

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Miscellaneous Appeal Nos.280 and 387 of 2015

COMMON JUDGMENT:

These two civil miscellaneous appeals under Order XLIII Rule (1) of the Code of Civil Procedure, 1908 ('the Code' for short) by the unsuccessful 1st respondent are respectively directed against two separate orders dated 23.06.2014 passed in IA.No.617 of 2013 and IA.No.613 of 2013 in OS.No.562 of 2008 by the learned XI Additional Chief Judge, City Civil Court, Hyderabad.

2. Since these two appeals arise out of two interlocutory orders in two temporary injunction applications in one suit between the same parties and as the factual matrix and the contentions to be considered are common, these two appeals are being disposed of by this common judgment.

3. I have heard the submissions of the learned counsel for the appellant/ 1st defendant and the learned counsel for the 1st respondent/plaintiff. I have perused the material record.

4. The facts that lead to the filing of these appeals by the 1st defendant may be stated, in brief, as follows: -

The 1st respondent herein i.e., the plaintiff, which is a flat owners association represented by its Secretary had brought the suit against the appellant i.e., the 1st defendant and the proprietary concern for a direction to the said defendants to complete nine pending works as per the compromise deed dated 27.08.2005 or alternatively grant a decree for recovery of Rs.19,20,000/-, for costs and other reliefs. Along with the suit, the plaintiff had filed two interlocutory applications viz., IA.No.613 of 2013 under Order XXXIX Rules 1 and 2 for a temporary injunction restraining the 1st defendant and his men, agents etcetera or anybody acting under him or through him

from alienating any part of the parking area pending final disposal of the suit; and, IA.No.617 of 2013 for a temporary injunction restraining the 1st defendant, his men, agents or servants or anybody acting under him or through him from interfering with the parking rights of the flat owners in the suit schedule property pending disposal of the suit. Both the before-mentioned applications were resisted by the 1st defendant. At the time of enquiry, no oral and documentary evidence was let in. On merits, the trial Court had allowed both the applications and granted the temporary injunctions as prayed for in the applications. Feeling aggrieved, the 1st defendant had preferred these two appeals.

5. The learned counsel for the appellant/1st defendant had contended as follows:

The suit is filed for a direction to complete nine pending works as agreed to under the compromise deed dated 27.08.2005 or alternatively for granting a decree for money which is said to be the estimated value of the pending works. The learned Judge of the Court below without considering the material facts and also the main relief sought in the suit had erroneously passed the interlocutory orders and granted injunctions by way of interim measure. The Court below ought to have seen that the plaintiff had clandestinely included in the schedule property the area covered by the cellar, which is not part of the complex and which is not part of the apartments and which is also not the part of the plan sanctioned by the Municipal Corporation of Hyderabad. The Court below ought to have seen that admittedly, each flat owner had purchased an undivided share of the land from the 1st defendant/appellant herein under separate registered sale deeds and that each flat owner having so purchased an undivided share had then entered into a development-construction agreement with M/s. Arihant Constructions represented by Miss Pushpa Gala for construction of individual flats. As per the terms of the said development-construction agreement between the flat owner and the said M/s.Arihant Constructions there is no stipulation to provide any car parking slot to any flat owner in whose favour the original sale deed was executed by its owner for undivided share of land.

The attempt of the plaintiff to treat the cellar portion of the said property as a common property and the claim of rights in the cellar portion is beyond the competence of the flat owners association and beyond the competence of individual flat owners who having purchased undivided share of land from the owner had got constructed individual flats by entering into separate construction agreements with the 2nd defendant concern. There is no privity of contract between the appellant/1st defendant, who had only sold undivided share of land to the individuals and who had in turn entered into construction agreements with the 2nd defendant represented by Ms.Pushpa Gala. The terms of construction were reduced into writing in the form of a construction agreement separately executed in favour of each owner of the undivided share of land. The cellar portion that was constructed by the 1st defendant cannot form part of the schedule property of the plaintiff association. The stilt area for which the permission was obtained also does not provide individual parking slot to each of the flat owners. As per the sanctioned plan, the area constructed and shown as stilt parking area is not sufficient to accommodate parking place to each of the flat owner. There is no stipulation or agreement between individual owners of undivided share on one hand and the builder who had constructed the flat as per the terms of construction agreement on the other. Each flat owner is bound by the terms of the construction agreement and they cannot seek anything beyond the scope of the terms of the said agreement. Suppressing all the facts, the suit is filed that too contrary to the terms of the so called compromise deed and contrary to the legal rights of the flat owners association. The plaintiff is guilty of suppression and misrepresentation of facts. The injunction orders were obtained by misleading the Court below. The plaintiff association has no manner of right, title and interest in the cellar portion, which does not form part of the main terms of the agreement between each flat owner and the builder M/s.Arihant constructions represented by Ms. Pushpa Gala. Neither the builder nor the individual flat owner has any say or right in the cellar area. The plaintiff association has no right to claim any right in the cellar area. The Court below had made erroneous observations regarding allotment of

