

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04 - 06 - 2015

Coram

The Hon'ble SMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 320 of 2009

and

C.M.P. No. 1 of 2009

S. Periaswamy

.. Appellant/Plaintiff

vs.

1. M/s India Builders
Rep. by its Partner
J. Uttam Kumar
Having its office at AA 49
3rd Main Road, 2nd Street
Anna Nagar, Madras - 40

2. J. Uttam Kumar

.. Respondents/Defendants

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 09.09.2008 in A.S. No. 38 of 2007 on the file of the Court of IV Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 24.07.2006 made in O.S. No. 740 of 2004 on the file of the XII Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr. V. Raghavachari

For Respondents : Mrs. Hema Sampath, SC
for Mr. T.V. Vineethkumar

JUDGMENT

The unsuccessful plaintiff in suit for permanent injunction and mandatory injunction has preferred the instant Second Appeal as against the judgment and decree dated 09.09.2008 passed in A.S. No. 38 of 2007 on the file of the learned IV Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 24.07.2006 in O.S. No. 740 of 2004 passed by the learned XII Assistant Judge, City Civil Court, Chennai.

2. The case of the plaintiff, who claims to have purchased the suit property measuring an extent of 681.8 sq.ft. as an undivided share described as 'B' Schedule property, from one Ramanathan, is

that after purchase of the undivided share, he entered into a building contract with the first defendant on 01.3.2002 and that even prior to that he entered into a separate agreement for the total 'A' Schedule property as a selling agent. The second defendant is a partner in the first defendant firm. It is stated that the first defendant, who is a owner - cum - builder, raised four storied building in 'A' schedule property covering 1200 sq.ft. including the common area and that as per the building contract, the builder is to construct within fifteen months from the date of contract and as such, according to the plaintiff, the agreement stood terminated on 01.6.2003. The further case of the plaintiff is that even prior to that, 'B' Schedule property's possession was handed over to him and that after completion of the contract period, the builder ought to have left the premises. On the other hand, according to the plaintiff, the defendant has not left the 'C', 'D' and 'E' Schedule which come within the 'A' Schedule property. It is the further case of the plaintiff that as on 01.7.2003, he has been in absolute possession of 'B' Schedule property with '2-A' covered car parking, which was allotted to him and handed over on 01.6.2003, with enjoyment of common entrance called lobby in 'C' Schedule property. The main grievance of the plaintiff is that even after the expiry of agreement on 01.6.2003 the defendants are continuing the construction work.

3. It is also the case of the plaintiff that the defendant, by converting the common main entrance called as lobby into a car parking, acted prejudicial to the common interest of the plaintiff. It is further averred that the defendants shifted the '2-B' flat owners car parking to 'A' side at '4-A' flat and shifted the '4-A' car parking to common main entrance. According to the plaintiff, the defendants have no right to change the common pathway called as lobby, an undivided share into a car parking. The further case of the plaintiff is that the defendants subsequently erased the '2-B' car parking and also destroyed the marbles in 'B' Schedule property and formed the uniform car parking and pursuant to issuance of notices, the defendants agreed to relay the marbles and on 06.01.2004, marked the main entrance as '4-A' car parking. According to the plaintiff, the defendants have no right to alter the main entrance into car parking and that once the 'C' to 'E' schedule properties were allotted to the respective owners and handed over possession, the builder's right as agreement holder expire on 01.6.2003 and after that, they have no right to remain and do the construction work. Hence, the plaintiff filed the suit for injunction restraining the defendants from converting 'B' Schedule property into car parking area and also for permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of two wheeler car parking of all the flat owners at 'A' Schedule properties and mandatory injunction directing the defendants to complete the pending works like walls, iron grills for safety walls and staircase and watchman shed.

4. Per contra, the defendants filed written statement to the effect that the agreement dated 01.3.2002 refers only with reference to the construction of the flat and not entire complex that too, subject to the norms and conditions enumerated under the agreement and as such, the agreement has not been terminated. The case of the defendants is that the entire possession was not handed over as alleged by the plaintiff. It is stated that the agreement does not speak about the claim of the plaintiff in 'C' Schedule property ground floor common entrance and the other provisions like lift, drive way, etc. It is also the case of the defendants that originally there was no provision for forming the lobby and it was provided later on the western side. It is further stated that since the car parking area provided to flat 2-B owner was inconvenient, they interchanged the scooter parking and shifted the lobby on the opposite side on the scooter parking area and that flat 2-B owner was allotted the old lobby for car parking and only to relocate the same, marbles were removed. It is stated that all the 8 flat owners were provided with car parking area with lobby and if the grievance of the plaintiff is true in nature, according to the defendants, the other flat owners should have joined with the plaintiff raising the same objections. On these grounds, the defendants sought for dismissal of the suit.

