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A.S.No.863 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

THE HONOURABLE **MR.JUSTICE RMT.TEEKAA RAMAN**

A.S.No.863 of 2014
and M.P.No.1 of 2014

Judgment reserved on 04.03.2024	Judgment pronounced on 07.03.2024
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G.Palani

...

Appellant

Vs.

1.T.N.U. Nagappa Chakravarthy

2.Khaleel Shirazi Estate Owners Association
Rep.by its President
Sridhar
No.97 to 345, Pantheon Road, Egmore
Chennai – 600 008.

3.Khaleel Shirazi Estate Owners Association
Rep.by its Secretary
S.Kumar
No.97 to 345, Pantheon Road, Egmore
Chennai – 600 008.

4.Anupam Kataria

5.J.Prakash

6.Mukesh Bajaji

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7.S.Vavaneeth

8.A.Yamuna

9.M.Abdur Rahman

10.Sarala Devi

11.Vasantlal B.Mody

12.Thaseen Baig

13.Dinesh Kumar Bohra

...

Respondents

Prayer: This First Appeal is filed under Section 96 and Order XLI Rule 1 of Code of Civil Procedure against the judgment and decree dated 12.08.2013 passed in O.S.No.11502 of 2010 on the file of the XVII Asst. Judge, City Civil Court, Madras.

For Appellant : Mr.C.Prakasam

For R1 & R4 : No appearance

For R2 & R3 : Mr.P.Neethi Kumar

For R5 to R13 : No appearance



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JUDGMENT

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The defeated first defendant is the appellant herein and the first respondent T.N.U. Nagappa Chakravarthy filed the suit in O.S.No.11502 of 2010 before the City Civil Court, Chennai for declaration that the defendants 1 to 4 therein have no right to put up any construction or obstruction or erection in the common passage at Shop Nos.153 & 154, ground Floor, at the Ground Floor, Fountain Plaza, Pantheon Road, Egmore, Chennai and consequential relief of permanent injunction in the form of putting up any further construction in any manner in the red marked portion in the plaint annexed and for mandatory injunction directing the defendants 1 to 4 therein to remove the obstruction and shutters and other erections put up by the first defendant between Shop Nos.153 & 154 in the schedule of properties.

2. Parties are referred to as per their ranking in the original suit for the sake of convenience.



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3(a) Originally the plaintiff's wife purchased undivided share of land alongwith other owners of undivided shares and a shopping complex was constructed by the Builder viz. Southern Investments and Shop No.154 in the Ground Floor was allotted to the plaintiff's wife and the plaintiff's wife was the owner of the said shop together with undivided share in the land like other owners of the shops. Plaintiff's wife died on 28.11.1992 leaving behind her, the plaintiff and her daughters as her legal heirs. In such capacity, the plaintiff, as husband is running the said flour mill. The plaint further proceeds that the 1st defendant is the owner of the Shop No.156 in the Ground Floor in the said complex, together with undivided share in the land. The said complex consists of Ground Floor, 9 floors besides basement. There are 85 shops in the Ground Floor and all the shop owners are the members of the 2nd defendant which maintains the complex and also providing water supply, operating lift and providing security and other allied facilities and services to its members. The members also pay maintenance charges to the 2nd defendant Association. There is also car park areas in the said complex. There is a common area in between the plaintiff's shop and the 1st defendant's shop and there is a staircase for access to the common area to the 1st floor and other



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floors. The said common area which is marked in red colour in the plan annexed with existing staircase which is to be kept as common for all the co-owners including the plaintiff and the 1st defendant.

3(b) It is alleged that the first defendant has put up the shed in between Shop Nos.153 & 154 and using it as a shop and hence the plaintiff has filed the above suit.

3(c) In short, the case of the plaintiff is that as per the map, rough sketch showing the plan where there is no shop as Shop No.153/1, it is only a common area for the staircase and no one has right in any manner to sell or deal with the common area. After issuing pre -suit notice, the suit was filed. The appellant/1st defendant remained exparte.

