

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.974 of 2008

and

MP.No.1 of 2008

Abdul Rahim Khan ...Appellant/2nd Defendant

Vs

1. Mrs. Jayasheree Ezhilan ...1st Respondent/Plaintiff

2. Dr. S. Kunjithapatham

3. P.M. Parakash

4. M/s. Rams Builders
Represented by P.L.S. Ram
No.28, Poes Garden
Chennai- 600 086.

5. Mr. Ganesh ...Respondents/Defendants 1,3,4 & 5

PRAYER: Second Appeal is filed under Section 100 of CPC praying to prefer this Memorandum of Grounds of Second Appeal in this Hon'ble Court against the Judgment and Decree dated 11.07.2006 passed in A.S.No.314 of 2005 on the file of the Additional District Judge, V Fast Track Court, Chennai confirming the judgment and decree dated 11.02.2005 made in O.S.No.5888 of 1997 on the file of the VII Assistant Judge, City Civil Court, Chennai.

For Appellant: Mr. J. Raja Kalifullah, Senior Counsel
for M/s. Jayendra A. Krishnan

For Respondents: Mr. V. Ravi for R1
R2 to R5- No appearance

Judgment

The second defendant is the appellant challenging the concurrent Judgment and decree in a suit filed by the first

respondent for grant of a mandatory injunction to remove the unauthorised occupation/constructions put up between the compound wall and the building line on the north and western sides of the suit schedule building as well as Neon Sign erected on the terrace of the building and for a permanent injunction restraining the defendants from proceedings with further encroachments on the open space left for car parking measuring 20 feet allround between the building line and the compound wall. The parties are referred to in the same array as in the suit.

2. The plaintiff had filed a suit OS.No.5888 of 1997 on the file of the VII Assistant City Civil Judge, Chennai in the following circumstances:

It is her case that she had purchased an apartment bearing Flat No. G-3 in the apartment constructed by the fourth defendant along with an undivided 5.01% undivided share in the land bearing Nos. 39 and 40, I Main Road, Gandhi Nagar, Adyar.

3.The plaintiff would submit that she has registered a sale deed dated 10.08.1994 pursuant to the agreement dated 20.05.1993 entered into between herself and the first and fourth defendant for putting up a flat. It is her case that the agreement clearly provided that she would enjoy her flat absolutely with open spaces, walls, passages, sewers, water lines and other common areas as a co-owner. The plaintiff would contend that she had acquired the right to enjoy the open space all round the building including the open space in the Front abutting the road, and the open space on the western side along with other co-owners, living at No.39 and 40, First Cross Road, Gandhinagar, Adyar.

4. While so, the plaintiff would contend that the fifth defendant had unauthorisedly occupied and put up a shed on the western side with concrete side walls and enclosed the area with collapsible steel gate and also using the adjoining open space, in collusion with the first and fourth defendant was preventing access to the plaintiff to park her vehicle and also obstruct free ingress and exgress into the open space all around. The second defendant, the appellant herein, stated that he had been exclusively allotted the entire open space in the front of the building. The second defendant was contending that he had been given exclusive possession to the open space in front of the building and second and fourth defendants had put up a flight of steps right in front of the building. Further the Association has been formed with the first defendant as its President. The plaintiff did not join the said Association as it was not a legally constituted one and not a representative of all the co-owners. Therefore according to her the activities of the

Association were unauthorised and the plaintiff had issued a legal notice dated 23.06.1997 to defendants 1 to 5 calling upon them to restrain others from illegally occupying the common areas to the detriment of the other owners and requesting the defendants 2 to 5 to vacate the unauthorised occupation of the open space within the compound on the southern and western sides. She had also requested the fourth respondent to handover the common areas and joint amenities as agreed upon. By their reply dated 23.06.1997, the defendants 2 and 4 had raised untenable contentions. To this the plaintiff has sent a suitable rejoinder in which she would contend that none could claim exclusive possession to any part of the common area. The second and fourth defendants could claim exclusive right to an area on the basis of a registered deed and without a registered deed they could not claim any exclusive right owner to the property in question. Since the defendants were not coming forward to remove the encroachment and permit others to park their vehicles in the said property, the plaintiff had filed the suit for the relief stated supra.

