

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 26.07.2019

DELIVERED ON: 20.08.2019

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

CRP(PD) No.775 and 776 of 2011 and

M.P.No.1 + 1 of 2011

Commissioner of Customs and
Central Excise, 6/7, ATD Street,
Race Course Road,
Coimbatore 641 018.

... Petitioners

Vs.

1. The Government of Tamil Nadu,
Rep. by its District Collector,
Coimbatore.
 2. The Commissioner of Police, Coimbatore.
 3. The Superintendent in Engineer,
Public Works Department, Coimbatore.
- ... Respondents

PRAYER IN CRP PD No.775 of 2011: Civil Revision petition filed under

Article 227 of the Constitution of India against the orders dated 09.11.2010 passed in I.A.No.118 of 2010 in O.S.No.852 of 1998 by the II Additional District Munsif, Coimbatore.

PRAYER IN CRP PD No.776 of 2011: Civil Revision petition filed under Article 227 of the Constitution of India against the orders dated 09.11.2010 passed in I.A.No.72 of 2010 in O.S.No.852 of 1998 by the II Additional District Munsif, Coimbatore.

For Petitioner : Mr.G.Rajagopalan,
Additional Solicitor General
for Mr.S.R.Sundar

For Respondents : Mr.N.Vijayaragavan, Advocate General
for Mr.S.Jaganathan,
Government Advocate (Civil Side)

COMMON ORDER

The civil revision petitioner (Commissioner of Customs and Central Excise) is the petitioner in I.A.No.72/2010 and I.A.No.118 of 2010 in O.S.No.852 of 1998 on the file of the II Additional District Munsif, Coimbatore.

2. The civil revision petitioner/plaintiff filed the suit in O.S.No.852 of 1998 for a relief of permanent injunction restraining the respondents/defendants from putting up any construction in the suit property. According to the revision petitioner/ plaintiff, the suit property belongs to the Government of India and that they being an organ of the

Central Government, are entitled to be in possession of the suit property. The respondents/defendants are 1. Tamil Nadu State Government, represented by the District Collector, Coimbatore, 2.Commissioner of Police, Coimbatore City, and 3. Superintending Engineer, Public Works Department, Coimbatore. The main contention of the revision petitioner/plaintiff is that though the respondents/ defendants 2 and 3 are aware of the fact that the suit property belongs to the Central Government, they attempted to trespass into the suit property. Therefore, they filed a suit for permanent injunction restraining them from interfering with their peaceful possession and enjoyment of the suit property.

3. The respondents/defendants filed their written statement questioning the title of the plaintiff to the suit property. Subsequently, the revision petitioner/plaintiff filed a petition in I.A.No.72 of 2010 under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure praying to appoint an advocate commissioner to inspect the suit property and to measure the illegal construction made by the defendants, with the help of a Taluk Surveyor and a Chartered Civil Engineer. They also filed another application in I.A.No.118 of 2010 under Order VI Rule 17 of the Code of Civil Procedure praying to amend the plaint to include the prayer of mandatory

injunction directing the respondents/defendants to remove the construction put up by them in the suit property.

4. The 2nd respondent/2nd defendant filed his counter in both the petitions and the same was adopted by the respondents/defendants 1 and 3. The contention of the respondents is that since the defenants had questioned the very title of the plaintiff in their written statement, the suit filed by the plaintiff for a bare injunction is not maintainable and that the petition filed by the revision petitioner/plaintiff under Order VI Rule 17 praying to include the prayer of mandatory injunction in the suit is barred by limitation.

5. Their contention in the petition in I.A.No.72/2010 is that since the petitioner admitted the construction of a building in the suit property, there is no necessity for appointment of an Advocate Commissioner.

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6. The learned II Additional District Munsif, Coimbatore dismissed the petition in I.A.No.72/2010 filed under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure praying to appoint an

advocate commissioner, on the ground that since the petitioner himself admitted in the petition that the defendants had completed the construction in the suit property, appointment of an advocate commissioner to measure the extent of construction put up by the defendants would no way help the court to resolve the matter in issue. He also dismissed the petition in I.A.No.118/2010 filed under Order VI Rule 17 of the Code of Civil Procedure on the ground that the petition is barred by limitation. Aggrieved over the same, the present civil revision petitions are filed.

7. Mr.G.Rajagopalan, learned Additional Solicitor General drew the attention of this court to the various proceedings issued by the Government of India, Department of Education, Health and Lands, wherein it is observed that T.S.No. and 1417 of Coimbatore Municipality belong to the Central Government. He therefore would contend that the District Collector, Coimbatore has no right to issue proceedings dated 27.05.1998 directing the Tahsildar, Coimbatore North to mutate the revenue records showing that the Police Department, Tamilnadu State Government is the owner of the suit property.

