

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :01.02.2021

Pronounced on :10.02.2021

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Appeal Suit No.487 of 2016

and

C.M.P.No.14736 of 2020

1.S.P.Valliappan

2.Ananthi

3.V.Subramaniam

...Appellants/Defendants 1 to 3

/versus/

1.E.M.Avanasiappan

2.A.Meenakshi

3.A.Sudarsan

4.A.Aparna

5.K.Annapoorani (Minor)

Rep.by her natural guardian and

Father E.M.Karunanidhi

6.E.M.Karunanidhi

7.K.Seetha

8.Dr.T.C.Chandran

9.Sureshkumar

10.Prakashkumar

11.Shamaz Mohammed

12.Shihah

...Respondents/Plaintiffs 1 to 10 &
Defendants 4 & 5

Prayer:- Appeal Suit has been filed under Section 96 of the Civil Procedure Code, 1908, against the judgment and decree dated 22.12.2015 in O.S.No.9908 of 2010 on the file of the 17th Additional City Civil Judge, Chennai.

For Appellants :Mr.G.R.M.Palaniappan

For Respondents:Mr.A.E.Ravichandran for R1 to R10

No appearance for R11 and R12

J U D G M E N T

The first appeal is directed against the judgment and decree passed by the trial Court in O.S.No.9908/2010 filed for declaration and permanent injunction in respect to the property

more fully described under schedule 'B' of the plaint and for mandatory injunction to remove the permanent structure put upon by the defendants in the area marked as ' X,Y and Z ' in the 'B' schedule property.

2.The brief facts leading to the appeal:

The suit property is a residential complex known as "Temple View Apartments" situated in 6 grounds 929 sqft land more fully described under schedule 'A' of the plaint. The subject matter of the dispute is the front set back meant to be kept as open space and for common usage of all the co-owners. The said portion is described as 'B' schedule property measuring approximately 2004 sq. ft. The flat owners are entitled for the right of easement along the common passage measuring 16 ft. width on the western side of the apartment and also the right to enjoy the other common area including the front set back area described as 'B' schedule property. The plaintiffs and the defendants are the co-owners of the 'A' and 'B' schedule properties. While so, the tenant of the defendants occupying the ground floor had put up temporary structure and started storing their things. This was brought to the notice of the defendants and requested to remove the encroachment on the common area. The defendants though promised to remove the temporary structure, contrary to his promise, during late 2005 in the portion marked as X,Y and Z in the B schedule property put up two permanent structures with shutters abutting either side of the steps leading to the Bank. The defendants refused to remove the permanent structures put up in the common area meant for common enjoyment of the co-owners. Attempts to settle the dispute amicably during the month of March, 2008 and thereafter failed. When no exclusive right given to the defendants over the 'B' schedule property, the defendants claiming exclusive right had encroached the common area.

3.The defendants through the written statement admit the fact that the 'B' schedule property is a common area to the plaintiffs and defendants. He claims only exclusive right to park his cars in that area, since the other co-owners are allotted the car park slot on the other sides of the building. The defendants have given an undertaking as early as June 2005 that they have no intention to put up any permanent structure in the common area and due notice given to the tenants under occupation not to cause in convenience to the co occupants. The steps also taken to vacate the said tenant. The entrance to the residents of Temple view Apartment is on the side of the building and not from the front of the building. The parking space for the plaintiffs are allotted on the rear side and southern side of the building. There is no necessity for the plaintiffs to meddle with the car park area allotted to the defendants on the front portion. The structure in 'XYZ' marked

portion was in existence, since 1985 and not a new structure put up by the defendants recently as alleged.

4.The issues re-casted and taken for decision:-

1) Whether the plaintiffs are entitled for the relief of declaration that the 'B' schedule property is common to the plaintiffs and defendants ?

2)Whether the plaintiffs are entitled for the relief of permanent injunction restraining the defendants from in any manner constructing any super structure in the 'B' schedule of property ?

3)Whether the plaintiffs are entitled for the relief of mandatory injunction directing the defendants 1 to 3 to remove the permanent structure marked as X,Y and Z in the plan annexed with plaint ?

4)To what other relief the plaintiffs are entitled?

5.PW-1 and PW-2 were examined on the side of the plaintiffs. DW-1 was examined on the side of the defendants. Ex.A-1 to Ex.A-23 and Ex.B-1 to Ex B-19 are the documents relied by the plaintiffs and defendants respectively. Ex.C-1 to Ex.C-5 are the Advocate Commissioner's Report, sketch, photographs and CD's of the suit property.

6.The trial Court, based on the evidence as well the admission of the defendants made in their written statement and in the deposition of first defendant Valliappan, declared the plaintiffs as co-owner along with the defendants in the common area i.e. 'B' schedule property and entitled to have ingress and egress to the 'B' schedule property. Proceeded to hold, having declared 'B' schedule property as common area, no prejudice will cause to the defendants 1 to 3 by granting the relief of permanent injunction. The defendants are liable to remove any superstructure in the 'B' schedule property, marked as 'XYZ', over which the defendants have put up the unauthorised permanent construction in the green marked portion 'X, Y and Z'.

