



S.A.No.898 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.10.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.898 of 2021
and
C.M.P.No.17031 of 2021

P.John Rajkumar

... Appellant/Appellant/
Defendant

Vs.

N.Palani

...Respondent/Respondent
Plaintiff

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 25.10.2019 in A.S.No.61 of 2019 on the file of the learned III Additional Judge, City Civil Court, Chennai, confirming the Judgment and Decree dated 27.09.2018 in O.S.No.4867 of 2012 on the file of the learned II Assistant Judge, City Civil Court, Chennai.



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For Appellant : Mr.V.Srikanth

For Respondent : Mr.Arun Anbumani
for Mr.K.Manikandan
Caveat counsel

JUDGMENT

The defendant who has been unsuccessful before both the Courts below has filed the above Second Appeal.

2.After hearing the parties, the Second Appeal has been admitted on the following Substantial Questions of Law:

“(1)Whether the Courts below have rightly interpreted the Clauses 11 and 12 in Ex.B.4 against the issue of mandatory injunction, wherein the plaintiff failed to establish the enforceable rights arising out of Ex.B4? Whether the Lower Appellate Court is correct in interpreting the Schedule B of Ex.B.1 in favour of the



plaintiff by shifting the burden of proof on the defendant to establish the covered car parking allotted to him?

(2)Whether the Court below is proper in granting the decree in favour of the plaintiff by picking the holes in the defendant's case and granting the Decree would be proper or not?

(3)Whether the Courts below are proper in holding that even the relief is limited for the purpose of mandatory injunction, it would be property to discuss the facts outside the scope of issue?

(4)Whether the Courts below are proper in holding that the exclusive allotment of parking area, and being a protection for his vehicle and which has not caused any obstruction to the usage of common area, would it be right in holding that the mandatory injunction and decree to the plaintiff?"

Thereafter, the appellant had filed additional substantial question of law which was taken on file as there was no objection from the counsel for the respondent.

Additional Substantial Questions of Law:

“(A)Have not the Courts below failed to appreciate the valuable right of the appellant/defendant that he purchased of the western side of the building for exclusive car park?

(B)Have not the Courts below Mis-constructed Open Parking space with that of Open to Sky requirement? thereby, resulting in grave injustice to the appellant?

(C)Have not the Courts below erred in law is rendering Judgments, even without the aid of the Sanctioned Building Plan for arriving at the impugned conclusion on the Open to Sky requirement?

(D)Have not the Courts below grievously erred in Law in rendering findings of fact in the absence of any



Open to Sky (OTS) stipulations in the Sanctioned Building Plan, and rendered findings which are beyond the scope of pleading and evidence?

3.It is necessary to allude to the facts of the case briefly set out the pleadings of both the parties in order to appreciate and answer the Substantial Questions of Law:

The plaintiff has filed O.S.No.4867 of 2012 on the file of the learned II Assistant Judge, City Civil Court, Chennai for the following relief:

“(a)To grant mandatory injunction directing the defendant to remove the illegal permanent shed put up by the defendant and remove the other obstruction caused in the Open to Sky area (OTS) and common area in the suit schedule property, i.e., Unique Ganga Apartments, New Door No.4, Old Door No.47, II Cross Street, Ganga Nagar, Kodambakkam, Chennai – 600 024.



(b)To grant an permanent injunction restraining the defendant, his agents, servants or any persons acting under him from making any further illegal construction or obstruction in the Open to Sky area (OTS) and common area with the apartment premises in Unique Ganga Apartments, New Door No.4, Old Door No.47, II Cross Street, Ganga Nagar, Kodambakkam, Chennai – 600 024.”

4.The case of the plaintiff is that he had purchased the second floor flat at Unique Ganga Apartments situate at New Door No.4, Old Door No.47, II Cross Street, Ganga Nagar, Kodambakkam, Chennai – 600 024, together with open car parking space at OTS around the building in the year 2002. From the date of purchase. the plaintiff has been in possession and enjoyment of the same. Further, the case of the plaintiff is that the defendant who had originally purchased the first floor flat in the said apartments initially and subsequently, purchased two flats at ground floor in the very same apartments. The remaining



flat in the second floor is the plaintiff's. In the month of October 2009, the defendant without the consent of the plaintiff put up an unauthorised pucca shed with the heavy iron pipes, beams and rods covered with iron industrial sheet covering the entire open sky area on both sides namely, on the right and left side of the building.