3(d) The lower court records show that in I.A.No.18325 of 2010 in O.S.No.11502 of 2010, the plaintiff sought for injunction restraining the defendants 1 to 4 from putting up any construction or causing any obstruction in the common passage in between Shop Nos.153 and 154,



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Ground floor, Fountain Plaza, Pantheon Road, Egmore, Chennai. By order

dated 03.12.2010, the said Interlocutory Application was dismissed. In the said application, it appears that the appellant/1st defendant filed counter affidavit and filed nine documents. After dismissal of the said I.A., the suit was not taken up for hearing and subsequently, when it was taken up for hearing, it appears from the lower court records that the 1st defendant/appellant herein remained exparte.

3(e) The written statement filed by the third defendant shows that there is a common passage and common staircase next to the plaintiff's shop No.154 and the common passage and staircase has been converted into a shop by the 1st defendant by breaking part of the staircase and fixing a rolling shutter in the passage and calling that passage as 153/1A or 153/1 which is totally illegal and unlawful. The said passage should be used by 85 shop owners and these defendants are entitled to use the same without any hindrance. The third defendant, in the written statement would state that the 1st defendant had encroached upon the common area and blocked the staircase in the middle of Shop Nos.153 and 154.



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3(f) It is the specific case of the Association / 3rd defendant that it is a common area and common staircase for all the shops numbering about 85 numbers. Defendants 5 and 6 who are neighboring shop owners have filed written statement supporting the case of the plaintiff.

4. The Trial Court has formulated as many as four issues. Plaintiff examined himself as PW1 and Exs.A1 to A8 were marked. On the side of the defendants, DW1 was examined and Exs.B1 to B13 were marked. On consideration of the oral and documentary evidence, the Trial Court has decreed the suit and hence the present appeal by the 1st defendant who remained exparte before the Trial Court.

5. Mr.C.Prakasam, learned counsel appearing for the 1st defendant / appellant would contend that Ex.A9 was not reflected in the annexure to the judgment.

6. Per contra, the learned counsel for the respondent / plaintiff would submit that it has been filed alongwith the plaint and marked as Ex.A9,



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however omitted to be mentioned in the annexure to the judgment and thus, the submissions made by the respective parties necessitates this Court to call for the lower court records.

7. On perusal of the lower court records, I find that the rough sketch alongwith the plaint is marked as Ex.A9 but it has been omitted by the stenotypist who has taken notes of the judgment, to be mentioned in the judgment. Admittedly, the plan was not an approved plan and it is only a rough sketch.

8. Based upon the pleadings and arguments made by the respective parties, following points arise for consideration -

(i) Whether the plaintiff has made out the case that the suit property Schedule 'B' was encroached by the 1st defendant ?

(ii) Whether the plea of the 1st defendant in the counter of the injunction petition that he had purchased the property under sale deed Ex.A5, initially purchased by the father of the 1st defendant and settled in the name of the wife of the first defendant is true ?



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(iii) Whether the suit is bad for non-joinder of necessary parties, namely wife of the first defendant in whose name the sale deed stands ?

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9. The fifth defendant was examined as DW1. Exs.B5 to B13 were marked. The sum and substance of DW1 supports the case of the plaintiff. It appears from the lower court judgment that the Trial Court has considered the documentary evidence of Exs.A1 to A9 and come to the conclusion that the plaintiff is the owner of Shop No.153 and he had succeeded the property after the death of his wife and based upon the legal heir certificate and sale deed, permission to run the flour mill and renewal certificate issued by the corporation.

10. The next finding was that there is no Shop No.153/1 and the same was obstructed by the first defendant illegally and also created a false document. It is further observed that it is a common pathway.

11. From the discussion of the Trial Court, I find that the sketch filed by the plaintiff and defendant, except D1 and D4, all the others have purchased the shop alone alongwith common area and common staircase.



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The sketch clearly proves that Shop Nos.153/1 & 153A is not in the sketch and originally it has been shown only as common area and consequently declared that the suit property is a common area. This finding was challenged by the learned counsel for the first defendant /appellant.