5. Before the trial Court, the plaintiff examined himself as P.W.1 and marked seven documents, viz., Exs. A.1 to A.7. To nullify the case of the plaintiff, one T.V. Sasimohan, Manager of the first defendant firm branch was examined as D.W.1 but no document was marked.

6. The trial Court / learned XII Assistant Judge, City Civil Court, Chennai, after analysing the oral and documentary evidence available on record, by judgment dated 24.7.2006, has come to a resultant conclusion that the plaintiff is not entitled for the relief as prayed for and accordingly, dismissed the Suit. On appeal, the Lower Appellate Court / learned IV Additional Judge, City Civil Court, Chennai, on appreciation of the facts and the materials available thereon, concurred with the finding of the trial Court and dismissed A.S. No. 38 of 2007 by judgment dated 09.09.2008. Feeling aggrieved by the unanimous decision of dismissal of the suit by the Courts below, the plaintiff is before this Court with this Second Appeal.

7. At the time of admission of this Second Appeal, the following substantial question of law was formulated for consideration:-

"Whether the Courts below are justified in rejecting the claim of the plaintiff on the ground of locus standi, when there is no impediment for a co-owner to challenge the illegal act of a builder post handing over possession of the property?"

8. Heard Mr. V. Raghavachari, learned counsel appearing for the appellant and Mrs. Hema Sampath, learned Senior Counsel for the respondents and perused the records.

9. The main attack of the learned counsel appearing for the appellant is that once the possession is handed over, the respondents as builders have no right to alter, modify or change the nature of the building without the consent of its owner. He submitted that when the construction has been made after approval of the plan, then the vacant site shall be the part of the scheme and the flat owners are entitled to use it as of right. Relying on Order 1 Rule 8 CPC, the learned counsel also submitted that an individual can maintain a suit as against the obstruction caused to the general public without any sanction. According to the learned counsel for the appellant, the judgment and decree of the Courts below are erroneous and unsustainable in law and sought for the interference of this Court.

10. Per contra, learned Senior Counsel appearing for the respondents submitted that the construction agreement does not speak about common area and if at all the appellant is aggrieved with common area, the Owners' Association can institute the suit. So saying, the learned Senior Counsel submitted that the appellant has got no legal right to maintain the suit in his individual capacity. She further submitted that the Appellant / plaintiff is trying to convert the car parking into lobby and no allottee is entitled to convert the car parking into lobby and according to her, both the Courts have come to the right conclusion that the plaintiff is not entitled to claim the relief of permanent injunction and mandatory injunction as prayed for in the plaint and the same need not be interfered with by this Court at this stage of Second Appeal.

11. From the materials available on record, it is seen that 'B' Schedule property situates in 'A' Schedule property which consists of ground floor with covered car parking common pathway named as lobby, lift, staircase, space for generator and two wheeler parking with three other floors and in total, with 8 flats. The suit properties are described as 'A' to 'E' Schedule properties. The facts remains that the plaintiff has purchased 681.8 sq.ft. as undivided share.

12. For deciding the question of maintainability of suit by the appellant / plaintiff in his individual capacity, at the outset, it is to be seen whether he is in any way affected by the alleged shifting of lobby and car parking by the defendants. In this regard, it would be relevant to refer to paragraph 8 of the written statement wherein it has been stated as under:-

"... originally there was no provisions for lobby in our specification. Later a lobby was provided on this western side. The CMDA approved enclosed herein with will show only the car parking in the ground floor. The plan was not approved by CMDA showing a portion lobby. Since the car parking space allotted for owner of flat 2B was inconvenient and since the car could not be parked in that area, to enable the allottee of 2 B to park his car, the defendants interchanged the scooter parking and shifted the lobby on the opposite side on the scooter parking area and the flat owner was allotted the old lobby place for car parking..."

