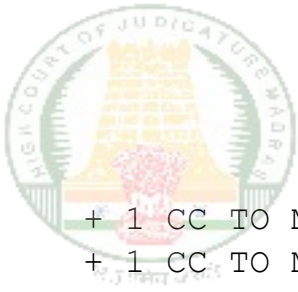
29. The Writ Petition is disposed of in the above terms. No Costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar



+ 1 CC TO Mr.AJMAL ASSOCIATES, ADVOCATE IN SR No.71428

+ 1 CC TO Mr.N.DILIP KUMAR, ADVOCATE IN SR No.71321

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PM

RJ/PN/SAR-1 : 13/07/2018 : 7P/3C

W.P (MD) No.14309 of 2018

and

W.M.P (MD) No.12964 of 2018

04.07.2018