5.The plaintiff would submit that the staircase going to the first and second floors is a spiral and narrow one. Therefore, heavy articles cannot be taken from the ground floor flat to the second floor flat where the plaintiff is staying. The articles had to be lifted from the ground floor to his flat. By reason of the putting up of this shed, the plaintiff is not able to move heavy articles to his house. The plaintiff would further submit that the terrace area is being used by the defendant who is using it for commercial purpose and causing nuisance to the plaintiff. The plaintiff would submit that due to closure of the OTS area the plaintiff is not able to repair and to paint both sides of the buildings, window and ventilator. Hence, the plaintiff has issued a legal notice dated 01.04.2012 calling upon the defendant to remove the



unauthorised constructions. Therefore, left with no other alternative, the plaintiff has filed the above suit.

6.The defendant had filed a Written Statement *inter alia* admitting the ownership of the apartments and contending that through the Construction Agreement he has been exclusively allotted to the Western side car parking space which he has been enjoying since the purchase. By reason of purchasing the ground floor and the apartment in the front portion of the ground floor, he is entitled to the car park in the front. By purchasing the rear portion of the ground floor, he is entitled to the undivided land as well as the car parking on the Eastern side. The defendant would submit that he is in absolute and uninterrupted possession of the ground and first floors and the Eastern and Western side car parkings from the date of its respective purchase. The plaintiff has purchased the second floor flat and the corresponding undivided share and car parking on the Northern side of the apartments.



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7.The defendant would submit that he has put up a construction only to protect the cars which are parked in the open area. The said car parking is put up by them with a tin sheet roof and iron rods temporarily and is not a permanent one. At the time of putting up the temporary roof during the year 2008, the plaintiff was present and he did not object for the same. The defendant therefore sought for dismissal of the suit.

8.Based on the pleadings on 12.08.2014, the learned II Assistant Judge, City Civil Court, Chennai, had framed issues which was recast as follows:

“(1)Whether the plaintiff is entitled for mandatory injunction as against the defendant as prayed for?

(2)Whether the plaintiff is entitled for permanent injunction as against the defendant as prayed for?

(3)To what other reliefs?”



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9.On the side of the plaintiff, the plaintiff had examined himself as PW1 and Ex.P.1 to Ex.P.10 were marked. The defendant had examined himself as DW1 and Ex.C.1 to Ex.C.3 were marked. The Advocate Commissioner's report and sketch were marked as Ex.C1 to Ex.C.3.

10.The learned Judge after perusing the Ex.A1 to Ex.A.3 – Sale Deeds and Ex.B.1 – Deed of Agreement for construction dated 25.02.2001 observed that the Agreement for Construction would clearly describe the area on either side as open to sky and the fact that the purchasers have not been allotted a specified car parking area but have been given only an undivided share. Therefore, the contention of the defendant with reference to the allotment of earmarked car parking area is absolutely baseless.

11.The learned Judge has also relied upon the Advocate Commissioner's report which states that the construction is not a



temporary one but a permanent one since the iron rods had been inserted into the wall of the buildings. Therefore, the learned Judge had directed the removal of the obstructions in the common area and granted an injunction restraining the defendant from putting up any further construction. Aggrieved by the said Judgment, the defendant had filed A.S.No.61 of 2019 on the file of the learned III Additional Judge, City Civil Court, Chennai. The learned Judge has also concurred with the Judgment of the trial Court and dismissed the appeal. Aggrieved by the concurrent Judgment and Decree, the appellant/defendant is before this Court.