13. The above extracted portion clearly indicates that the intention of the defendants was only to allot the old lobby place for 2 B flat owner since the space allotted to him for parking the cars is inconvenient and he is unable to park his car therein. Whereas no clear averment has been made by the appellant / plaintiff as to how he is personally affected because of the interchange. Further more, if at all the plaintiff is aggrieved, he should have challenged the relocation of lobby. He has also not averred anything with regard to the two wheeler parking. It is also not the case of the appellant that the lobby portion or car parking area has been removed or taken away by the builder. It has only been shifted and interchanged. Therefore, it cannot be said that there is any deviation.

14. Expatiating her submissions, learned Senior Counsel for the respondents submitted that the shifting of lobby has been completed even prior to the date of filing of the suit and as such, according to her, the suit has become infructuous.

15. A mere reading of the plaint itself would show that the alleged shifting was made on 01.6.2003 whereas the suit was filed on 03.02.2004. Therefore, it is clear that the so-called shifting of lobby and interchange of car park of 2B flat owner was made even prior to the filing of the suit and hence, the suit on the said relief becomes infructuous.

16. A perusal of the records would also show that even though there is no provision for lobby in the CMDA approved plan, lobby has been provided in the place of car parking. In such circumstance, the appellant cannot, as a matter of right, claim the provision of lobby.

17. Lastly, the suit is also liable to be dismissed for want of impleadment of necessary party. It is not in dispute that the car parking and the lobby portion were interchanged only to suit the convenience of the 2B flat owner. When it is so, the owner of 2B flat is the proper person to speak about the interchange and whether the car park is to be resumed to the original position as prayed for, by the appellant. Even the appellant himself while deposing as P.W.1, has deposed during cross-examination that he has been in enjoyment of the place specified for his car parking without any interference by others. Therefore, as rightly found by the learned trial Judge, there is no legal obligation pending on the part of the defendants to be performed to the appellant / plaintiff.

18. Further a combined reading of Ex. A.2 construction agreement and the deposition of the appellant / plaintiff himself as P.W.1 would prove that the lobby and two wheeler parking do not find place in 'B' schedule of Ex. A.2 and as such, the appellant / plaintiff cannot have individual right over the lobby. In such circumstance, the appellant / plaintiff cannot have an individual cause of action since the lobby comes under common area of all the flat owners. It is also pertinent to point out at this juncture that Ex. A.7 notice dated 13.10.2003 has been issued by the Crystal Greek Owners Association to the defendants in respect of some lapses committed by them with regard to a common area. While so, the suit instituted by the appellant with regard to the relief sought for against the common area, in his individual capacity, is not sustainable in the eye of law and the finding rendered by the Courts below in this regard warrants no interference by this Court.

19. As regards the relief of mandatory injunction, it is the case of the appellant / plaintiff himself that the agreement with the builder expired on 01.6.2003 and that the construction agreement is no longer alive. That being so, as rightly held by the Courts below, the appellant / plaintiff cannot have a relief based on Ex. A.2 construction agreement so as to direct the respondents / defendants to perform the works.

20. In my opinion, the Courts below have clearly recorded a finding that the plaintiffs have not established their case by any acceptable evidence for granting the reliefs as prayed for. As per Section 100 of Civil Procedure Code, the High Court's scope for interference with concurrent findings of the Court while exercising jurisdiction is, indeed, very limited. This being a Second Appeal filed under Sec.100 C.P.C. against the concurrent judgments, no question of law, much less, substantial question of law would arise for consideration. There are no error of jurisdiction or law or perversity on the face of the records. Hence, a re-appraisal of the evidence to arrive at a different conclusion than the one concurrently arrived at by the Courts below, is not warranted.

In the result, the Second Appeal fails and the same is dismissed leaving the parties to bear their own costs. Consequently, the judgment and decree dated 09.09.2008 passed in A.S. No. 38 of 2007 on the file of the learned IV Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 24.07.2006 in O.S. No. 740 of 2004 passed by the learned XII Assistant Judge, City Civil Court, Chennai, are affirmed by this Court for the reasons ascribed in this Appeal. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. IV Additional Judge, City Civil Court, Chennai,
2. XII Assistant Judge, City Civil Court, Chennai

+1cc to Mr.T.V. Vineethkumar, Advocate, S.R.No.26782

+1cc to M/s. V. Raghavachari, Advocate, S.R.No.26476

S.A. No. 320 of 2009

UG(CO)
EU 15.07.15

सत्यमेव जयते

WEB COPY