(2007) 12 MAD CK 0013

In the Madras High Court

Case No : Writ Petition No. 7452 of 1998 and W.P.M.P. No''s. 11362 to 11364 of 1998 and 16311, 16312 and 21053 of 1999

Sathrasala Sharath Babu APPELLANT

Vs

Shanthilal Kothari and Others RESPONDENT

Date of Decision : 07-12-2007

Acts Referred:

Constitution of India, 1950 — Article 226
Madras City Municipal Corporation Act, 1919 — Section 244A, 256(1), 256(2), 256(3), 256A

Citation : (2008) 4 MLJ 533

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : R.S. Jeevarathinam, for the Appellant; R. Thiagarajan for Meera Gupta, for R1, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—This writ petition seeking direction directing the respondents 8 to 12 to demolish the illegal construction put at 140

Govindappa Naicken street, Chennai-79.

2. The petition averments are as under:

The grand father of the petitioner was the plaintiff in C.S. No. 770 of 1997 filed before this Court. After the death of the grand father, the writ

petitioner impleaded himself as plaintiff in that suit. The petitioner''s grand father was the owner of the land and building bearing D. No. 140,

Govindappa Naicken street, Chennai. After the death of his wife, the petitioner''s grand father remained unmarried and he was left with no issues.

He was living in the said building, the major portion of the same was used as a lodge. The petitioner''s grand father had a trusted maid servant who served him all her lifetime and while the servant maid was alive, a girl by name Selvi acquainted herself with the trusted servant maid. The said Selvi

was appointed by the petitioner''s grand father to assist the servant maid. The said Selvi stepped in the shoes of the servant maid after her death. It

is stated that the said Selvi developed illegitimate intimacy with the first respondent herein, who was a tenant in occupation of a portion of the

ground floor. As the grand father was 86 years old at that time, the said Selvi become in charge of all the affairs of the grand father including

handling cheque books, collecting the rent, depositing the money into bank, withdrawing the money for expenses, using the bank locker etc. The

lodge was closed down as the said Selvi told the petitioner''s grand father that she was not able to manage the lodge as well as look after the grand

father. After sometime, the grand father developed urinary infection and he was kept in the bed-room on the second floor and no modes of

communication was available to him. The petitioner''s grand father wanted to endow the property after his lifetime by creating a trust for charitable

purpose. The said Selvi and the first respondent under the guise of taking steps for creation of such trust made the grand father to execute certain

documents and also made him to sign documents in some blank papers.

3. After the execution of the documents as stated above, the said Selvi started ill-treating and neglecting the grand father. Within three months the

grand father was made to sign some papers under the threat of being killed. Due to such torture and neglect, the grand father became extremely

sick. One day the grand father managed to use the telephone and communicate to the petitioner. Immediately, he rushed to the place and with the

help of the police he managed to rescue his grand father and give him medical treatment. After his condition improved, he was shifted to

petitioner''s residence. The grand father thereafter narrated the entire facts to the petitioner relating to the torture and ill-treatment meted out to him

at the hands of Selvi and the first respondent and the documents and other papers signed by him.

4. On enquiries, it came to the light that on 22.1.1997, the said Selvi and the first respondent managed to get a lease deed executed by the

petitioner''s grand father by which the first respondent has been granted a 51 years lease of the property and also the right to demolish and reconstruct the entire building. Further, a trust deed dt.24.3.1997 was also created, wherein, the said Selvi was included as one of the trustees and

she is the beneficiary of 1/3rd income of the trust. So many other acts of frauds and theft were alleged against the said Selvi and the first

respondent herein.

5. The first respondent on the basis of the created lease deed demolished the major portion of the building and in such circumstances the

petitioner''s grand father filed C.S. No. 770 of 1997 for appropriate reliefs. This Court granted an interim injunction restraining the first respondent

herein from demolishing the building. But the first respondent went on to demolish the building and managed to put up unauthorised construction

upto third floor.

6. According to the writ petitioner, the construction of the first respondent was without proper authority and the lease deed is a bogus one.

Further, the Chennai Corporation and the C.M.D.A. had given permission to build only two floors and the plan sanctioned was only for residential

purpose. But the first respondent put up construction upto third floor and there are lot of deviations from the sanctioned plan. He also took steps to

let it out for commercial purpose. Hence the petitioner has filed the above writ petition for the aforesaid relief.

7. Originally, 12 respondents were arrayed in the writ petition and as per the order dt. 22.6.1998, the respondent 2 to 7 were deleted by the

petitioner.

