
(1999) 01 MAD CK 0095

In the Madras High Court

Case No : Writ Appeal No. 1029 of 1998 and WMP No's. 11428 of 1998 and 1842 of 1999

M.S. Sivakumar

APPELLANT

Vs

The Director General of Police and Others

RESPONDENT

Date of Decision : 15-01-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 2000 Mad 228

Hon'ble Judges : V. Kanagaraj, J; S.S. Subramani, J

Bench : Division Bench

Advocate : Party in person, for the Appellant; Patti B. Jagannathan, (for Nos. 1 to 4) and V. Ragavachari, (for No. 6), for the Respondent

Final Decision : Dismissed

Judgement

1. Petitioner in W. P. 1277 of 1998 is the appellant before us.
2. The relief sought for in the writ petition is for the issuance of writ of mandamus directing respondents 1 to 4 to take action against respondents 5 and 6 and restore possession of the petition portion in the groundfloor of premises No. 567, Anna Salai, Teynampet, Madras-18 to the petitioner and direct respondents 1 to 6 to pay compensation of Rs. 10 lakhs to petitioner and pass such other orders as the Honourable Court may deem fit and proper in the circumstances of the case.
3. Material facts may be summarised thus : 5th respondent, is the owner of the premises in question and it is the case of appellant that he has taken on monthly rent three rooms and a toilet in Door No. 567, Anna Salai, Madras located in the middle portion having an area of 580 sq. ft. for non-residential purposes. It is further case of appellant that two tenants adjoining the said premises vacated and landlord also agreed to lease out the said premises also to the appellant. For the said purpose, Landlord also received an additional advance of Rs. 57,000/- from

him. After some time misunderstanding arose between them 5th respondent started giving trouble to petitioner, which compelled him to file a suit in O.S. 8440 of 1992 before City Civil Court, Madras for permanent prohibitory injunction. Due to intervention of well-wishers and others, the matter was settled. By virtue of settlement, the additional space which according to him was let out by 5th respondent was agreed to be surrendered and in respect of middle portion. Landlord agreed not to interfere with, his possession. In view of the settlement, appellant withdrew the suit and Court also recorded compromise and the suit itself was disposed of.

4. It is the case of appellant, that even thereafter, 5th respondent began giving trouble to him. which compelled him to file several complaints to police and even attempt to murder was made. In the meanwhile, 5th respondent also filed an application for eviction before the Rent Controller alleging defeaull of payment of rent and subletting. The attempts of 5th respondent to forcibly evict petitioner continued. It is further stated that for all rooms bearing Door Nos. 565, 566 and 567 are having common entrance and pathway. In view of interference by 5th respondent, even the usage of common pathway is prevented.

5. It is also admitted in the writ petition alleging threat to possession, appellant filed O.S. 6665 of 1997 on the file of 17th Assistant City Civil Court, Madras and that suit was one for permanent prohibitory injunction restraining 5th respondent and his men from interfering with the peaceful possession of appellant. In that suit, an interim application was also filed as LA. 17551 of 1997 seeking an order of temporary injunction. It is also admitted that 5th respondent filed a counter-affidavit in the case narrating the entire facts and as per order dated 24-12-1997. the application for temporary injunction was dismissed holding that petitioner/ appellant was not in possession of the property, on the date when he filed the suit. The suit was filed in September, 1997.

6. An appeal was taken under Order 43 Rule 1 of CPC against the order dismissing injunction application before the Principal City Civil Court Madras as C.M.A. No. 13 of 1998. The appeal was preferred in early January. 1998. Appellant also moved for interim injunction before the appellate authority. 5th respondent also entered appearance and filed counter-affidavit. It is in between the present writ petition is filed on 28-1-1998. In the writ petition it is averred that appellant was in possession of property till 18-1-1998 and he was forcibly dispossessed only thereafter.

7. Detailed counter-affidavit was filed by 5th respondent questioning the right of appellant to maintain the writ petition. According to him, appellant is not in possession of any portion of property and long before suit itself was instituted. entire premises was in the hands of various other tenants. Subtenants handed over possession to 5th respondent and appellant has also abandoned his right. It is further submitted that on the basis of compromise, a decree was drafted, which is not in accordance with compromise. Appellant himself filed contempt application against 5th respondent and ultimately it came to this Court in W.A.