parking area though no single document is filed before the Court below in support of the reliefs claimed in the injunction applications. The Court below ought to have seen that the relief of injunction is an equitable relief and cannot be granted in favour of the plaintiff association which is guilty of suppression and misrepresentation of facts. The Court below ought to have seen that the interlocutory reliefs claimed are totally inconsistent with the main prayer in the suit and are also irrelevant to the main relief claimed in the suit and as such the applications seeking such interlocutory orders are hopelessly un-maintainable. The orders of the Court below which are erroneous and which are contrary to the facts and which are not supported by valid and cogent reasons are unsustainable. Since the plaintiffs conduct does not deserve the grant of equitable reliefs, the Court below ought to have rejected the request for grant of temporary injunctions prayed for by the plaintiff association. The plaintiff had mischievously shown and included the name of the 1st defendant as proprietor of M/s.Arihant constructions and had misguided the Court below. M/s.Arihant constructions is being represented by Miss Pushpa Gala.

6. On the other hand, the learned counsel for the 1st respondent/plaintiff while supporting the orders of the Court below in the two interlocutory applications, which are impugned in these appeals, had contended as follows:

Every flat owner not only as per the facts but also as per the law governing the rights of the parties is entitled to have a parking slot. The admitted facts and the legal position applicable to the case on hand was correctly considered by the Court below while granting interim orders in favour of the plaintiff as prayed for in the two interlocutory applications. The ratios in the decisions and the statute, which regulates the permission for construction and sale of apartments in multi storied buildings on ownership basis, clearly mandate that the phrase 'common areas and facilities' in its compass covers basements, cellars, yards, gardens, parking areas, children's playground and storage spaces also and that the promoter shall not make any additions or alternations which affect any apartment without

previous consent in writing of all the flat owners and that after construction of the flats is completed in all respects, the builder/developer who has undertaken construction has to leave the building and go. The flat owners shall alone be entitled to whatever common areas and facilities which are remaining and which are provided as per the plan and all other amenities as contemplated under the definition 'common areas and facilities'; the flat owners shall be entitled to the same to the extent of the percentage of their undivided interest as per the provisions of the statute; and even any apartment owner cannot take up any work, which would be prejudicial to the soundness and safety of the building. Therefore, the promoters or anybody else has no right to sell the stilt or open parking place or deal with it in any manner. The stilt car parking places are part of common amenities. Similar contentions as were being raised by the present appellant/1st defendant were not accepted by the Supreme Court in **Nahalchand Laloochand Private Limited v. Panchali Cooperative Housing Society Limited**^[1]. In that decision the Supreme Court had clearly considered the question as to what are the rights of the promoter vis-à-vis the society in respect of open parking space(s)/stilt parking space(s). The Supreme Court having considered the legal position in extenso had held that stilt parking spaces being part of "common areas" of the building developed by the promoter, the only right that the promoter has, is to charge the cost thereof in proportion to the carpet area of the flat from each flat purchaser and such stilt parking space being neither a 'flat' under Section 2(a-1) nor a 'garage' within the meaning of that provision is not sellable at all. The case of the plaintiff is well supported by the ratio in the decisions of this Court and various other High Courts and also the Supreme Court. The builder/developer who had undertaken to construct apartments has a legal obligation to complete all the works. In the case on hand, all the nine pending works are mentioned in the plaint. Therefore, the defendants are bound to either complete the pending works or pay the liquidated sum as claimed in the plaint. Therefore, none of the contentions raised in the appeals merit consideration and that the appeals are devoid of merit and are liable to be dismissed.