12. Shop No.153/1 was sold by the promoters of the complex viz. Southern Investments Company and subsequently the first defendant paid all taxes to the local bodies and also paid the maintenance charges to the defendants 2 and 3 and the said maintenance charges were duly received by the defendants 2 and 3. But now, they induced the plaintiff and filed suit as if, the first defendant's shop bearing Shop No.153/1 is a common area.

13(a) After perusing the order passed by the Trial Court and also the documents, I find that if actually the Shop No.153/1 is common area, certainly the Association would have moved for filing of suit and claiming over the common area but the Association has not come forward to file any suit but the adjacent shop owner has filed the suit. Further, I also considered that the plaintiff was well aware that the 1st defendant already settled the suit



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property in favour of his wife P.Selvi and she is now the owner of the said property, but the plaintiff has not at all impleaded her as one of the defendant in the suit and that non-joinder of necessary party has hit the entire suit.

13(b) It remains to be stated that ownership and title by way of claiming common property and also the plaintiff has not impleaded the promoters who sold the suit property to the 1st defendant and hence the suit itself has to be dismissed in-limine on the ground of non-joinder of necessary party. Hence, I find that the suit is bad for non-joinder of necessary parties, namely the promoter and owner of the suit property.

14. According to the first defendant, he has the sale deed executed by the promoter in his favour and subsequently settled in favour of his wife T.P.Selvi. On perusal of the order in I.A.No.18325 of 2010 in O.S.No.11502 of 2010, I find that before the Trial Court, during contest in the I.A. (injunction application filed by the plaintiff), the first defendant has also filed some photographs, that is available in the case bundle marked as Exs.R1 to R4. Ex.R2 - photograph would go to show that separate staircase from the



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ground floor is in use for access to first floor and other floors. Ex.R6 is the copy of notice issued by the Corporation of Madras to P.Selvi, wife of the first defendant wherein address is mentioned as Shop No.153/1 and property tax appears to have been levied from the years 2007 to 2011 and water and sewerage tax charges was received and Ex.R7 is the receipt for tax paid from April 2005 to March 2011. Ex.R8 is the copy of the receipt issued by the 2nd defendant and Ex.R9 is the copy of the agreement of lease between P.Selvi and Anupam Kataria for Shop No.153/1.

15. Considering the fact and the limited scope of appeal, this Court has not gone into the document filed by the first defendant filed in I.A.No.18325 of 2010 as the same has to be taken on file in the suit and opportunity has to be given for cross examination by the plaintiff. Hence, I find that the contention raised by the learned counsel for the first defendant that an opportunity has to be given to the first defendant to contest the case on merits has considerable force. After perusing the order passed in I.A.No.18325 of 2010 in O.S.No.11502 of 2010 and documents filed therein, I find that it is necessary that an opportunity has to be given to the first defendant to make



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out his case. In view of the order proposed to be passed in the subsequent para, this Court is not expressing any opinion on points of consideration determined in Para 8 of this judgment. Hence, it is open for the Trial Court to render finding on the basis of evidence to be adduced in the re-trial.

16. In the result, the Appeal Suit is allowed setting aside the judgment and decree dated 12.08.2013 passed in O.S.No.11502 of 2010 on the file of the XVII Asst. Judge, City Civil Court, Madras and the matter is remitted to the Trial Court for fresh consideration. The Trial Court shall pass appropriate orders after taking into consideration the documents filed by the first defendant as well as arguments to be made on behalf of the respective parties, in accordance with law, within a period of four months from the date of receipt of a copy of this order. No Costs. Consequently, the connected Miscellaneous Petition is closed.

07.03.2024

Index : Yes / No
Neutral Citation : Yes/No
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To

1.The XVII Asst. Judge,
City Civil Court,
Chennai.

2.The Section Officer,
VR Section, High Court,
Madras.



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RMT.TEEKAA RAMAN, J.

(rgr)

**Judgment in
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07.03.2024