8. He further contended that the court should be liberal in granting prayer of amendment of pleadings, unless serious injustice or irreparable loss is caused to the other side. He would further contend that the purpose and object of Order VI Rule 17 of the Code of Civil Procedure is mainly to avoid multiplicity of proceedings between the parties and that the courts while deciding such applications should not adopt hyper technical appraoach. His specific cotention is that technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. According to him, when the Government of India is able to trace their title even during the year 1939, the plaintiff need not prove his title to the suit property and can seek for a mandatory injunction directing the respondents/defendants for removal of the construction put up by them in the suit property.

9. Per contra, Mr.N.Vijayaraghavan, learned Advocate General, appearing for the respondents contended that when the defendants have questioned the title of the plaintiff in their written statement, the plaintiff did not seek for the relief of declaration of their tile to the suit property and for recovery of possession from the defendants and on the contrary, the suit was filed for a bare injunction, which cannot be maintained. His further

contention is that the petition in I.A.No.118/2010 filed by the plaintiff under Order VI Rule 17 of the Code of Civil Procedure praying to amend the plaint for inclusion of the prayer of mandatory injunction directing the defendants to demolish the construction put up by them in the suit property is also barred by limitation since the plaintiff is in know of the fact that the defendants have already put up construction over the suit property at the time of filing a writ petition in W.P.No.5766 of 1999 before this court. He further drew the attention of this court to the prayer in the petition in I.A.No.118 of 2019, which reads that

"For the reasons stated in the accompanying affidavit, it is respectfully prays that this Hon'ble Court may be pleased to grant leave to the petitioner to amend the plaint in the manner set out in the accompanying application and thus render justice."

and pointed out that the revision petitioner/plaintiff has not even mentioned the details of amendment in the petition.

10. He also relied on the decision in **Ananthula Sudhakar Vs. P.Buchi Reddy (dead) by LRs and others reported in 2008(4) Supreme**

Court Cases 594, wherein, in paragraph No.13, it has been held thus.

" 13.The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and / or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek an addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without

claiming the relief of possession.

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction".

He would further contend that the petition filed under Order VI Rule 17 of the Code of Civil Procedure cannot be maintained.

11. At the outset it may be observed that the revision petitioner/ plaintiff had filed the suit in O.S.No.852/1998 for a bare injunction restraining the defendants from interfering with their peaceful possession and enjoyment of the suit property. It is also relevant to note that

in the petition in I.A.No.118 of 2010, the revision petitioner had alleged that at the time of disposal of CRP No.3027 of 1999 by this court on 25.11.1999, the respondents submitted before this court that they had completed construction in the suit property.

12. In the decision in *Bodi Reddy Vs. Appu Gounder reported in 1970(2) MLJ 577*, Honourable Justice M.M.Ismail, as he then was has observed thus,

"A prayer for a mandatory injunction may be made by a plaintiff in different situations. Broadly, it may be in two categories of cases. One is, where the defendant has trespassed on the plaintiff's land and put up a construction, the plaintiff, who is entitled to recover possession of his land, may in a suit for ejectment ask for a mandatory injunction as incidental to the principal relief which he has prayed for. In such a case, the encroacher who puts up the construction on another's land not being entitled to the superstructure and the superstructure belonging to the person who owns the

land, the plaintiff can be given complete relief by a simple decree for possession without there being any mandatory injunction against the defendant at all. The mandatory injunction in such a case is merely for the purpose of giving an opportunity to the trespasser to remove the superstructure put up by him on the land of the plaintiff and if the defendant does not want to avail himself of that opportunity, the plaintiff will not be the loser and in no way the plaintiff's right to the relief can be defeated and even in the absence of any mandatory injunction, the relief of possession will be complete. As a matter of fact, in such cases, it may not be quite appropriate to call the suit as one for mandatory injunction, but on the other hand, that will be a simple suit in ejectment against the trespasser and the mandatory injunction is merely incidental to the principal relief. In fact, in "the Municipal Committee, Nokodar V. Sadha Ram and others" a learned Judge of the Punjab High Court held that a suit for declaration of title in which a prayer for injunction has been made as a

auxiliary to the relief of declaration of the title, is not a suit to which section 54 of the Specific Relief Act will apply. The learned Judge pointed out that such was not a case in which the court is free to uphold the title and yet in the exercise of its discretion refuse to grant the relief of injunction and the relief of injunction cannot be claimed as a substantive relief independently of the declaration sought.