7. Now the points for determination are:

1. **Whether the plaintiff had made out valid and sufficient grounds and had satisfied the cardinal principles for granting temporary injunctions as prayed for?**
2. **Whether the orders impugned in these two appeals are unsustainable under facts and in law?**

8. **POINTS:**

8.1 Before taking up the two points framed for determination, it is appropriate to mention that the learned senior counsel for the appellant and the learned counsel for the plaintiff had made extensive references to various documents in support of their respective contentions though no documents are exhibited at the time of enquiry into in these two interlocutory applications before the trial Court. Both the parties had further filed documents and additional documents at the time of hearing of these two appeals. And, arguments were advanced on behalf of the plaintiff making references to provisions of the statutes and certain precedents. The learned senior counsel for the appellant also placed reliance on certain precedents. Be that as it may.

8.2 Both the parties now want to rely upon several documents though no applications are filed under Order 41 Rule 27 of the Code to permit to receive additional evidence. In the well considered view of this Court, both the parties ought to have requested the Court below at the time of enquiry into the two interlocutory applications to mark their respective documents on which they intended to place reliance. But they did not do so. It is also evident from the orders impugned that the orders impugned were passed by treating the arguments on the side of the 1st defendant as 'nil' as no representation was made on behalf of the 1st defendant on the dates of hearing. The fact remains that no documents were exhibited on either side at the time of hearing of the interlocutory applications before the trial Court. Therefore, the contents of the documents of the parties are not adverted to and not

considered by the Court below. When an Interlocutory Application is filed for a temporary injunction in regard to immovable property, the Court has to necessarily look into the documents of both the parties and examine the contents thereof to find out as to whether the pleadings and the contentions urged find support from the recitals in the respective documents. No just decision as regards the property in dispute can be made without looking into the documentary evidence that may be relied upon by both the parties. In the light of the contentions urged by both the parties, it is necessary to refer to and carefully examine the recitals in the documents before coming to a just decision in the matter. Unless the documents filed by both the parties are exhibited, the documents will not be sent to this Court from the trial Court along with the lower Court records. Unless the documents are before this Court and are duly exhibited, it is neither possible nor is just and proper to appreciate the rival contentions. The trial Court ought to have allowed the parties to have their documents exhibited before disposing of the petitions for temporary injunction on merits. Even in a case where the parties fail to make a request to exhibit their documents for consideration in the interlocutory application, it is the duty of the Court to see that the necessary documents are exhibited. It is not a case where the parties specifically opted not to exhibit the documents for one reason or the other. Rule 60 of the Civil Rules of Practice says that the enquiry into an interlocutory application shall be conducted by receiving affidavits, but if the Judge directs that the evidence be given orally, then it shall be recorded and the exhibits be marked in the same manner as in the case of suits. This Court in a decision in **A.P. Minerals Development Corporation Limited Hyderabad v. M/s.Trimex Minerals Pvt.Ltd.**,^[2] and another decision in **Bhoopal Reddy and another v. K.Lakshmi Bhai and another**^[3] held that the practice of marking the documents in the interlocutory application only shall be continued. It is thus obvious that the documents filed by either of the parties shall have to be marked, unless the parties specifically opt for not marking either on the ground of inadmissibility or for some other reasons of their own. Therefore, there is no need to go into the merits of the appeals. And, in these

circumstances, it is just and proper to allow the appeals and remand the matters to the trial Court for disposal of the Interlocutory applications on merits, after following the procedure established by law, which was adverted to supra. The points are answered accordingly.

9. For the reasons assigned, both the Civil Miscellaneous Appeals are allowed and the orders and the decretal orders of the trial Court in I.A.Nos.613 of 2013 and 617 of 2013 are set aside and the said applications are remitted to the trial Court with a direction to give an opportunity to both the parties to exhibit their respective documents and then decide the said applications afresh on merits and in accordance with the procedure established by law. However, considering the peculiar facts and circumstances of the case, there shall be in operation interim injunction orders as prayed for in both the aforesaid applications in favour of the plaintiff/1st respondent herein until the said two interlocutory applications stand decided afresh on merits by the trial Court as per the directions in this common judgment, as such a course sub-serves the ends of justice.

Miscellaneous petitions, if any, pending in these appeals shall stand closed.

M. SEETHARAMA MURTI, J

16th September, 2015
Vjl

[\[1\]](#) (2010) 9 SCC 536

[\[2\]](#) 1998(1) ALT 182

[\[3\]](#) 1998(1) ALD 770