



S.A.(MD).No.60 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.09.2023

CORAM

THE HONOURABLE MR. JUSTICE C.KUMARAPPAN

S.A.(MD).No.60 of 2017

Poomani @ Mary

through her Power Agent

C.J.Russell

... Appellant /Appellant/ Plaintiff

Vs.

1.R.Gunaseeli

2.P.Jeyapaul

... Respondents/ Respondents / Defendants

Prayer: Second Appeal is filed under Section 100 of CPC, against the judgment and decree, dated 01.07.2015 in A.S.No.133 of 2014 on the file of the Principal Sub Court, Madurai, confirming the judgment and decree, dated 02.06.2014 in O.S.No.614 of 2009, on the file of the Additional District Munsif, Madurai.

For Appellant : Mr.R.Ponkarthikeyan

For Respondents : Mr.V.Nagendran for R1

: No appearance for R2



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JUDGMENT

The appellant herein is the appellant / plaintiff and the respondents herein are the respondents / defendants before the Court below.

2. For the sake of convenience, the parties are referred to according to their litigative status before the trial Court.

3. The brief averments in the plaint is as follows:-

The plaintiff is represented through her power agent. According to the plaintiff, she is the owner of Flat No.C7/118, in C7 Block of the Tamil Nadu Housing Board. The same is the suit property. This plaintiff submits that, in the undivided common area and the common facility, no one have any right to alter the physical features, unless it is approved by all the Flat owners. This plaintiff further submits that the flat, namely, the suit property was constructed 45 years back. The C - Block consist of 6 houses and all the 6 flat owners have been using the common area available infront of their block and in that



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common area, there is also a common sewage system exist. This plaintiff further submits that, the first defendant is the owner of the flat No.C7/6, and the second defendant is the owner of flat No.C7/5. The defendants, without even obtaining any concurrence from other flat owners, have altered the physical features of the flat by shifting the main door in the place of the existing window and has also put up a cement concrete floor in the common area. As such, this plaintiff submits that the defendants have encroached upon the common area. This plaintiff further submits that the very conduct of the defendants is contrary to the Tamil Nadu Apartment Ownerships Act, 1994 (Herein after called “the Act”). Therefore, this plaintiff prayed to grant an order of permanent injunction, restraining the defendants from interfering in the usage of the common area, and for mandatory injunction to direct the defendant to set right the unauthorized alteration made in the defendants' flat. Hence, prayed to allow the suit.

4. The brief averments of the written statement filed by the first defendant is as follows:-



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This defendant submits that, their flat situate in the ground floor, and that their floor level is in the depth of one foot from the road level. They further submit that, during the rainy season, there will be influx of sewage and rainy water. Hence, they got permission from the apartment owners Association to put up concrete floor, similar to the one has already been permitted by the Association for the flat owners C7/1, 2 and 3. Therefore, this defendant submits that concrete flooring has been put up only upon the permission granted by the apartment owners. This defendant further submits that, they have made alteration of the door with the permission of the Secretary of the Association and of the other flat owners. This defendant further submits that the plaintiff has every right to use the common area. It is also the further submission of the defendant that, since they had an Association under the name and style of “Housing Unit Association”, the instant suit is liable to be dismissed on the ground of non-joinder of necessary party qua the Association. They would further submit that the plaintiff instituted the suit only with vengeance on account of the complaint of this defendant against misdeeds of the plaintiff. Hence prayed to dismiss the suit.



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5. Before the Court below, the plaintiff has examined One witness as P.W.1, and on behalf of the defendants 2 witnesses were examined as D.W.1 and D.W.2. On behalf of the plaintiff, 12 documents were marked as Ex.A1 to A12 and on behalf of the defendants, 4 documents were marked as Ex.B1 to B4. As Court documents, Ex.C1 and C2 were marked.

6. After considering the submission made by either side and upon considering the documents and evidence, the trial Court has dismissed the suit with the finding that the alleged alteration has been done with the permission of the Association, and that a similar alteration has already been done by the other flat owners. It was also the finding of the Court below that the defendant has unequivocally stated that they have no objection for the plaintiff to use the common area. It is the further finding of the Court below that there is no proof about the alleged obstructions or interference made by the defendants.