The second category is, where the defendant puts up a construction on his own land, but that construction interferes with certain legal right vesting in the plaintiff or interferes with any enjoyment by the plaintiff of his own property. It may happen that the plaintiff has a right of way over a piece of land and the defendant causes obstruction to the same or the plaintiff's ancient right to light and air is interfered with by the defendant putting up a wall on his own land. Equally it may be that the plaintiff's right to support is sought to be removed or taken away by some act on the part of the defendant or again some other right of easement which the plaintiff has

is sought to be interfered with by the Act on the part of the defendant. In all these cases, the primary relief which the plaintiff can have in a suit instituted by him is the mandatory injunction directing the defendant to remove the construction put up by him, and the prayer for mandatory injunction in such a suit is neither ancillary nor incidental, but that is the only manner in which the injury suffered by the plaintiff can be remedied or rectified. Such suits can be very properly described as suits for injunction as distinguished from the first category, namely, suits in ejectment or for possession based on trespass or encroachment on the part of the defendant. Where the primary relief claimed is a mandatory injunction and the injunction having been originally an equitable relief and subsequently the grant thereof being in the discretion of the court, it is certainly open to the court to see whether the plaintiff could be adequately compensated by the award of damages and whether there are other circumstances present in the case to justify the award of damages to the plaintiff instead of granting a

mandatory injunction."

13. In the instant case, the revision petitioner/plaintiff did not seek for recovery of possession of the suit property from the defendants, especially when they admitted that the defendants had constructed a building in the suit property. Further more, it is seen from the written statement that the defendants have questioned the title of the plaintiff to the suit property. In such circumstances, it is the bounden duty of the plaintiff to seek for a relief of declaration of their title to the suit property and for recovery of possession of the same from the defendants, which has not been done by the plaintiff in the instant case.

14. As per Article 113 of the Limitation Act, right to sue accrues when there is an accrual of the rights asserted in the suit and an unequivocal threat by the defendant to infringe the right asserted by the plaintiff in the suit and the period of limitation is 3 years. In the instant case, even though the revision petitioner/plaintiff admits that the defendants had completed the construction over the suit property at the time of disposal of CRP No.3027 of 1999 on 25.11.1999, they did not file a petition to amend the plaint for inclusion of the prayer for recovery of possession from the

defendants. On the other hand, they filed I.A.No.118 of 2009 for a mandatory injunction directing the defendants to demolish the construction put up by them.

15. A decision on an application made under Order VI Rule 17 is a very serious judicial exercise and at the time of considering the petition, the court has to see whether the petition is filed in time. The acid tests are 1) whether on the date of filing amendment petition if a separate suit for the same relief is maintainable, 2) whether the amendment sought for is imperative for proper and effective adjudication of the case and 3) whether refusing amendment would lead to injustice or multiplicity of proceedings. Though the above 3 tests may not be exhaustive, yet, they are important tests which should be determined in a petition filed for amendment of prayer.

16. In the instant case, on the date of filing of amendment petition, admittedly the revision petitioner/plaintiff was not in possession of the suit property. On the other hand, the respondents/defendants have put up construction over the suit property and they have also alleged in their written statement that as per the proceedings of the Board of Revenue in

G.O.Ms.No.2953, Public Works Department dated 30.09.1947, the suit property was transferred to the Police Department and thus, they have exclusive right over the suit property. In such circumstances, seeking for amendment of the plaint for inclusion of the prayer of mandatory injunction for demolition of the construction is not appropriate and in view of the reasons expressed by me in the preceedings paragraphs, such a relief sought for by the revision petitioner/plaintiff is also barred by limitation. In the circumstances, appointment of an advocate commissioner is not also necessary to resolve the dispute between the parties in the instant case. Therefore, both the revision petitions are liable to be dismissed.

17. In the result,

(1) The civil revision petitions in CRP No.775/2011 and 776/2011 are dismissed. No costs. The connected miscellaneous petitions are closed.

