



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Civil Appellate Jurisdiction)

Friday, the Twenty Ninth day of April Two Thousand Twenty Two

PRESENT

THE HON'BLE MR.JUSTICE S.S.SUNDAR

CMP.No.8823 of 2020

in SA.No.656 of 2018

RAMESH KRISHNAN [PETITIONER]
REP BY HIS POWER AGENT MR.SURYA NARAYANAN,
NO.40/51, BEACH ROAD, KALAKSHETRA COLONY,
BESANT NAGAR, CHENNAI - 600 090.

Vs

1 NIRMALA VICTOR [RESPONDENTS]

2 THOMAS WILSON

3 SANDRA WILSON

4 M/S.VALUE LOGICS PRIVATE LIMITED,
HAVING OFFICE AT FLAT NO.1,
REP BY MR.SUBRAMANIYAM SHARMA,
REGIONAL MANAGER(OPERATION) ,
NO.27, JUSTICE BALAKRISHNAN ROAD,
VALMIKI NAGAR, THIRUVANMIYUR,
CHENNAI- 600 041.

5 S.JAYARAMAN

6 R.PREMA

7 S.KUMARAN

8 S.MAHESHWARAN

9 SHYAMALA SRIDHARAN,

10 SRIKANT SRINIVASAN,

11 RAVIKARAN

12 LATHA GANAPATHY

13 N.SUBRAMANYAN

<https://hcservices.ecourts.gov.in/hcservices/>
14 MANU NATARAJAN



15 SUJATHA MANU

16 P. PREM

17 BEENA PREM

18 VIVEK PREM

19 LAKSHMI RAMA KRISHNAN

20 THE PRINCIPAL SECRETARY
CHENNAI METROPOLITAN DEVELOPMENT AUTHORITY,
NO.01, GANDHI IRVIN ROAD,
THALAMUTHU NATARAJAN HOUSE,
EGMORE, CHENNAI - 600 008.

21 THE COMMISSIONER,
GREATER CHENNAI CORPORATION,
RIPPON BUILDINGS,
SYDENHAMS ROAD, KANNAPAR THIDAL,
PERIYAMET, CHENNAI - 600 003

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to restrain the respondents from disturbing the peaceful possession of the appellant's property at Door No.6/11, 5th Floor(Penthouse), Avatar Apartments, situated in Plot No.5(2)A and 5(2)B, 2nd Seaward Road and Justice Balakrishnan Road, Valmiki Nagar, Thiruvanmiyur, Chennai-600 041(CMP.No.8823 of 2020)pending disposal of the present SA.No.656 of 2018.

SCHEDULE OF PROPERTY

The penthouse property situated at Door No.6/11, 5th Floor (Penthouse), Avatar Apartments, Plot No.5(2)A and 5(2)B, 2nd Seaward Road and Justice Balakrishnan Road, Valmiki Nagar, Thiruvanmiyur, chennai-600 041 admeasring about 1790 sq.ft.

Order : This petition coming on this day for hearing upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of M/S.S.SIVARAMAN, Advocate for the petitioner and of M/S.K.V.ANANTHA KRUSHNAN, Advocate for 1 to 3, 5 to 8, 10 to 12, 19 to 21 Respondents and of the 13th Respondent not appearing either in person or by an Advocate and of M/S.P.VEENA SURESH, Standing Counsel(CMDA) for 20th Respondent, the court made the following order:-

This petition is filed to restrain the respondents from disturbing the peaceful possession of the appellant's property at Door No.6/11, 5th floor (Penthouse), Avatar Apartments, situated in Plot No.5(2) A and 5(2) B, 2nd Seaward Road and Justice Balakrishnan Road, Valmiki Nagar, Thiruvanmiyur, Chennai - 600 041, pending disposal of the present proceedings.



2. Brief facts that are necessary for the disposal of this petition are as follows:

The respondents 1 to 19 in the petition, as plaintiffs, filed a suit in O.S. No.1775 of 2005 before the City Civil Court, Chennai, for a declaration that the plaintiffs and their successors alone have exclusive right to enjoy the open terrace portion in the building, Avatar Apartments and permanent injunction restraining the defendants 1 to 3 and their heirs from selling the unauthorised construction of about 1790 sq.ft. in the common open terrace with undivided share of land and in any way interfering with the plaintiffs' exclusive right over the common open terrace and for other reliefs.

