

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No. 913 of 2019

1.S.Jayalakshmi

2.N.Govindarajan

3.G.Anuradha

....Appellants/Appellants/Defendants

Vs.

S.Abdul Razack

...Respondent/Respondent/Plaintiff

Prayer: Memorandum of Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree passed by the first appellate Court in A.S.No. 215 of 2018 dated 05.03.2019 on the file of the XVII Additional Judge, City Civil Court, Chennai confirms the judgment and decree passed by the trial Court in O.S.No. 4799 of 2008 dated 15.03.2018 on the file of the III Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr. S.Suresh Kumar

J U D G M E N T

The defendants in O.S.No. 4799 of 2008 have come forward with this appeal challenging the judgement and decree of the Courts below in and by which the Courts below decreed the suit for declaration, permanent injunction and for mandatory injunction.

2. The case of the plaintiff is that he had purchased an apartment in the ground floor of the building, which admittedly consists of three floors having two apartments each. According to the plaintiff, the defendants who are the owners of the apartment in the second floor had put up a gate in the staircase leading to the second floor from the first floor and had thereby obstructed the access to the owners of the apartments in the ground and first floor to the open terrace on the second floor. It is also averred that the defendants 1 to 3, who jointly own the two apartments on the second floor had put up constructions in the open terrace.

3. According to the plaintiff, he having purchased the apartment in the ground floor along with undivided share in the land he is entitled to use the staircase and the other common areas to his advantage. The defendants who are the owners of the apartments in the second floor cannot prevent his access to the open terrace and they are not entitled to put up any construction in the common area and use it exclusively for their benefit only. The plaintiff claimed that he had purchased the flat under a sale deed dated 14.05.2007. The defendants had purchased their apartments under sale deed 24.01.2001.

4. The suit was resisted by the defendants claiming that the plaintiff's sale deed does not convey any right to him to the second floor or the staircase or the overhead tank. It was further claimed that the Tamilnadu Apartment Ownership Act does not apply. The defendants also raised a plea of limitation claiming that the construction was put up even in year 1985 and therefore, the suit for mandatory injunction is barred by limitation. Relying upon the recitals in the sale deed in their favour dated 27.08.1981, it was claimed that the defendants have an exclusive right to use the sump and the overhead tank.

5. The Courts below on appreciation of the evidence and the law relating to ownership of apartments as well as the provisions of the Tamilnadu Apartments Ownership Act, concluded that the defendants have no right to put up any construction in the common area namely, the open terrace. The Courts below had also concluded that their action in putting up a gate blocking the access of the ground floor and first floor flat owners to the open terrace amounts to invasion on the rights of the apartment owners and decreed the suit. Aggrieved, the defendants have come forward by way of this second appeal.

6. I have heard Mr. S.Suresh Kumar, learned counsel appearing for the appellants. Mr.S.Suresh Kumar, learned counsel appearing for the appellants strenuously contend that the sale deed in favour of the respondent or his predecessors in interest does not convey any right to them to use the staircase above the first floor level and the open terrace. According to him, the plaintiff though had purchased an apartment with an undivided share in the land is not entitled to use the staircase and the open terrace. He would also contend that the Tamilnadu Apartments Ownership Act would not apply in as much as, the act would apply only to apartments constructed in accordance with an approved plan. He would also claim that there is no approved plan for this apartment building. Pointing out that the plaintiff has not produced the sale deeds of his vendors, he would submit that the Courts below should have drawn adverse inference against the plaintiff. It is also claimed that the

suit is barred by limitation in as much as the room on the second floor has been put up even in the year 1985.

7. I have considered the submissions of the learned counsel appearing for the appellants. The sale deed in favour of the respondent / plaintiff, which has been marked as Ex.A4 conveys 1/6th undivided share in an extent of 2,400 sq.ft. comprised in RS.No. 3740/3, (part) of Mylapore Revenue Division together with "all fixtures, fittings, electric and other installations / connections, water and sewerage connections etc, and also with common ways, common areas, passages, stairs, drains, water sources, liberties, privileges, easements, advantages and appurtenances whatsoever to the said property belonging or in any way appurtenant to or reputed to belong to the said property and all the right, title and interest of the vendor in or over and unto and upon the said property."

8. According to the learned counsel appearing for the appellants, the recitals above would not include a right to use the staircase or right to use the open terrace. This submission, in my considered opinion, overlooks the very essential ingredients of common ownership of the property. The learned counsel would also fault that the Courts below for having relied upon the Tamilnadu Apartments Ownership Act. De hors the Tamilnadu Apartments Ownership Act a joint owner of an undivided share in immovable property, under the general law, is entitled to use every inch of the property or every easement or privilege or right that belongs to the property to the best of his advantage without disturbing the rights of the co-owners. I am of the considered opinion that the claim of the learned counsel that the right to use the terrace and the staircase was not conveyed in the sale deed (Ex.A4) is misconceived. On the applicability of the Tamilnadu Apartments Ownership Act, the learned counsel would contend that the Tamilnadu Apartments Ownership Act would apply to the apartments, which have been constructed in accordance with an approved plan in view of the Section 2 of the said act. As already pointed out, even in the absence of the Tamilnadu Apartments Ownership Act, the appellant cannot prevent the respondents / plaintiffs from using the common property to the best of his advantage. The next contention of the learned counsel is that the Courts below ought to have drawn an adverse inference over the respondent for non-production of the anterior title deeds. The claim of the plaintiff that he has purchased an apartment in the ground floor along with 1/6 undivided share in the land was not denied by the respondents. The title of the vendors of the plaintiff has also not denied therefore, I do not think that the non-production of the anterior sale deeds would have a bearing on the issues raised in the suit.

9. Relying upon the recitals in the sale deed executed in favour of the appellants in 1981, the learned counsel would submit that exclusive right to the overhead tank has been conveyed. He has also taken me through the recitals of the sale deed dated 27.08.1981, which has been marked as Ex.A1. The recital would show that the purchaser is entitled to use only the sump provided at the rear side of the block of buildings to pump water to the overhead tank and he shall not use the sump, which is in front portion as the same does not form part of the property conveyed. This clause only places a restriction on the user of the sump. This clause cannot be read, as suggested by the counsel, to mean that it conveys a exclusive right in the sump or the overhead tank in favour of the purchaser namely, the first defendant.

10. As the last but not the least question of limitation is raised by the learned counsel. As far as constructions put up in the second floor, it is claimed by the defendants that it was put up in 1985 itself. The Courts below have found that there is evidence to show that the construction was put up in 1985. As regards the claim for injunction and it is a continuing cause of action therefore, I do not find any merit in the submissions of the learned counsel that the suit is barred by limitation. Hence, I do not see any question of law much less substantial question of law in order to enable this Court to entertain this second appeal. Accordingly, this second appeal is dismissed without being admitted. Consequently, connected Civil Miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

- 1.The XVII Additional Judge,
City Civil Court, Chennai.
- 2.The III Assistant Judge,
City Civil Court, Chennai.

+1cc to Mr.S.Suresh Kuamr, Advocate Sr.77511

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