

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on : 12-09-2019

Judgment pronounced on : 28-11-2019

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MRS. JUSTICE T.KRISHNAVALLI

OSA Nos. 49 and 395 of 2018
and
C.M.P. Nos. 17902 and 19117 of 2018

OSA No.49 of 2018

1.T.Mani @ Manikandan
2.T.Jeevan

... Appellants

Versus

1.The Commissioner,
Corporation of Chennai,
Chennai-600 003.

2.The Executive Engineer Zone VIII,
Corporation of Chennai,
Chennai-600 031.

3.M.Mahalingam

... Respondents

OSA No.395 of 2018:-

1.The Commissioner,
Corporation of Chennai,
Chennai-600 003.

2.The Executive Engineer, Zone VIII,
Corporation of Chennai,
Chennai-600 031.

... Appellants

Versus

1. T.Mani @ Manikandan
2. T.Jeevan
3. M.Mahalinngam

.. Respondents

Original Side Appeals filed under Order XXXVI Rule 1 of

Original Side Rules r/w Clause 15 of the Letters against the judgment and decree dated 15.06.2017 passed by this court in C.S.No.448 of 2013.

OSA No.49 of 2018

For appellants : Mr. R. Sankarappan
For Respondents : Dr. C. Ravichandran for RR1 and 2
Mr.S.V.Karthikeyan R3

OSA No. 395 of 2018

For Appellant : Dr. C. Ravichandran
For Respondents : Mr. R. Sankarappan for RR1 and 2
Mr.S.V.Karthikeyan R3

COMMON JUDGMENT

T. KRISHNAVALLI, J

Both these Original Side Appeals are directed against the Judgment and decree passed by this court, dated 15.06.2017 in C.S.No.448 of 2013. While O.S.A. No. 49 of 2018 has been filed by the plaintiffs in the suit, the defendants 1 and 2/Corporation has filed the other appeal in O.S.A. No. 395 of 2018.

2. For the sake of convenience, the parties to these appeals shall be referred to as per their litigative status in the suit as 'plaintiff' and 'defendants'.

3. As per the averments in the plaint, the property situated at Door No.11 Selvanathan Street, Chetpet, Chennai - 600 031 comprising a ground plus 2 floors originally belonged to Manickam Chettiar, Paternal Grand father of the plaintiffs. The aforesaid Manickam Chettiar has executed a settlement deed dated 20.02.2006 in favour of his daughter in law by name T. Komala and the plaintiffs settling the ground floor of the aforesaid property. The first floor of the property was allotted to the third defendant, while the second floor was settled in favour of another son by name Vasu. Subsequently, the aforesaid Vasu executed a settlement deed dated 24.01.2007 settling the property settled in his favour in favour of the third defendant. Thus, the plaintiffs and their mother Komala are entitled to the ground floor of the property, while the third defendant became the absolute owner of the first and second floor. The plaintiffs and the third defendant have enjoyed their respective portion of the property in common. While so, dispute arose between the parties when the third defendant raised a pillar in