It is admitted that the suit was decreed as prayed for by the trial Court and the appeal filed by the defendants 1 to 3 in A.S. No.336 of 2011 before the VI Additional City Civil Court, Chennai, was also dismissed. The present appeal is filed by the son of first defendant. The first defendant in the suit is also the son of second defendant. It is admitted that defendants 2 and 3 are none else than the mother and sister of first defendant who are the owners of the entire property in which the first defendant has put up a four floor building as promoter. It is the case of the respondents that the first defendant, after executing a sale deed in respect of undivided interest in favour of plaintiff, has retained a portion of undivided share and put up an unauthorised construction of approximately 1790 sq.ft., in open terrace i.e 4th floor which was originally reserved as a common area for all the apartment owners. It is also stated in the plaint that the first defendant was trying to alienate the unauthorised construction put up in the terrace portion with the unconveyed undivided share illegally retained by the first defendant.

3. In the memorandum of grounds of appeal, the appellant has raised several issues with regard to the maintainability of the suit as well as the right of his mother the first defendant, to own the constructed area in the fourth floor. During pendency of the above second appeal, the appellant has filed this petition for interim injunction.

4. It is admitted that the first defendant, the proprietrix of M/s. Sri Devi Constructions, entered into a joint venture agreement on 06.09.1995 with defendants 2 and 3 for construction and development of property into apartments in the land belonged to them. It is the case of plaintiffs that first defendant, after completion of 13 apartments, put up an unauthorised construction of 1790 sq.ft. in the open terrace which is the common area of all the apartment owners. The Courts below accepted the case of plaintiffs that the construction is unauthorised and decreed the suit. Aggrieved by the judgment and decree of the Courts below, the above appeal is filed by the son of first defendant who died pending proceedings before the lower Court. It is admitted that the first defendant constructed a Pent house in 2006 and the suit is filed



after construction. It is also evident that the defendants have retained sufficient undivided share in the land while selling the undivided share to the owners of 13 apartments. In the affidavit it is stated that the petitioner / appellant is not dispossessed and that the respondents are now preventing the petitioner to enter the Pent house. It is further stated that the appellant who is taking treatment for his illness and his wife who is physically challenged with 86% disability should be allowed to reside therein.

5. The application is seriously contested by the counsel for sixth respondent mainly on the following grounds:

a) The petitioner has earlier filed two other applications earlier for stay and injunction and they were dismissed. Hence the third application is not maintainable.

b) The petitioner / appellant has no right to maintain the appeal as he does not have any undivided share in the site and the power of attorney given to first defendant is not valid as the second defendant died pending suit.

c) The 'Terrace' portion of the building which is a common area of all owners of apartments cannot be permitted to be occupied by appellant.

6. The learned counsel for the sixth respondent vehemently argued that no interim order can be granted as that would jeopardise the right of respondents who have succeeded before the Courts below. This Court expressed its inclination to pass an interim order so that the Pent house which is already constructed in the fourth floor can be enjoyed by the appellant during the pendency of appeal with a protection to other flat owners namely the plaintiffs. However, the learned counsel for the sixth respondent submitted before this Court that the appeal itself is not maintainable as the promoter was only the Power of Attorney agent who cannot get any right in the undivided share which is not sold by defendants 2 and 3. The learned counsel further submitted that this Court has earlier dismissed two petitions and therefore, the third petition filed by the petitioner is not maintainable. The learned counsel further submitted that the appellant is not in possession of the property. In other words, it is submitted that the constructed portion which is kept under lock and key cannot be considered to be a portion which is in the occupation of appellant for the purpose of seeking interim order. However, the learned counsel for the petitioner elaborately argued and sought indulgence of this Court to consider the situation to which the petitioner is put to because of the pendency of the litigation.

7. This Court after hearing elaborate arguments of both sides, is not convinced with the submissions of the learned counsel for the sixth respondent. It is admitted that the petitioner is the son of promoter / first defendant and he is entitled to challenge the judgment and decree of the Courts below. It is strange to contend that the appellant has no locus standi to file an appeal when it is



admitted that he is the only legal heir of first defendant who is the contesting defendant before the Courts below. The submission of the learned counsel for the sixth respondent that the power of attorney deed on the basis of which the first defendant promoted the building died with the person as the second defendant is no more is not acceptable. Having regard to the admitted fact that the petitioner is a legal heir of first defendant, he is entitled to claim right over the undivided share as a son of predeceased son of second defendant who is one of the co-owner.

8. With regard to possession and enjoyment, it is not in dispute that the suit was filed when the first defendant had already put up construction (Pent house) occupying 1790 sq.ft., out of the total extent of more than 10,000 sq.ft. available in the terrace portion (fourth floor). Though it is stated that the building constructed by the petitioner or the first defendant is not having electricity service connection and that there is no lift facility, it cannot be disputed that the petitioner can have access to the building (Pent house). It is to be noted that the respondents have not sought for mandatory injunction. When the construction was completed, the respondents have no access to the portion of 'Terrace' occupied by the building. Hence, there is no further injury if the petitioner is allowed to reside in the Pent house during pendency of this appeal.