8. The first respondent entered appearance and filed three separate counter affidavits.

9. In the counter affidavit dt.6.7.1998, it is stated by him that the lease deed dt. 22.1.1997 for a period of 51 years was registered as Doc. No.

80/1997 and only on the basis of the lease deed he was put in possession of the property and the entire demolition work was completed in

September 1997 itself. He submitted necessary application and obtained planning permission from Chennai Corporation in PPA No. 928/1997

and building permit No. BA: 1483/1997. This construction was thus after obtaining necessary permission. On 24.12.1997, in C.S. No. 770/1997,

this Court granted an interim injunction restraining him from demolishing the building in the suit property. But the counsel for the plaintiff sent a telegram asking him not to proceed with the construction knowing fully well that such an injunction was not granted by this Court. However, in due

obedience of injunction order, the construction which had come upto the third floor in the back portion was stopped by him. The plaintiff in the suit

died on 21.1.1998 without any issues.

10. According to the first respondent, the petitioner is claiming himself to be the legattee of the Will said to have been executed by the late

Venkatram and sought impleadment in the suit. On the legal advice given to him, the first respondent re-started the construction work on

30.4.1997 and completed it on 25.6.1998.

11. The first respondent refers to O.S No. 3080 of 1998 filed by the petitioner''s father Suganakar in the City Civil Court, Chennai arraying the

Corporation of Chennai and C.M.D.A. as parties with a prayer for mandatory injunction to demolish the second and third floor and also for a

permanent injunction restraining the first respondent from putting up any construction. Having failed to get any interim order in the above suit, the

writ petitioner filed the present writ petition and obtained interim reliefs and therefore according to the first respondent the writ petition is not at all

maintainable.

12. All the factual allegations were denied as false by the first respondent and it was contended by the first respondent that such disputed question

of fact could be only in the trial of the suit and not in the writ petition.

13. In the second counter affidavit dt.10.6.1999, the first respondent reiterated his contention that all the disputed question of fact including the

validity of the lease deed could not be gone into in this writ petition. When the writ petitioner alleges forgery, fraud, cheating and breach of trust, it

cannot be gone into in a writ petition especially when an elaborate suit is pending on the original side of this Court. He further stated that though the

plan of the second and third floor of the building was not yet approved by the C.M.D.A., the same could be regularised under the guidelines of the

Government of Tamilnadu.

14. In third counter affidavit dt. 22.9.1999, the first respondent questions the right of the writ petitioner with regard to the property in question as

the alleged Will has not yet been probated.

15. The Commissioner of Chennai Corporation has filed a counter affidavit dt. 22.7.1998, wherein he referred to the pending Civil Suit No. 770 of 1997 and submitted that the writ petition is not maintainable. He further stated that on 20.3.1997 the first respondent obtained sanction plan for demolition and reconstruction of a new building. It was submitted by him that the first respondent deviated from the sanctioned plan by covering open space on the rear side second floor and first floor. On 13.10.1997 a notice u/s 379A of the Chennai City Municipal Corporation Act was issued to the first respondent for the aforesaid deviations. On 14.11.1997 notices u/s 256(1) & 256(2) was also issued to the first respondent. On 18.12.1997 notice u/s 256(A) was also issued and the building materials were seized from the site for the unauthorised construction. Again on 27.12.1997 notice u/s 256(3) was issued and the first respondent was prosecuted before the Metropolitan Magistrate Court and on 10.6.1998, the first respondent was fined to pay a sum of Rs. 1600/-. Further, notice u/s 244(A) has been recommended for levying penalty for the unauthorised construction.

16. In so far as the construction of second and third floor by the first respondent is concerned, the Commissioner stated that a notice was given to the first respondent on 7.5.1998 to stop the work. When the first respondent failed to stop the work, on 15.5.1998 notice u/s 256(1) & (2) of the Act was issued to demolish the second and third floor. Thus, according to the Commissioner, Corporation of Chennai has initiated proceedings under the Act for the demolition of illegal structures put up by the first respondent.

17. The Senior Planner of C.M.D.A. has filed a counter affidavit dt. 12.10.1998, wherein he has stated that their officials inspected the site on 3.6.1998 and noticed that the construction of the ground plus three floors building was structurally completed. As no approved plan was produced to the officials, a statutory stop work notice dt. 3.6.1998 was served at the site itself. The first respondent did not comply with the notice resulting in C.M.D.A. issuing a statutory demolition notice, treating the entire construction as unauthorised. It is further stated that C.M.D.A. has not issued any planning permission and if the planning permission is issued by the Corporation of Chennai under the delegated powers, the details of such

planning permission have to be explained by the Corporation of Chennai.

