

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN

Second Appeal No.1061 of 2016

Judgment:

Aggrieved by the concurrent judgments granting a decree of permanent injunction in favour of the respondents/plaintiffs, the defendants have come up with the above second appeal.

2. Heard Mr. V.L.N.G.K. Murthy, learned Senior Counsel appearing for the appellants. Ms. S.Pranathi, learned counsel, takes notice for the respondents.

3. The respondents, claiming to be the joint owners of Flat No.FF-4 in 1st floor, Maruthi Towers, located in Tikkle Road, Vijayawada, filed a suit in O.S.No.497 of 2013 on the file of the III Additional Junior Civil Judge, Vijayawada, praying for a decree of permanent injunction to restrain the respondents herein from ever constructing anything in the common areas of the building including the stilt/cellar portion of the apartment complex. The claim of the respondents in the suit was that they purchased the flat under a registered sale deed dated 13-8-2007. They purchased the flat along with the undivided share of 34.735 square yards out of the total extent of 926.55 sq. yards and common area of 50 sq. feet and parking area of 40 sq. feet in the stilt/cellar portion.

4. The grievance as projected by the respondents/plaintiffs before the Trial Court was that the 2nd defendant,

who is the owner of Flat No.203 and also who happened to be the Secretary of the Flat Owners Welfare Association, put up shops illegally in the cellar portion, in collusion with the 1st defendant who constructed the entire flat complex. The respondents/plaintiffs first approached the Vijayawada Municipal Corporation to stop construction and thereafter they also filed a writ petition. It appears that the writ petition is pending.

5. Simultaneously, the respondents also filed the aforesaid suit. In the suit, the appellants/defendants filed a common counter affidavit contending that the constructions made by them were removed by the Vijayawada Municipal Corporation and that thereafter the constructions were also regularized, after compounding fees were paid. It was the case of the appellants/defendants that the revised plan was approved on 09-4-2012, pursuant to the Government Orders G.O.Ms.No.419, dated 30-7-1998, permitting the regularization of such constructions. The appellants also took a stand that there was no new construction and that when they were attempting to renovate the structures as approved by the Vijayawada Municipal Corporation, the respondents filed the suit.

6. The Trial Court framed the following issues for consideration:

1. Whether the plaintiffs 1 and 2 are in lawful possession and enjoyment of the common areas including stilt/cellar portion of apartment of schedule property?

2. Whether the defendants 1 and 2 tried to interfere with lawful possession and enjoyment of the plaintiffs' common areas including in stilt/cellar portion of the schedule property apartment?

3. Whether the plaintiffs are entitled for permanent injunction with respect of common areas of building schedule property including stilt/cellar portion of the apartment complex against the defendants 1 and 2, their men and agents as prayed by the plaintiffs 1 and 2? and

4. To what relief?

7. The respondents/plaintiffs examined one witness on their side as P.W.1 and filed 14 documents as Exts.A-1 to A-14. The 1st appellant examined himself as D.W.1. An Agricultural Consultant and Free Lance Scientist, who was a tenant in Flat No.3, was examined as D.W.2. He appears to have purchased the flat later in the year 2004. 6 documents were marked on the side of the appellants/defendants as Exts.B-1 to B-6.

8. On the basis of the pleadings and the oral and documentary evidence, the Trial Court recorded a finding on issues 1 to 3 that the plaintiffs were in lawful possession and enjoyment of the common areas including stilt/cellar portion and that since there was interference by the defendants, they were entitled to permanent injunction. The Trial Court relied upon a decision of this Court in *C.S.R. Estates, Flat Owners Welfare Association v. Hyderabad Urban Development Authority* [1998 (6) ALT 540] to come to the conclusion that the moment the entire construction is over and the flats are sold, the builder ceased to have any right over the property.

9. Aggrieved by the said judgment and decree of the Trial Court, the appellants filed a regular appeal in A.S.No.76 of 2015. The Appellate Court framed the following points for determination under Order XLI, Rule 31 CPC:

1. Whether the plaintiffs are entitled for the relief of permanent injunction as prayed for in the plaint? and

2. Whether the judgment and decree dated 05-02-2015 in O.S.No.497 of 2013 passed by the Trial Court is correct basing on the evidence on record and according to law?

10. After independently analyzing the pleadings and the evidence, the Lower Appellate Court concurred with the findings of the Trial Court and dismissed the appeal. Therefore, the defendants are before me.

11. The primary grounds of attack, as projected by Mr. V.L.N.G.K. Murthy, learned Senior Counsel for the appellants are: (1) that both the Courts below failed to advert to the regularization order filed along with the approved plan as Ext.B-6, before deciding whether the construction was authorized or unauthorized, (2) that in the absence of any declaration, as required by Section 2 of the Andhra Pradesh Apartments (Promotion of Construction and Ownership) Act, 1987, the rights flowing out of Section 9 of the Act over common areas and facilities could not have been enforced by the respondents/plaintiffs in a suit and (3) that the respondents/plaintiffs were guilty of availing parallel remedies, one before this Court and another before the Civil Court.

12. I have carefully considered the above submissions.

13. Insofar as the 1st ground of attack is concerned, it is seen that the proceedings for regularization and the approval of the revised plan took place on 09-4-2012 under Ext.B-6, long after the sale of the undivided shares of land to the purchasers of flats. As rightly contended by the learned counsel for the respondents, the moment the undivided shares of land are sold, nothing remains for the builder to put up a construction and to have the same regularised. It is an admitted fact that the construction was not in accordance with the original plan as approved. This is why the Vijayawada Municipal Corporation admittedly issued a notice directing them to stop construction and the construction also appears to have removed at one point of time. While an order for regularization can be put against the statutory authorities, it cannot be put against the co-owners of the property, especially by a builder. Therefore, the 1st ground of attack cannot be accepted.

14. Insofar as the 2nd ground, I do not think that the rights of the purchasers of undivided shares of land over the common areas of land, flows solely out of Section 9 of the A.P. Apartments (Promotion of Construction and Ownership) Act, 1987. As seen from the preamble to the Act, the State Act No.29/1987 was intended to regulate the promotion of construction and transfer of ownership of apartments. The rights of a purchaser of a land and building, flows out of

the Transfer of Property Act and these rights are also protected as human rights and as constitutional rights under Article 300A of the Constitution of India. The respondents were not seeking to enforce any right under the State Enactment of 1987, so as to see whether a declaration by all the co-owners was made as required by Section 2 or not. Hence, the 2nd ground cannot also be accepted.

15. The 3rd ground revolving around the question of parallel remedy, is unsustainable. The respondents filed a writ petition, primarily seeking a remedy against the Vijayawada Municipal Corporation for their failure to effectively perform their statutory functions. The writ petition did not concern the property rights of the purchasers of flats. Therefore, what the respondents sought under Article 226 of the Constitution of India is not parallel remedy. Hence, the 3rd ground is also unsustainable.

16. Therefore, I find no substantial question of law arising for consideration in the second appeal. Hence, it is dismissed. The miscellaneous petitions, if any, pending in this second appeal shall stand closed. No costs.

V.RAMASUBRAMANIAN, J.

27th January, 2017.
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