12.Considering the fact that the dispute between the parties is only with reference to the Open to Sky area on either side of the building, the Sale Deeds and the Agreement for Construction have to be considered. The Sale Deeds have been marked as Ex.A.1 to Ex.A.3, Ex.A.10, Ex.B.3 and the Agreement for Construction has been marked as Ex.B.1 and Ex.B.4. A perusal of the Sale Deeds which are all identical would indicate that what is purchased by the defendant is only



an undivided share from out of 3500sqft. The Construction Agreements Ex.B.1 and Ex.B.4 consists of schedules A to D. “A” schedule describes the entire property, “B” schedule the Open parking space, “C” schedule the details of the amenities, flooring, fixtures, etc., of the apartments and the “D” schedule describes the flat and the undivided share.

13.Clause 12 of the Agreement further stipulates as follows:

“12.That the plan or elevation of the said building shall not be altered nor any other portion of the said building to be erected in the said land without the consent in writing of the other owners of undivided share of land. The purchaser shall not tamper in any way with the beams, columns, structural walls, slabs, etc., that may come within or outside the premises.”

14.Clause 13 further placed a fetter on the purchasers using the premises for any trade and business which is offensive in nature or



which becomes an nuisance or danger to the owners of the other portions of the Complex. Schedule B of the Ex.B.1 - Construction Agreement describes the open parking space on the Western side to be earmarked exclusively in the case of the defendant and Ex.B.4 describes the open parking space on the Eastern side/front earmarked for the plaintiff. The Advocate Commissioner who has inspected the premises has submitted his report that a shed has been constructed in the set back area both on the Eastern and Western sides to the height of 9 feet and the shed is fixed with pipes, iron square bar and iron round pipes, permanently on the main walls of the schedule properties. This shed is found on both sides. The Advocate Commissioner has further noted the fact that in order to reach the terrace or the apartments on the first and second floor the access was through a narrow stair case. The Advocate Commissioner has opined that any heavy material like cot with frames, fridge, washing machine, almirah and all other other household articles cannot be taken through this stair case and even in the lift, only four persons can go at a time. The Engineer who had accompanied the Advocate Commissioner has also stated that the



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Eastern and Western sides have been closed with the metal sheet fixed on both Eastern and Western sides. He has also stated that the heavy house hold articles cannot be carried out to the first and second floors through this stairway. Therefore, it is clearly seen that both the Eastern and Western side no longer remains open to the sky area. In his cross examination, the defendant as DW1 has admitted that he has purchased the flat along with an undivided share in the land. The defendant as DW1 has categorically admitted that he has not obtained the consent of the plaintiff before putting up the shed. Therefore, there is a clear violation of the Clauses in the Construction Agreement. He has also admitted that he has not been granted an exclusive car parking area. He has also admitted that in none of the documents under which he has claimed a right to the property has it been stated that he is entitled to a covered car parking area. Therefore, from a perusal of the documents as well as the Written Statement of the defendants, it is clear that the defendant has not purchased an exclusive car parking or the right to a



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covered car parking. Therefore, the Additional Substantial Questions of Law (A) and (B) and Substantial Questions of Law 1 and 4 are answered against the defendant.

15.Considering the fact that there is no dispute among the parties with reference to the constructed area and the undivided share as well as the open area around the apartments, the non filing of the sanctioned building Plan is not fatal to the case of the plaintiff since the Construction Agreement under which the defendant claims a right very clearly describes the car parking as an open car parking which clearly indicates that the car parking is not a covered car parking. The Additional Substantial Questions of Law (C) and (D) are answered against the defendant. Therefore, I see no reason to interfere with the concurrent Judgment and Decree of both the Courts below.

16.As regards Substantial Questions of Law 2 and 3, the Courts below have given their findings and conclusion only based upon the



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documentary and oral evidence placed before it. Ex.B.1 and Ex.B.4 and the Advocate Commissioner's report clinches the case of the plaintiff.

Therefore, these questions of law are answered against the defendant.

Accordingly, the Second Appeal is dismissed with costs throughout and the Decree of the Courts below are confirmed. The defendant shall comply with Clause 1 of the Decree in O.S.No.4867 of 2012 within two months from the date of receipt of a copy of this Judgment. Consequently, connected Miscellaneous Petition is closed.

13.10.2022

Index : Yes/No
Internet : Yes/No
Speaking order / Non speaking order
mps

To

1.The III Additional Judge,
City Civil Court,
Chennai.

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



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P.T. ASHA, J,

mps

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