the ground floor to commence construction in the first and second floor as also in the open terrace. The plaintiffs questioned such construction proposed by the third defendant mainly on the ground that the third defendant is attempting to put up such construction without a sanctioned plan from the defendants 1 and 2. As the complaint given by the plaintiffs to the statutory authorities namely the defendants 1 and 2 against the third defendant did not evoke any response, they have filed Writ Petition No. 11058 of 2008 before this Court for a direction to the defendants 1 and 2 to remove the illegal construction put up by the third defendant. This Court, by order dated 30.04.2008, directed the plaintiffs to approach the Civil Court for appropriate relief. In the meantime, on the basis of the representation made by the plaintiffs, the officials of the defendants 1 and 2/Corporation inspected the property and issued a provisional order dated 28.03.2008 under Section 256 (1) of The Chennai City Municipal Corporation Act to show cause as to why the unauthorised construction put up by the defendant should not be demolished. On receipt of the above notice, the third defendant filed O.S. No. 4540 of 2008 before the V Assistant Judge, City Civil Court for the relief of permanent injunction restraining the defendants 1 and 2 as well as the plaintiffs from removing the AC sheets in the III Floor and the alterations effected in the first and second floors. The learned V Assistant Judge, by judgment and decree dated 08.09.2010 dismissed the suit. In spite of the dismissal of the suit filed by the third defendant, the defendants 1 and 2 did not pursue further action. Therefore, the plaintiffs sent a representation dated 13.08.2011 enclosing the copy of the Judgment dated 08.09.2010 passed in O.S. No. 4540 of 2008, however, no action has been taken. Therefore, the plaintiffs filed W.P. No. 27739 of 2011 before this Court for a Mandamus directing the defendants 1 and 2 to remove the alterations and illegal constructions made by the third defendant in terms of the notice dated 28.03.2008 issued by the Corporation. By order dated 07.12.2011, this Court directed the Corporation to take necessary action against the illegal construction made. Pursuant thereto, the plaintiffs sent a notice dated 11.01.2012 to the first defendant to initiate action on the basis of the order dated 07.12.2011 passed in WP No. 27739 of 2011. In the meantime, the defendants 1 and 2 inspected the site on 03.10.2011 and called upon the third defendant, by a notice dated 07.10.2011, to produce the approved plan within three days from the date of receipt of the notice as contemplated under Section 85 of the Tamil Nadu Town and Country Planning Act, 1971. Even though the third defendant received the notice dated 07.10.2011 on 21.10.2011, he did not produce the approved plan. Therefore, the second defendant issued a demolition notice dated 28.02.2012 calling upon the third defendant to demolish the offending construction and to restore the building as it existed

on 27.07.2007, failing which action will be initiated under Section 56 (5) (b) (i) and (ii) of the Tamil Nadu Town and Country Planning Act. Despite the said notice, the third defendant did not remove the offending construction.

4. According to the plaintiffs, due to the offending construction put up by the third defendant, the sewerage has clogged and stench emanated from the same which was unbearable. That apart, the building has become so weak and cracks have developed and it has posed grave risk to the occupant of the property. Therefore, after inspection, the second defendant, by notice dated 23.04.2012 directed the tenants as also the plaintiffs to vacate the premises and accordingly, the plaintiffs vacated the ground floor. While so, taking advantage of the situation, the third defendant break open the lock of the premises in the ground floor and occupied it. The plaintiffs therefore given a complaint on 21.08.2012 to the defendants and to the corporation authorities, however, no action has been taken. While so, the plaintiffs came to know that the third defendant has filed WP No. 13153 of 2012 to quash the order of demolition dated 28.02.2012 issued by the second defendant. The plaintiffs also came to know that the writ petition was dismissed on 10.10.2012 for non-prosecution. However, at the instance of the third defendant, WP No. 13153 of 2012 was restored and taken up for hearing. Thereafter, by order dated 27.08.2012, this Court dismissed WP No. 23084 of 2012 on merits. Despite the same, the defendants 1 and 2 did not initiate any action, therefore, plaintiffs sent notice dated 20.10.2012 to the defendants 1 and 2 seeking damages of Rs.30 lakhs to the plaintiffs for the inaction in not taking steps to demolish the premises in terms of the notice dated 23.04.2012 and 28.02.2012 and forcing the plaintiffs to vacate the premises for carrying out demolition. It is also stated that the plaintiffs were forced to leave their own residence and shifted to Union Territory of Pondicherry for an accommodation thereby they were subjected to huge loss. According to the plaintiffs, the defendants 1 and 2 are equally liable to compensate the plaintiffs in not removing the unauthorised illegal construction put up by the third defendant. The defendants 1 and 2 have been negligent in enforcing the order passed by the Court purportedly at the instance of the third defendant. Even though the notice dated 20.10.2012 was received by the defendants 1 and 2, they have not sent any reply. It is also stated that the plaintiffs could not proceed with any fresh construction in the property due to the inaction on the part of the defendants 1 and 2 in removing the offending construction. Such inaction on the part of the defendants 1 and 2 had emboldened the third defendant from preventing the plaintiffs from enjoying the suit property settled in their favour. While estimating the loss caused to them, the plaintiffs would contend that if a new construction is

put up in the ground floor alone, it would cost them not less than Rs.25 lakhs. Therefore, the plaintiffs have filed the suit praying for a direction to the defendants 1 and 2 to pay a sum of Rs.25 lakhs as damages and to direct the third defendant to pay another sum of Rs.25 lakhs and for mandatory injunction directing the defendants to remove the unauthorised construction in the third floor and the alterations made in the first and second floor of the suit property and to remove the pillar put up in the ground floor.