1897 of 1993. Division Bench of this Court found that appellant is not in possession of any inch of property and the entire area is in the possession of various sub-tenants. Division Bench therefore found that there is no necessity to give any direction to the police nor 5th respondent is liable for contempt. The writ appeal was also dismissed. It is further submitted by 5th respondent that appellant himself shifted his business to some other area and present attempt is only to get possession, which he does not have. It is further submitted before the learned single Judge that when appellant himself moved Civil Court forgetting injunction and having failed, for the same purpose, a writ petition is not maintainable. In fact, it amounts to abuse of process of Law. Therefore, 5th respondent prayed for dismissal of the writ petition.

8. Learned single Judge after hearing both sides held that the order of Civil Court in I.A. 17551 of 1997 dated 24-12-1997 is a bar for entertaining the writ petition, and it really amounts to abuse of process of law. Learned single Judge further found when Civil Court itself ceased of the matter, appellant should not have come to this Court with this writ petition alleging that he was in possession till 18-1-1998 and he was dispossessed only thereafter. It is found that when the Civil Court already entered a finding that appellant was not in possession on the date of the suit, to contend that he was in possession till 18-1-1998 will amount to re-agitating the same issue and the same cannot be allowed to be agitated in the Court which exercises its extraordinary original jurisdiction. On merits, learned Judge found that the question to be decided is as to whether appellant is in possession of the property when he filed writ petition and whether he was dispossessed as alleged. Learned Judge found that, that is the question of fact which requires detailed investigation and this Court is not the proper forum to have the same adjudicated. The writ petition was dismissed.

9. It is against that judgment of the learned single Judge, this writ appeal is filed.

10. Even though appellant is represented by counsel, appellant himself argued the matter.

11. The only question that requires consideration is whether the Judgment of learned single Judge requires interference in this appeal?

12. Before going to the facts of the case. We feel that a writ appeal is not to be equated with an order of the appeal of civil Court, where both question of fact and law are to be discussed. No one has a right to contend that he is entitled to invoke the extraordinary original jurisdiction of this Court under Article 226 of Constitution of India. It is only the discretion which the Court exercises under the Constitution of India. If it is discretionary remedy, the scope of appeal also will be, whether the discretion has been properly exercised by the learned Judge?

13. In Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi, the question that came for consideration was whether the order u/s 34 of the Indian Arbitration Act 1940 is liable to be interfered in appeal. Section 34 of the Arbitration Act provided for staying the suits and whether the suit has been

stayed or not is a matter of discretion. In such cases, in what way appellate Court could interfere was considered in that case. In paragraph 8 of the judgment, their Lordships considered thus, "Where the discretion vested in the Court u/s 34 has been exercised by the lower Court, the appellate Court would be slow to interfere with the exercise of their discretion. In dealing with the matter raised before it at the appellate stage, the appellate Court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify such interference with the trial Court's exercise of discretion. If it appears to the appellate Court that in exercising its discretion the trial Court has acted unreasonably or capriciously or has ignored relevant facts, then it would be open to the appellate Court to interfere with the trial Court's exercise of discretion."

We feel that the same principle will have to be applied in appeal against the order of single Judge under Article 226 of Constitution of India also.

14. Learned Judge came to the conclusion that the appellant is not entitled to invoke the extraordinary original jurisdiction mainly for two reasons; appellant failed to obtain interim order in regard to the same premises on the same facts in the suit filed by him. That order is dated 24-12-1997. He also filed an appeal before the principal City Civil Court, Madras in C.M.A. 13 of 1998 in which he could not obtain interim order and in the meanwhile he files writ petition as if he was dispossessed on 18-1-1998.

15. Civil Court, after tracing entire history and various litigations between Parties, came to the conclusion that appellant is not in possession of the premises on the date when he filed the suit i.e., in September, 1997. But, by filing this writ petition alleging that he was dispossessed only on 18-1-1998. appellant wanted to reagitate the very same matter, which is the matter to be decided only by the Civil Court. If the appellant is not in possession when he files the suit i.e., in September, 1997. he cannot be dispossessed in January 1998. Learned single Judge therefore found that the purpose of writ petition is only to reagitate the very same issue and the correctness of the Civil Court Judgment is sought to be assailed in the writ petition. Learned Judge was of the view that the said conduct amounts to abuse of process of Court and discretionary remedy under Article 226 of Constitution of India is not to be invoked.