7. Aggrieved with the said finding, the plaintiff has preferred First Appeal in A.S.No.133 of 2014. Wherein the first Appellate Court by order dated 01.07.2015 has dismissed the First Appeal.



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8. Aggrieved with the concurrent findings of the trial Court as well as the First Appellate Court, the plaintiff has preferred the instant Second Appeal.

9. This Court, by order, dated 24.03.2017, has admitted the Second Appeal on the following substantial question of law:

(1) Whether the Courts below are correct in law in placing reliance on Ex.B2, which contravenes Section 8 of the Tamil Nadu Apartment Ownerships Act, 1994?

(2) Whether the Courts below are correct in law in dismissing the suit and appeal filed by the appellant without considering the provision of Section 8 of Tamil Nadu Apartment Ownerships Act, 1994?

10. The learned counsel for the plaintiff would submit that the defendants have admitted the so called alterations, and it is also the submission of the learned counsel for the plaintiff that the alleged permission granted by the so called Association through Ex.B2 is a fabricated document, and that no alteration could be done in contravention to Section 8 of the Act. It is also the submission of the learned counsel for the plaintiff that the Court below as well as the first



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Appellate Court has not gone into the legal aspect of Section 8 of the Act. The learned counsel for the plaintiff would further submit that the very reliance of Ex.B2, which is the so called permission letter, granting permission for the alleged alteration has not been proved in the manner known to law. Hence, prayed to allow the Second Appeal.

11. Per contra, the learned counsel for the first defendant would vehemently submit that the alleged alteration has been done only with the permission of the Association. It is also the submission of the first defendant that a similar alteration has been done by the other flat owners, which is evident through the Commissioner's Report as well as through the admissions made by the plaintiff. The learned counsel would further submit that, such an alteration is not in contravention to Section 8 of the Act, and that the alteration has not impaired any easement or material structure of the building, and that the plaintiff has not proved the alleged interference in the common passage and also would submit that this defendant has no objection for the plaintiff to use the common passage as the same is undivided common area. Hence, prayed to dismiss the Second Appeal.



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12. I have given my anxious consideration to the either side submissions.

13. It is an admitted case that the defendant has made an alteration by blocking existing main door and changing the main door in the place of the existing window. That was objected by the plaintiff on the ground that the same is in contravention to Section 8 of the Act. For ready reference, this Court deems it appropriate to extract Section 8 of the Tamil Nadu Apartment Ownerships Act, 1994:-

8. Certain works prohibited – No apartment owner shall do any work or put the apartment to any other use which would jeopardise the soundness or safety of the property, reduce the value thereof or impair any easement or hereditament nor shall any apartment owner add any material structure or excavate any additional basement or cellar without previously obtaining the unanimous consent of all the other apartment owners.”

According to the plain reading of Section 8 of the Act, the apartment owner should not do any work jeopardising the soundness and safety of the building and impair the easement of other flat owner, without the previous permission of all Apartment owners.



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14. But, in this case, according to the defendant, they have not made any excavation or additional basement or cellar, and it is also the submission of the learned counsel for the defendant that their act will in no way reduce the value or safety of the property.

15. The learned counsel for the defendant would draw the attention of this Court in respect of the admission made by P.W.1. According to the plaintiff, the nature alteration which is now under challenge, has already been done by some other flat owners, qua the flat owners of the Flat No. C7/1, 2 and 3. But, curiously, the plaintiff has no grievance against those flat owners, for the reason best known to him.

16. The learned counsel for the defendant also drew the attention in respect of Ex.B2, namely, the permission letter given by the Association to do the alteration. While perusing the said letter, the first defendant has sought for a permission to do some temporary alteration, as has already been permitted to the other flat owners, namely, the flat owners of the Flat No. C7/1, 2 and 3. The Secretary of the Association has permitted such alteration.



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17. In this regard, this Court would deem it appropriate to refer Section 18 of the Act.