5. The defendants 1 and 2 resisted the claim of the plaintiff by stating that after inspecting the site, a provisional order dated 28.03.2008 was passed under Section 256 (1) of The Chennai City Municipal Corporation Act to the third defendant to show cause why unauthorised construction should not be demolished. Challenging the notice dated 28.03.2008, the third defendant filed a suit in O.S. No. 4540 of 2008 on the file of V Assistant Judge, City Civil Court, Chennai for permanent injunction. The suit was dismissed on 08.09.2010. Thereafter, on 03.10.2011, the second defendant inspected the suit property and issued a notice dated 07.10.2011 directing the third defendant to produce the approval plan, but he failed to produce it. Therefore, the second defendant issued a demolition notice dated 28.02.2012 calling upon the third defendant to restore the building as it existed on 27.07.2007. Thereafter, to facilitate the demolition, the plaintiffs as well as the occupants of the building were directed to vacate the property by a notice dated 23.04.2012 of the second defendant, in the interest of the safety of the occupants. Thereafter, the officials of the Corporation have locked and sealed the unauthorised portion in the first and second floor and also entire vacant portion in the third floor on 17.08.2012. Thereafter, the entire third floor portion was demolished on 08.12.2012. Thus, the defendants have taken all actions in accordance with the Tamil Nadu Town and Country Planning Act. Therefore, according to the defendants, there is no laxity on their part in taking steps to remove the offending construction. The defendants have discharged their duties strictly in accordance with the provisions of the Statue and therefore, the question of payment of compensation of Rs.25 lakhs to the plaintiffs will not arise. The claim for damage has been made by the plaintiffs without any evidence to substantiate the same. The defendants 1 and 2 therefore prayed for dismissal of the suit.

6. During the course of trial, on behalf of the plaintiffs, PWs 1 to 5 were examined and Exs. P1 to P25 were marked. On behalf of defendants 1 and 2, DW1 has been examined and Exs. D1 was marked. The report of the Advocate Commissioner was also marked as MO1 in the suit. Before the learned single

Judge, the suit was contested only by the defendants 1 and 2 and the third defendant was set exparte. The learned single Judge, upon consideration of the oral and documentary evidence, held that the plaintiffs have failed to establish that the defendants 1 and 2 failed to take action in removing the offending construction. Therefore, it was held that the plaintiffs are not entitled for damage, as claimed. At the same time, the defendants 1 and 2 were directed to remove the unauthorised construction put up in the suit property in accordance with law, in continuation of the action already initiated by them. Thus, the learned single Judge granted the relief of mandatory injunction as prayed for by the plaintiffs.

7. Assailing the Judgment and Decree passed by the learned single Judge in refusing to award damages of Rs.25 lakhs from the defendants 1 and 2, the plaintiffs have filed O.S.A. No. 49 of 2018. As against the relief of mandatory injunction granted by the learned single Judge, the defendants 1 and 2 have filed O.S.A. No. 395 of 2018.

8. Since, the issues involved in both the appeals are one and the same, they are clubbed together, heard jointly and disposed of by this common Judgment.

9. On the basis of the above pleadings, the following points emerge for consideration in these appeals, they are:-

(1) Whether the plaintiffs have sustained damages on account of alleged inaction in discharging the statutory functions by the defendants 1 and 2?

(2) Whether the defendants 1 and 2 are liable to pay damages of Rs.25,00,000/- as claimed by the plaintiffs?

(3) Whether the defendants failed to remove the offending construction put up by the third defendant, pursuant to the provisional order, dated 28.03.2008?

(4) Whether the plaintiffs are entitled to claim mandatory injunction directing the defendants to remove the unauthorized construction in the 3rd floor and the alteration made in the 1st and 2nd floor together with a pillar erected in the ground floor?

