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S.A.No.64 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.03.2022

CORAM

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

S.A.No.64 of 2013
and M.P.No.1 of 2013

Y.Devendran

...Appellant

Vs.

1.D.Shanmugam

2.The Special Officer,
PTC Co-operative House Construction Society Ltd.,
having Office at
Anna Salai, Chennai – 2.

3.The Commissioner,
St. Thomas Mount,
Panchayat Union,
having Office at
Chittalapakkam.

4.The Member Secretary,
Chennai Metropolitan Authority,
having Office at
Thalamuthu Natarajan Buildings,
No.1, Gandhi Irwin Road,
Egmore, Chennai – 600 008.

... Respondents

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the
Judgment and Decree dated 06.07.2012 made in A.S.No.74 of 2011 on the



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file of the Court of Subordinate Judge at Tambaram, confirming the Judgment and Decree dated 08.07.2011 passed in O.S.No.209 of 2005 on the file of the Principal District Munsif Court, Alandur.

For Appellant	: Mr.P.Rajendra Kumar
For Respondents	: Mr.K.P.Chandrasekaran for R1
	Mr.E.Inthumathi Government Advocate for R2 & R4
	Mr.A.Edwin Prabakar Special Government Pleader for R3

JUDGMENT

The 1st defendant is the appellant in this Second Appeal.

2.The 1st respondent/plaintiff filed the suit seeking for the relief of mandatory injunction directing the 1st defendant to remove the illegal construction that has been put up in the suit property and for a permanent injunction restraining the 1st defendant from putting up any further illegal construction in the suit property.



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3.The case of the plaintiff is that he is the absolute owner of the flat bearing Door No.55B which is in the ground floor. The 1st defendant is the owner of the flat situated in Door No.55C. The grievance of the plaintiff is that the 1st defendant is attempting to put up construction in the common area and he did not stop putting up the illegal construction in spite of issuing a legal notice. Hence, the suit was filed seeking for the reliefs stated *supra*.

4.The 1st defendant has filed the written statement and has taken a plea that he is occupying the 1st floor of the property in Door No.55C and he has only put up construction in the space exclusively given to him and there is no illegal construction on the part of the 1st defendant. He further contented that the construction was put up with the consent of all the flat owners. The 1st defendant has also alleged that the plaintiff has put up construction and occupied the common space in the front and back side of his flat and he has not approached the Court with clean hands. Therefore, the 1st defendant has sought for the dismissal of the suit.

5.Both the Courts below on considering the facts and circumstances of the case and the evidence available on record, concurrently held in favour of the plaintiff. Aggrieved by the same, the 1st defendant has filed this Second Appeal.



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6.This Court while admitting the Second Appeal framed the following substantial questions of law:

1. Whether the Appellate Court is right in not considering the grounds raised in the appeal and decide an issue which is not raised by the party and not relevant to the case?

2. When the description of the suit property in the schedule to the plaint is erroneous and further identification and linear measurement of the suit property having not been mentioned lead to non compliance of mandatory requirement under Order 7 Rule 3 of Civil Procedure Code and therefore is not the suit is liable to be rejected in limine?

3. Whether the Courts below without deciding the question whether a party's right to drainage, water is infringed can an injunction be granted?

4. Without a finding that an irreparable loss and hardship will be caused to a party, a mandatory injunction be granted against him?

5.Whether a party can curtail the right of another by filing a suit for demolition of additional constructions, thereby depriving a party to invoke the Town & Country Planning Act, 1971?



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7. Heard the learned counsel for the petitioner and the learned counsel appearing on behalf of the respondents.

8. A careful reading of the judgment passed by both the Court below reveals that both the plaintiff as well as the 1st defendant have put up additional construction in the common space. The plaintiff and his son-in-law who are in occupation of the ground floor in Door Nos. 55A and 55B respectively have encroached the common space in the front and back side of their flats. Similarly, the 1st defendant and one Kennedy, who are residing in Door Nos. 55C and 55D respectively have also put up constructions in the common space. It looks like there is absolutely no control over the constructions that are taking place in the property that was allotted by the PTC Co-operative House Construction Society Limited. It is a free for all to all the flat owners. Both the Courts below found that the plaintiff and the 1st defendant have put up constructions illegally and have proceeded to hold that the construction put up by the 1st defendant should be removed and it will be left open to the defendants 2 to 4 to initiate separate action to remove the illegal construction that has been put up by the plaintiff.

9. In the present case, both the Courts below failed to appreciate the fact that the plaintiff is approaching the Court with an equitable relief of

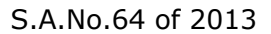


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mandatory injunction and therefore, the plaintiff is expected to come to the Court with clean hands. The plaintiff has pleaded as if the 1st defendant has encroached upon the common space and put up construction. However, the plaintiff conveniently concealed the encroachment upon the common space made by him and his son-in-law who are residing in the ground floor. This ground was enough to disentitle the plaintiff the relief that was sought for in the suit.

10.Both the Courts below also failed to notice the fact that Order VII Rule 3 of C.P.C., specifically mandates that where the subject matter of the suit is an immovable property, the plaint shall contain the description of the property sufficient to identify it. In the present case, there is absolutely not a single averment made in the plaint as to the nature of illegal construction put up by the 1st defendant and the extent to which it has been made. The plaintiff did not even take steps to appoint an Advocate Commissioner to identify the so called encroachment. Both the Courts went by the *ipse dixit* of the plaintiff and have proceeded to decree the suit even without understanding the extent of encroachment made by the 1st defendant.

11.The 1st defendant while filing the appeal in fact had taken a very specific ground to the effect that the trial Court over looked the fact that the



12. The moment both the Courts below came to know that plaintiff is also guilty for having encroached upon the common space in front and back side of the flat, both the Courts below ought to have dismissed the suit in limine without getting into any of the other issues. This is more so, since the plaintiff has approached the Court seeking for an equitable remedy. A person who seeks equity must do equity and approach the Court with clean hands and this fundamental requirement has not been fulfilled by the plaintiff.

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areas only with an understanding with the other flat owners. Such constructions can never be entertained.

14.In the result, this Second Appeal stands allowed. Considering the facts and circumstances of the case, there will be no order as to costs. Consequently, connected miscellaneous petition is closed.

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Index :Yes/No

Internet :Yes/No

ssr



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To

- 1.The Subordinate Judge, Tambaram.
- 2.The Principal District Munsif Court, Alandur.



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N.ANAND VENKATESH.,J

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