9. This Court is concerned with the preservation of right of parties during pendency of this appeal. By permitting the petitioner to use the constructed area without causing any hindrance to any of the plaintiffs including the sixth respondent, no serious prejudice is likely to be caused to anyone of them. However, if the petitioner is not permitted to use the constructed portion, it is nothing but preventing him from enjoying a right which may also be acknowledged if the petitioner succeeds in the appeal. The existence of building not being disputed, an argument that the petitioner should not be allowed to occupy the building is not fair.

10. The serious objections raised by the learned counsel for the sixth respondent is by referring to two earlier orders of this Court which has no relevance to the present petition. It is true that the petitioner filed a petition in C.M.P.No.6432 of 2020 for an injunction restraining the respondents from disturbing the peaceful possession of the appellant's property at plot No.5(2) A and 5(2), 2nd Seaward Road and Justice Balakrishnan Road, Valmiki Nagar, Thiruvannamiyur, Chennai - 600 041. The said petition was dismissed mainly on the ground that the grant of order of injunction without proper description of the property is not possible and liberty was granted to the petitioner to file an appropriate petition with proper description of the property. Hence, the nature of order passed in C.M.P. No.6432 of 2020 is not a deterring factor to dismiss the present petition. The petitioner also filed a petition in C.M.P. No.6438 of 2020 for stay of further proceedings in the decree and judgment dated 30.01.2018 in A.S. No.336 of 2011 on the file of VI Additional City Civil Court,



Chennai. The said petition was disposed of by order dated 05.06.2020. which reads as follows:

" This application has been filed seeking stay of all further proceedings pursuant to the decree in O.S. NO.1775 of 2007 as confirmed in A.S. No.336 of 2011. The decree is one for declaration and injunction. I do not find there is no further proceedings contemplated pursuant to the decree. Hence this application is dismissed."

Since the prayer for stay of further proceedings is not appropriate, this Court, finding that no further proceedings is contemplated pursuant to a decree, found that the petition is unnecessary. Hence the dismissal of C.M.P.No.6438 of 2020 cannot be a reason to dismiss the present petition.

11. Learned counsel for the contesting respondent has admitted that the dismissal of two applications earlier will not operate as res judicata. In such circumstances, this Court is unable to find any substance in any of the arguments advanced by the learned counsel for the sixth respondent while contesting the petition which is to protect the rights and interest of parties during pendency of the proceedings.

12. Even though the petitioner / appellant is not permitted to enjoy the property so far by various means by the plaintiffs, this Court after recording the admitted facts that the construction was put up by the petitioner even at the time of filing of suit and the petitioner is a co-owner having right in the unsold undivided share in the property, is of the view that the petitioner can be permitted to enjoy the property till the appeal is disposed of.

13. Therefore, there shall be an order restraining the respondents from disturbing the peaceful possession of the appellant's property at Door No.6/11, 5th floor (Penthouse), Avatar Apartments, situated in Plot No.5(2) A and 5(2) B, 2nd Seaward Road and Justice Balakrishnan Road, Valmiki Nagar, Thiruvanmiyur, Chennai - 600 041, pending disposal of the present proceedings. However, the order of injunction cannot be construed to enable the petitioner to cause any hindrance to the enjoyment of any of the plaintiffs particularly the sixth respondent. Any act of petitioner which may cause inconvenience or interference with the existing right of sixth respondent or any of the plaintiffs, will be viewed seriously and this Court will modify the order in case this order of injunction is interpreted to cause hindrance to the enjoyment of any of the flat owners. The petitioner shall pay the usual maintenance charges as it is being collected from other apartment owners and the statutory dues like property tax, water tax, etc.



13. Accordingly, the Civil Miscellaneous Petition is allowed in the above terms.

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29/04/2022
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Sub-Assistant Registrar (Statistics / C.S.)
High Court, Madras - 600 104.

TO

1 THE VI ADDITIONAL JUDGE,
CITY CIVIL COURT, CHENNAI.

2 THE XV ASSISTANT JUDGE,
CITY CIVIL COURT, CHENNAI.

C.C. to M/S.S.SIVARAMAN Advocate SR.NO.3685/2022

+2 C.C. to M/S.K.V.ANANTHA KRUSHNAN, Advocate SR.NO.3691/2022

Order
in
CMP.No.8823 of 2020
in SA.No.656 of 2018

Date :29/04/2022

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