(5) To what other relief the plaintiffs are entitled to?

10. The learned counsel appearing for the plaintiffs would contend that the 3rd defendant, who is the owner of the first and second floor of the suit property, had put up illegal

and unauthorized construction by erecting pillars and making alterations in the first and second floor and also in the open terrace. The plaintiffs have objected to it inasmuch as they could not freely enjoy their property in the ground floor. The plaintiffs have also submitted complaint to the defendants 1 and 2 about the illegal and unauthorised construction put up by the third defendant, but the defendants 1 and 2 did not take any action thereof to stop the illegal construction inspite of giving notice. By reason of the inaction on the part of the defendants 1 and 2 in not removing the offending construction, the plaintiffs were constrained to vacate their own property and to settle at Union Territory of Puducherry. The loss and hardship caused to the plaintiffs could not be measured in terms of money. However, for the purpose of valuing the suit, the plaintiffs have estimated the damages caused to them at Rs.25 lakhs. For substantiating their plea of damages, the plaintiffs have adduced oral as well as documentary evidence. The third defendant did not contest the suit and remained exparte. While so, the learned single Judge ought to have granted the relief of damages as against the third defendant who had put up illegal construction besides remaining exparte during the trial. The learned single Judge did not refer to the plea of the plaintiffs with reference to the third defendant and he was made to go scot free without any direction. In fact, the third defendant is responsible for the damages caused to the building by making additional construction and alterations in the suit property. Even in this appeal, the third defendant did not engage an advocate to contest the appeal. When relief of mandatory injunction was granted to the defendants 1 and 2 by the learned single Judge to remove the offending construction and when it is not challenged by the third defendant, the third defendant must be directed to pay damages as claimed by the plaintiffs. The plaintiffs have established that there was a pillar erected by the third defendant which had affected the structural stability of the building. Further, the plaintiffs have also established that inspite of several reminders and orders passed by this Court in the writ petition, the defendants 1 and 2 have maintained stoic silent. At the same time, under the garb of demolishing the offending construction, the defendants 1 and 2 made the plaintiffs to vacate the suit property, whereby, the plaintiffs got settled in Union Territory of Puducherry where they have taken up a house for rent and paying rent all these years. However, the defendants 1 and 2 did not demolish the offending construction and thereby subjected the plaintiffs to monetary loss. In fact, the learned single Judge, in para No.9 has specifically observed that after the notice issued to the occupants to discontinue the occupation under Exs. P13 and P14, the defendants 1 and 2 did not remove the offending construction. Thus, the defendants 1 and 2 did not act in accordance with law after issuance of notice under Exs. P13 and

P14 dated 23.04.2012. In such circumstances, the learned counsel for the plaintiffs would contend that the damages suffered by the plaintiffs has direct nexus against the inaction on the part of the defendants 1 and 2 by not removing the offending construction after the issuance of notice dated 23.04.2012 and thus the ground floor of the suit property is damaged and has become unfit for living. The learned counsel for the plaintiffs therefore prayed for allowing O.S.A. No. 49 of 2018, to remand the matter to the learned single Judge for rendering a finding as to whether the third defendant is liable to pay damages.

11. Per contra, the learned counsel for the defendants 1 and 2 would vehemently contend that it is not the case of the plaintiffs that immediately after the third defendant commenced the offending construction, they have given a complaint to the defendants 1 and 2. On the other hand, after completion of the offending construction, the plaintiffs have given the complaint to the defendants 1 and 2. Immediately, the defendants 1 and 2 have issued a notice dated 28.03.2008 under Section 256 (1) of The Chennai City Municipal Corporation Act, 1919 and set the law in motion. While so, it cannot be said that there is slackness on the part of the defendants 1 and 2 in taking steps against the illegal construction put up by the third defendant. It is further stated that the removal of one pillar adjacent to the existing old building having intersect connections with the old building would result in falling of entire old building. Even the plaintiffs have admitted that the superstructure is out dated and the same is required to be demolished as per the evidence of Engineer, PW5. While so, the learned single Judge erred in granting the relief of mandatory injunction in entirety. In fact, the defendants 1 and 2 have demolished the entire unauthorised construction except one pillar which is having interlink connected beams with the existing old building and the demolition would result in bringing down the entire building. The learned counsel would further contend that even during the pendency of these appeals, an Advocate Commissioner was appointed by order dated 04.12.2018, he inspected the suit property on 13.04.2019 and filed his report before the learned Master in EP No. 11 of 2018. The report of the advocate commissioner clearly pointed out the interlink between the connected beams with the existing old building and if it is demolished, it would be fatal to the existing old building. In such circumstance, when the defendants 1 and 2 have already removed the offending construction except one pillar, the decree of Mandatory injunction granted by the learned single Judge for removal of pillar and wall in the third floor adjoining neighbour building is not warranted. The learned counsel for the defendants therefore prayed for allowing O.S.A. No. 395 of 2018.