7.The learned counsel appearing for the appellants submitted that, the promoter, while selling the apartments, car park slot was allotted for the respective owners in the common area open to space, on the rear side and southern side of the building. The promoter retain 3 apartments for himself, one on the ground

floor and two on the first floor and the open set back in the front. For these three apartments, car parking facility was provided in front portion of the building, which is in the 'B' schedule. It is common area and the same is admitted. When the promoter sold these 3 apartments to the appellants/defendants, the common area on the front of the building was given to the appellants for their exclusive use for parking their cars. As per the TamilNadu Apartment Owners Act, 1984 and CMDA Regulations, apartment above 500 sqft should be allotted one car parking space. As such, the total extent of the three apartments owned by the appellants is $(1900 + 1000 + 1680) = 4580$ sqft appellants. Therefore, they are together entitled for 6 car parking slots. The plaintiffs are entitled for one parking slot each for their respective flats. A letter to that effect has been given by the promoter on 18/09/2001. Due to inadvertence, the said letter was not marked during trial. After the impugned judgement, the appellants have removed all the structures in the 'B' schedule property.

8. After submitting to decree in respect of declaration that the 'B' schedule property is held in common by the plaintiffs and defendants, there is no necessity to grant permanent injunction against the defendants. The respondents misinterpreting the relief of permanent injunction granted in the judgment, preventing the appellants from parking their cars in the 'B' schedule property. The photographs will show that the area allotted for the appellants to park their cars has now been in disuse due to the interference of the respondents.

9. The Learned counsel for the appellants further submitted that, in the written statement, while admitting the right in common in respect of 16 feet passage and the front set back, the appellants have categorically pleaded that the area in 'B' schedule was left of the car parking of the appellants exclusively. In spite of the plaintiffs himself admitting the fact that each of the flats owners are given one car parking slot each for their use and the same is exclusively used by them, the trial Court erroneously held against the appellant on the ground that the appellants failed to prove that they were allotted exclusive car parking in the 'B' scheduled portion. Therefore, in C.M.P.No.14736 of 2020 indulgence of the Court to permit the appellants to adduce additional evidence regarding the allotment of exclusive car parking by the vendor-cum-promoter through his letter dated 18/09/2001, the CMDA Regulations regarding allotment of car park space in apartments and photographs of the suit property sought.

10. The learned counsel for respondents submitted that the application to receive additional documents like the letter conveying right on immovable property, CMDA regulations and

photographs subsequent to decree is only an attempt to introduce a new case which was not pleaded. Documents to which the both parties are not privy cannot be adduced as evidence. The appellant under the guise of claiming exclusive parking right try to encroach the entire 2004 sq ft land shown in B schedule.

11. On considering the reasons set out for filing the additional documents in the appeal and the nature of the documents sought to be introduced, this Court finds that the petition does not satisfy the conditions laid in Order 41, Rule 27 of the Civil Procedure Code. Hence, the Civil Miscellaneous Petition No.14736/2020 is dismissed.

12. The point for determination in the appeal suit, is whether there is evidence to hold the common area namely, the front set back to an extent of 2004 sqft which is more fully described in the schedule 'B', allotted to the appellants exclusively for parking their cars ?

13. The Temple View Apartment was promoted by one K.Subbiah, Proprietor of M/s Pioneer Engineering Corporation. The flats in the apartment were purchased by the plaintiffs and defendants 1 to 3 mostly from K.Subbiah the promoter directly. In the sale deeds of the plaintiffs, while the 16 feet passage on the western side alone specifically mentioned to be used as common passage and shown as Western boundary. The rest of the sides refers the Santhome High Road on the East and the neighbouring apartments as Northern and Southern boundaries. There is no reference about the set back area on the other sides. The appellants, who have purchased 3 units of flats facing east, abutting the front set back area, though admit the common ownership over the area, claim exclusive enjoyment of that area for car parking, which is opposed by the other flat owners. Even if the appellants have right of parking space and he need it to be exclusive, the right for parking must commensurate to the units of flats in the said apartment and area available for parking. From the evidence of PW-1, it appears each flat owner is allotted one car parking space and the said space is specifically earmarked. It is not the case of the plaintiffs that the defendants are also allotted space for parking car commensurations to their holdings. Having declared that the front set back area is common area for the flat owners, it applies to the set back in the other sides of the apartment. Neither the plaintiffs can interfere the access of the defendants nor the defendants can interfere the access of the plaintiffs over the common area on all sides.

14. Having conceding the right of the plaintiffs over the 'B' schedule property which is declared as common area, the other relief like permanent injunction and mandatory injunction to

remove the super structures put up in the 'B' schedule area are consequential and need to be granted. No exclusive right to the parties either the plaintiffs or the defendants declared. Therefore there is no reason to misinterpret the decree declaring the right in the common for both parties. No exclusivity over the common area including 'B' schedule property could be claimed by either parties.

15.It is open to the respondents to allow the appellants or his tenants/agents to use the front set back (B schedule property) for parking his cars (maximum 3) or elsewhere within the apartment, but for no reason prevent the appellants their right of parking cars in the common area, by misquoting the trial Court decree. Also it is made clear that the appellants can have no exclusive right over the common area either on the front set back area (B schedule property) or on the other sides of the apartment save right of parking their cars.

16.With this clarification, this Appeal Suit is dismissed. The judgment and decree passed by the trial Court viz., 17th Additional City Civil Court, Chennai dated 22.12.2015 made in O.S.No.9908 of 2010 is confirmed. No order as to costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

ari
To:

The 17th Additional Judge
City Civil Court,
Chennai.

Copy to
The Section Officer
VR Section
High Court, Madras 104.

+1 CC to Mr. Joseph, Advocate sr 7293.
+1 CC to Mr.A.E.Ravichandran, Advocate sr 7894.

A.S.No.487 of 2016
and
C.M.P.No.14736 of 2020

PA(CO)
SP(15/03/2021)