5. The second defendant appellant had filed a written statement inter alia contending that the purchase of the property was not by the plaintiff alone but also by his wife and son, who had not been made parties to the suit and therefore the suit is bad for non joinder of necessary parties. They stoutly denied the allegations made by the plaintiff. They would contend that Clause 19 of the construction agreement would clearly provide that the agreement was subject to the exclusive right being granted to some owners with reference to the earmarking of areas towards car parking and therefore the allegations that the second defendant had illegally occupied the entire open space is not true. Further the steps have been put up by the builder as per the building regulations framed by the CMDA. The plaintiff would submit that the allegations made in paragraph 7 with reference to the registration of the agreement being mandatory since under the Transfer of Property Act, the transfer of a property over a value one hundred rupees requires compulsory registration was totally erroneous. In the case on hand, the defendants would submit that the second defendant was granted two exclusive car parks for which a sum of Rs.2,00,000/- was claimed.

6. The defendant would further submit that the plaintiff herself has accepted the fact that the properties were being allotted to the defendants for their exclusive use by her letter dated 27.03.1997 and she cannot renege from the said statement. The second defendant would further submit that there is still open space allotted on the east, north and the western sides of

the property. The defendant would further submit that as regards these areas, the second defendant has not encroached into any portion. Therefore in the given circumstances, the defendant had sought to have the suit dismissed.

7. The Trial Court viz; the VII Assistant City Civil Court, Chennai on perusing the evidence on record proceeded to decree the suit by granting the decree for mandatory injunction directing the defendants to remove the unauthorised construction/occupation.

8. Aggrieved by this judgment and decree the second defendant had filed AS.No.314 of 2005 on the file of the Fast Track Court-V, Additional District and Sessions Judge, Chennai. The Appeal filed by the second defendant/appellant herein was dismissed by Judgment and decree dated 11.07.2006. After the dismissal of this appeal, the Appeal filed by the defendants 1, 4 and 5 in AS.No.53 of 2007 was allowed and the decree in OS.No.5888 of 1999 was dismissed in toto.

9 . Mr.J. Raja kalifullah, Senior Counsel appearing on behalf of the M/s. Jayendra A. Krishnan had argued the matter at length and had produced the judgment in AS.No.53 of 2007.

10. On perusal of the above Judgment, it is clearly evident that the III Additional City Civil Court, Chennai had allowed the Appeal and set aside the entire decree in O.S.No.5888 of 1997. The decree in O.S.No.5888 of 1997 reads as follows:

"(i) That it is hereby directed that the defendants do remove all the unauthorized occupation/constructions between the building line and the compound wall on the Northern and western sides of the schedule Building and the Neon sign erected in the terrace of building on or before 11.05.2005.

(ii) That the defendants or his men are hereby restrained by way of permanent injunction from proceeding with further encroachments on the open space left for car parking measuring approximately 20 feet all round the building between the building line and the compound wall.

(iii) That the defendants do pay plaintiff a sum of Rs.561/- (Rupees Five Hundred and Sixty one only) towards the cost of this suit as taxed and noted below."

11. The judgement in AS.No.53 of 2007 which was produced by the learned Senior Counsel has not been rebutted by the learned counsel for the plaintiff/first respondent who would admit that said judgment and decree.

12. Considering the fact that the entire decree has been set aside and this Judgment and decree arising from out of the very suit having not been challenged by the plaintiff, the Second Appeal should be allowed and the Judgment in A.S.No.314 of 2005 confirming the judgement and decree in O.S.No.5888 of 1997 should be set aside in the light of the judgment and decree in A.S.No.53 of 2007. In the result the Second Appeal is allowed. No costs. Consequently connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To,

1.The Additional District Judge,
V Fast Track Court.

2.The VII Assistant Judge,
City Civil Court,
Chennai.

Copy to

The Section Officer,
VR Section, High Court, Madras.

+1cc to M/s.S.Jayendra Krishnan, Advocate Sr.20485

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and
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