12. We have heard the counsel for the parties and perused the material records placed. Even in this appeal, the plaintiffs did not significantly assail the Judgment and Decree of the learned single Judge in refusing to direct the defendants 1 and 2 to pay compensation of Rs.25 lakhs, but what is mainly assailed is that the learned single Judge did not direct the third defendant, who was instrumental in causing structural disability to the building by putting up the offending construction in the suit property, to pay the compensation of Rs.25 lakhs prayed for. In fact, the third defendant was set ex parte before the learned single Judge as well as before this Court in these appeals. Having regard to the above and the fact that the plaintiffs and the third defendant are related to each other and were residing in one and the same building besides that the complaint was given by the plaintiffs to the defendants 1 and 2 only after the offending construction was put up completely, the learned single Judge did not rightly deal with the said aspect. We are also of the view that the plaintiffs, having acquiesced with the third defendant till he completed the offending construction, cannot claim damages. Moreover, the plaintiffs also, on receipt of a notice from the defendants 1 and 2, vacated the ground floor of the suit property in their occupation voluntarily without raising any objection. In any event, there is no strong evidence made available to show that the plaintiffs are entitled for damages from the third defendant. In such circumstances, even though the third defendant did not contest the suit, the learned single Judge rightly did not go in to the plea for damages as against the third defendant and we see no reason to interfere with the same.

13. The learned single Judge found that the defendants 1 and 2 have acted in accordance with the statutory provisions contained under The Tamil Nadu Town and Country Planning Act. By referring to the notice issued by the defendants 1 and 2 to the third defendant and the various other action initiated by the defendants 1 and 2, the learned single Judge had concluded that as a statutory authority, the defendants 1 and 2 have initiated action swiftly. However, as there were cases filed by the third defendant before the Civil Court as well as pendency of writ petition before this Court, the defendants 1 and 2 stopped initiating action during the pendency of litigation between the plaintiffs and the third defendant for a short period. In any event, there was no delay or slackness on the part of the defendants 1 and 2 in taking action on the basis of the complaint given by the plaintiffs, much after the offending construction was put up by the third defendant. Hence, the doctrine of acquiescence will be made applicable to this case and therefore also, the plaintiffs are not entitled for any damages from the third defendant.