18. Heard the learned Counsel for the writ petitioner and the learned Senior Counsel for the first respondent, learned Counsel for Corporation of

Chennai and the learned Counsel for C.M.D.A.

19. The learned Counsel for the petitioner submitted that it is a clear case of fraud on the part of the first respondent and in the light of the counter

affidavits filed on behalf of the Corporation of Chennai and C.M.D.A., the entire illegal construction is to be demolished. He further submitted that

the first respondent allowed the suit in C.S. No. 770 of 1997 to become final and the suit was already decreed as prayed for.

20. Per contra, the learned Senior Counsel for the first respondent contended that the writ petition itself is not maintainable as the same was filed

after the writ petitioner failed to get an order to demolish the construction in the suit. He further referred to O.S. No. 3080 of 1998 filed by the

father of the petitioner for the very same relief as prayed in this writ petition. No interim order was granted by the City Civil Court, Chennai in that

suit and suppressing the material fact in the affidavit, the writ petitioner managed to get interim orders from the Court. The learned Senior Counsel

urged that the conduct of the writ petitioner in chasing more than one legal forum for the same relief by suppression of facts should be held against

him and the writ petition is to be dismissed. The learned Senior Counsel wound up his arguments by submitting that the writ petition is full of

disputed facts and the same cannot be gone into in a petition filed under Article 226 of the Constitution of India.

21. I have considered the rival submissions carefully.

22. The admitted fact is that a comprehensive suit was filed by the grand father of the writ petitioner on the original side of this Court in C.S. No.

770 of 1997. The suit itself was based on fraud, forgery, cheating and breach of trust alleged against the first respondent and one Selvi, who was

the servant maid of the writ petitioner''s grand father. In such circumstances, the question with regard to the ownership and title of the property, the

validity of the documents said to have been executed by the grand father, the alleged acts of fraud and breach of trust and the locus standi of the

writ petitioner to continue the suit on the basis of the Will as claimed by him are all to be decided in the suit, i.e., C.S. No. 770 of 1997. These disputed facts cannot be gone into by this Court in this writ petition.

23. But the learned Counsel for the petitioner submitted that the suit was already decreed as prayed for on 6.7.2006 and the case of the petitioner

was proved. The learned Senior Counsel submitted that it was an ex-parte decree and as against that ex-parte decree dt. 6.7.2006, appeals have

been filed in O.S.A. No. 236, 237 & 238 of 2006 and the same are pending with an order of status quo. A copy of the status quo order

dt.7.8.2006 made in these O.S.As. was also made available by the first respondent in the typed set of papers filed by him. That being so, all these

questions of disputed facts are to be decided in the appeals as the appeal is only an off-shoot of the suit.

24. The remedy under Article 226 of the Constitution of India is an extraordinary one and when that Article is invoked by a litigant, a duty is

undoubtedly cast upon him to show all the material facts and suppression of the material facts itself is sufficient to dismiss a writ petition. It is not in

dispute that before filing the present writ petition, a suit was laid by the father of the writ petitioner on the file of the City Civil Court, Chennai, in

O.S. No. 3080 of 1998 for the same relief. But there was not even a whisper of the same in the affidavit filed in support of the writ petition. When

this was pointed out by this Court, the learned Counsel for the writ petitioner submitted that the suit was withdrawn later. Withdrawal of the suit

later on will not absolve the writ petitioner from the act of suppressing the vital fact at the time of filing the writ petition. If this fact of filing a civil suit

for the same relief was disclosed in the affidavit, this Court would not have certainly entertained this writ petition itself, leave alone granting interim

orders. Hence, I am inclined to dismiss the writ petition as the writ petitioner is guilty of suppressio veri.

25. Before parting with the case, the counter affidavit filed by the Corporation and the C.M.D.A. reveal that the construction of the first

respondent was with deviations and some of the floors put up by him are unauthorised. Hence, it is open to the local authorities to proceed against

the offending construction of the first respondent in the manner known to law and in accordance with the provisions of relevant statutes.

In the result, the writ petition is dismissed. No costs. Consequently, W.M.P. Nos. 11362 to 11364 of 1998 are dismissed.