“18. Right of Society or Association of Apartment owners to maintain, repair and replace any of the common areas and facilities, etc., -

The society or the Association of Apartment owners shall have their irrevocable right to be exercised by its secretary or by any other person authorize in this behalf by the committee to have access to every apartment from time to time during reasonable hours as may be necessary for the maintenance, repairs and replacement of any of the common areas and facilities and the limited common areas and facilities therein or accessible from such apartment, or for making emergency repairs therein necessary to prevent damage to the common areas and facilities and the limited common areas and facilities or to another apartment or apartments.”

18. According to Section 18 of the Act, Secretaries, of the Association has got irrevocable right to have access to every apartment during reasonable hours and to effect emergency repairs and also prevent



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damages to the common area and facilities. Therefore, the Secretary of the Association has got authority to permit the repairs.

19. Here, the only grievance put forth by the plaintiff is that the defendant unauthorizedly made such alteration. However, the defendant would submit that the alteration is with the permission of the Secretary as evidenced through Ex.B2. Though Ex.B2 was objected by the plaintiff as the same is fabricated, this Court could not accept such an argument. Because to prove Ex.B2, the author of the said document was examined as D.W.2.

20. However, the plaintiff also disputed the authority of D.W.2 to give such permission, and would submit that D.W.2 is not at all the Secretary. But, the defendant submitted Ex.B4, to show that the D.W.2 was the Secretary of the Apartment Owners Association of the Housing Unit. Therefore, reliance of Ex.B2 by the trial Court as well as the first Appellate Court is based upon the evidence and materials on record, and there are no material to interfere with the well considered findings of facts recorded by the trial Court as well as the First Appellate Court.



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21. Therefore, this Court is of the view that the alteration made by the first defendant has been done with the permission granted under Ex.B2-letter. In respect of second defendant - D.W.2, who is the Secretary, has deposed that, he has orally permitted the second defendant for such alteration.

22. It is pertinent to mention here that such similar alteration has already been done by the other flat owners as evidenced from the Commissioner's Report and Plan, viz. Ex.C1 and Ex.C2. According to the Commissioner's Report, he has found similar alteration in flat C7/1, C7/2 and C7/3, where a door was replaced in the place of the window, as the defendant has done. If really the plaintiff has any objection towards the alteration, he should have questioned against all the flat owners those who done alteration. But, this plaintiff did not question the /flat owners of C7/1,2&3. For which, the defendant contended that those permission was granted by the power agent of the plaintiff (P.W.1) as the Secretary of the flat owners Association. Therefore, this Court is of the view that,when the alteration is with the permission of the



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Secretary of the Association, the same cannot be termed as in contravention to Section 8 of the Act. Apart from that, Section 18 of the Act, empowers the Secretary to make necessary repairs by way of maintenance of the building.

23. Therefore, this Court is of the view that the findings recorded by both the Court below that the alleged alteration is only with the permission of the Association is liable to be confirmed.

24. Coming to the next ground of encroaching upon the common area, here, again the learned counsel for the first defendant invites the attention of this Court in respect of Commissioner's Report as well as the evidence of P.W.1. Admittedly, in front of the flat C7/1, C7/2 C7/3, there is a cement flooring as in the common area before the house of the defendant. Besides, the defendant in their written statement has categorically held that they never objected the plaintiff to use the common space. In that background, it is interesting to note that even according to the plaint pleading, there is no pleading as to the nature of obstructions or date of obstructions made by the defendant. Therefore,



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the findings recorded by both the Courts below that there is no proof in respect of obstructions made by the defendant for using of the common area is well considered one.

25. In view of the above detailed discussion, this Court is of the firm view that there are no substantial question of law involves in this Appeal. Hence, the Second Appeal is liable to be dismissed.

26. In the result, the instant Second Appeal stands dismissed. There shall be no order as to cost.

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NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
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To

- 1.The Principal Sub Court,
Madurai.
- 2.The Additional District Munsif,
Madurai.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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C.KUMARAPPAN,J.

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