14. It is seen that the third defendant had unauthorisedly proceed with construction in the suit property. After the third defendant put up such construction, the plaintiffs have belatedly given a complaint to the statutory authority namely the defendants 1 and 2. On receipt of such complaint, an inspection was caused to be made by the officials of the defendants 1 and 2 and a provisional order dated 28.03.2008 under Section 256 of the Chennai City Municipal Corporation Act, was issued calling upon the third defendant to show cause as to why the unauthorised construction be not demolished. On receipt of such notice, the third defendant instituted a suit in O.S. No. 4540 of 2008 before the V Assistant Judge, City Civil Court, Chennai for permanent injunction restraining the first defendant and the plaintiffs from removing the AC sheets in the third floor and the alterations effected in the first and second floors. The suit was dismissed on 08.09.2010. Therefore, during the pendency of the suit between April 2008 to September 2010, the defendants 1 and 2 could not initiate any action in the subject matter. Thereafter, the plaintiffs filed WP No. 27739 of 2011 before this Court directing the first and second defendants to remove the offending construction. The writ petition was disposed of on 07.12.2011 with a direction to the defendants 1 and 2 to take appropriate action as per law. Thereafter, the second defendant inspected the property on 03.10.2011. After such inspection, the second defendant issued a notice dated 07.10.2011 to the third defendant calling upon him to produce the approved plan within three days. Since the third defendant failed to do so, the second defendant issued the demolition notice dated 28.02.2012 calling upon the third defendant to restore the building as it existed on 27.07.2007 failing which action will be initiated under Section 56 (5) (b) (i) and (ii) of The Town and Country Planning Act. Inspite of such notice, since the third defendant did not take steps to restore the original condition of the building as it existed on 27.07.2007, the second defendant issued a notice dated 23.04.2012 to the plaintiffs as well as the other tenants to discontinue their occupation. The plaintiffs have also vacated the premises under their occupation on 06.05.2012. The fact that the defendants 1 and 2 have inspected the suit property twice, issuance of the notices to the third defendant under Section 256 of The Chennai City Municipal Corporation Act and the further action initiated by issuing notice dated 23.04.2012 to the plaintiffs as well as the other tenants to facilitate the demolition of the offending construction would amply prove that the defendants 1 and 2 have taken all earnest action in accordance with law to ensure that the offending construction is demolished by following all adequate procedures contemplated under law. Therefore, it cannot be said that the defendants 1 and 2 did not take any action at all and therefore, the defendants are liable to pay

damages to the plaintiffs. When the statutory authorities have taken adequate steps to protect the inmates of the building by following all the due process of law before resorting to demolishing the offending construction, the plaintiffs cannot be heard to contend that the defendants 1 and 2 did not take any action or lethargic in pursuing action.

15. Even during the pendency of this appeal, a report dated 28.06.2018 has been filed by the second respondent/Executive Engineer-VIII, Greater Chennai Corporation, stating inter alia that the third defendant was called upon to remove the offending construction during August 2017, however, he failed and neglected to do so. It is further stated in the said report that a notice dated 16.02.2018 was issued by the second defendant directing the third defendant to demolish the illegal/unauthorised construction within 15 days. As the third defendant failed to do so, a letter dated 05.04.2018 was sent to the third defendant stating that the offending construction would be demolished by the Corporation and the cost thereof would be recovered from the third defendant. On receipt of the letter dated 05.04.2018, the son of the third defendant sent reply letters on 07.04.2018 and 09.04.2018 undertaking to demolish the offending construction by himself. Subsequently, the third defendant demolished the offending construction except the columns, as the removal of columns would affect the existing old building. Therefore, it is contended on behalf of the defendants 1 and 2 that the Mandatory injunction issued by the learned single Judge is not warranted inasmuch as the offending construction itself has been removed by the earnest steps taken by the defendants 1 and 2.

16. In the light of the fact that the defendants 1 and 2 have issued notices dated 16.02.2018 and 05.04.2018 to the third defendant and the offending construction has also been demolished, the relief of Mandatory injunction sought for by the plaintiffs, no longer survives for consideration in these appeals.

17. In the result,

(i) OSA Nos. 49 filed by the plaintiffs is dismissed by confirming the decree and Judgment dated 15.06.2017 passed in C.S. No. 448 of 2013 refusing to award any damages to the defendants.

(ii) O.S.A. No. 395 of 2018 is allowed by setting aside the portion of the judgment and decree dated 15.06.2017 passed in C.S. No. 448 of 2013, whereby the learned single Judge issued a Decree for Mandatory Injunction against the defendants 1 and 2/appellants herein.

(iii) No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

smn/rsh

TO

1.The Sub Assistant Registrar,
Original Side,
High Court.

2.The Commissioner Corporation of Chennai,
Chennai 600 003.

3.The Executive Engineer,
Zone VIII,
Corporation of Chennai,
Chennai 600 031.

+1cc to Mr.R.Sankarappan, Advocate, S.R.No. 99732

+1cc to Mr.S.V.Karthikeyan, Advocate, S.R.No.99301

+2cc to Mr.C.Ravichandran, Advocate, S.R.No. 99259

OSA Nos.49 and 395 of 2018

CNR (CO)
GN (27/02/2020)

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