16. We are in entire agreement with the finding of learned single Judge on this issue.

17. In the recent decision of Honourable Supreme Court reported in K.K. Modi Vs. K.N. Modi and Others, this question has been considered. Their Lordships explained what is meant by abuse of process and held that the Court should not encourage the practice of reagitating the same issue even in case where the

matter may not be res judicata. In paragraphs 44 to 46 of the Judgment, their Lordships held thus,

"44. On of the examples cited as an abuse of the process of the Court is rellitigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as res judicata. But if the same issue is sought to be reagitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose. or a sourious claim being made in litigation may also in a given set of facts amount to an abuse of the orocess of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of the Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and, the Court from being wasted. Undoubtedly, it is a matter of the Court's discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding.

45. In the case of *Greenhalgh v. Mallard*, (1947) 2 All ER 255 the Court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments. The Court held that if the plaintiff has chosen to put his case in one way. he cannot thereafter bring the same transaction before the Court, put his case in another way and say that he is relying on a new cause of action. In such circumstances, he can be met with the plea of res judicata or the statement or plaint may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the Court.

46. In *McIlkenny v. Chief Constable of West Mldlans Police Force*, (1980) 2 All ER 227 the Court of appeal in England struck out the pleading on the ground that the action was an abuse of the process of the Court since it raised on issue identical to that which had been finally determined at the plaintiffs' earlier criminal trial. The Court said even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the Court because it is an abuse for a party to relittgate a question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppel."

Their Lordships also approved the meaning of the phrase "abuse of process of Court" in the *Supreme Court Practice 1995* published by Sweet & Maxwell. In paragraph 43 the same is extracted thus.

This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vaxation and oppression in the process of litigation. . . . The

categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of Justice may be very material."

In the earlier portion of the Judgment, their Lordships also held that under the inherent powers of the Court, it is also entitled to dismiss the proceedings if it is found to be abuse of process.

18. In this case, as rightly found by the learned Judge, the appellant wanted only to reagitate the same issue, which was found against in the civil Court.

19. Against the order of the Civil Court, appellant moved an appeal under Order 43, Rule 1 of CPC in C.M.A. 13 of 1998. He wanted to get an interim order but failed. Before learned Judge, it is submitted that the applicant had already withdrawn the C.M.A. and pleaded that he is without any remedy. Learned single Judge rightly held that if at all the petitioner is without any remedy that is only result of his own making and that will not give right to reagitate the matter in a writ proceedings. When the civil Court found that appellant is not in possession at least in the interlocutory application stage, we do not think that we will be justified in coming to a different conclusion, when that decision stands against us. It is to overcome this, appellant contends that even after filing of suit in September, 1997, he continued to be in possession for which he relied on various documents including phonograms, telephone bills, complaints to Police, etc. All those documents came into existence after the dispute between parties began and therefore, we will not be justified in relying on the same. We are of the view that the writ petition filed by appellant is purely an abuse of process of Court.

20. Learned single Judge also found, the question whether appellant is in possession of the premises and whether he was forcibly dispossessed cannot be decided in writ proceedings since that is a disputed question of fact. It is well settled that the writ Court is not to be converted as a civil Court.

21. In AIR 1997 993 (SC) their Lordships held that if the disputed question of facts is involved, such writ petitions are to be dismissed at the threshold. In paragraph 18 of the Judgment, their Lordships held thus,

". . . The proper course for the High Court was to dismiss the writ petition at the very inception when it was brought to their notice that it involved disputed questions of fact. . . "

22. In *Bharat Ram Meena Vs. Rajasthan High Court at Jodhpur and others*, and in *Visakhapatnam Port Trust and Another Vs. M/s. Ram Bahadur Thakur Pvt. Ltd.*, etc., also similar view was taken.

23. From these decisions, it is clear that whether appellant was in possession of the property in question and till what date he continued to be in possession of the property. Whether the sub-tenants surrendered the property to 5th respondent and whether appellant has abandoned his right to the use of

property are all matters which can be conveniently decided only by a civil Court and not in proceedings under Article 226 of Constitution of India.

24. We do not find any ground to Interfere in the order of the learned single Judge.

25. In the result, the Writ Appeal is dismissed. No costs. Consequently, connected C.M. Ps. are also dismissed.