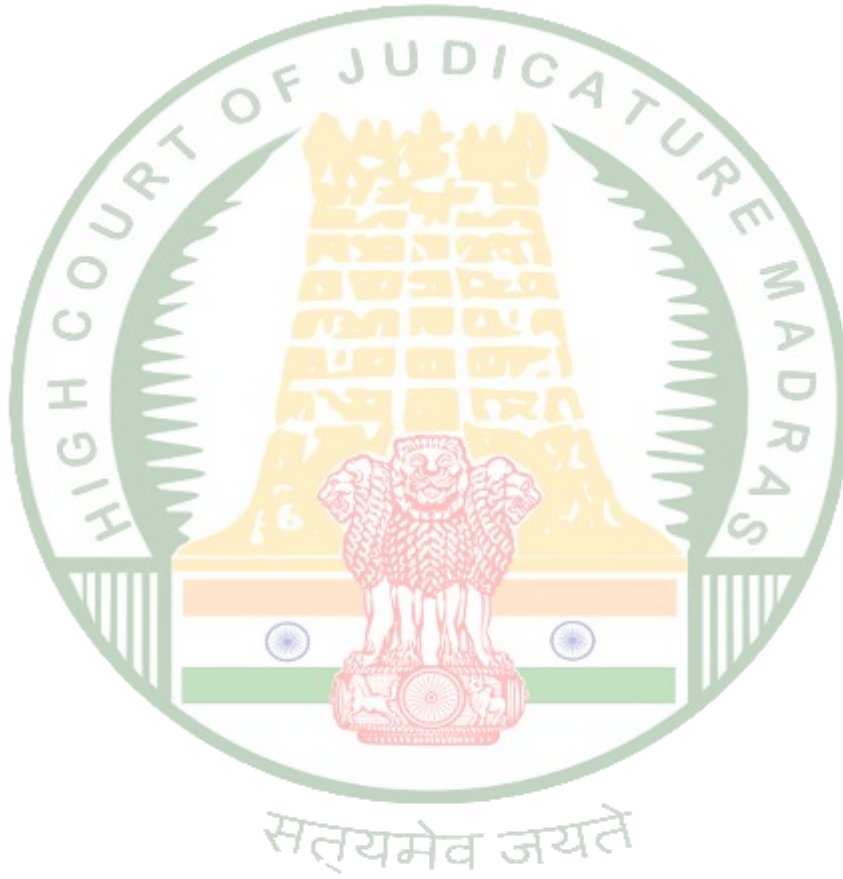
(ii) The orders dated 09.11.2010 passed in I.A.No.72/2010 and I.A.No.118 of 2010 in O.S.No.852 of 1998 by the II Additional District Munsif, Coimbatore are upheld.

20.08.2019

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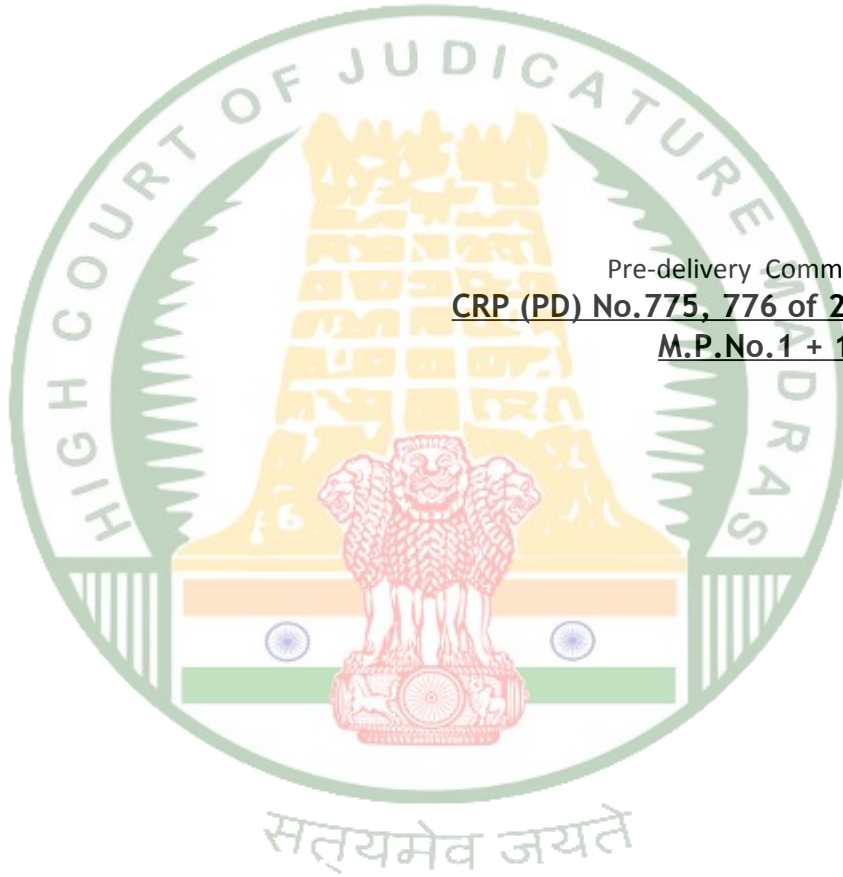
1. The II Additional District Munsif, Coimbatore.



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CRP (PD) No.775,776 of 2011

R.HEMALATHA,J.
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Pre-delivery Common order in
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