
(2015) 03 KAR CK 0041

In the Karnataka High Court

Case No : Regular First Appeal No. 1809 of 2013

Sandra Lesley Ann Bartels

APPELLANT

Vs

Paul Manoharan Moses and Others

RESPONDENT

Date of Decision : 17-03-2015

Acts Referred:

Citation : (2015) ILR Kar 3085 : (2015) 3 KCCR 2767

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : Sreevatsa, Senior Advocate for Udita Ramesh, for the Appellant;
Jaganath K.M., Advocates for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—This appeal is by the plaintiff, whose suit has been partly decreed by the trial court.

2. The parties are referred to by their rank before the trial court for the sake of convenience.

3. The case of the plaintiff was that she had purchased an apartment bearing No. 103, on the first floor of the apartment building named, "Revelstoke", at 6/4, III Cross, Hutchins Road, St. Thomas Town, Bangalore- 560084, with interest in the undivided land on which the apartment building was constructed, namely 17.42% (853.80 Sq.ft.) as mentioned in the Sale Deed, dated 3.3.2004, executed and registered in her favour. The apartment consisted of an area of 1226 Sq.ft., the plaintiff was also entitled to the use of a car parking space, a two wheeler parking space and the right to all common areas, including the terrace of the building as described in Schedule-C to the Sale deed.

The plaintiffs vendors were said to be one P. Gunavathy, the owner of the land and M/s. Masonite Construction Company, the Developer. It was said to be agreed as between the owner and the developer that the total saleable area of the building was 7089.73 sft. The building had 8 apartments in all. Under the

Joint Development Agreement, the owner had reserved for herself two apartments in the ground floor and two apartments in the first floor. The developer is said to have reserved one apartment in the first floor, which has been purchased by the plaintiff, and three apartments in the second floor.

The defendants are said to have purchased Apartment No. 201 in the second floor on 28.6.2007. It was the plaintiff's case that she and the other apartment owners had free access to the terrace and to the common facilities such as the water tank, plumbing lines, and other installations. She had been freely accessing the terrace area from the date of purchase of the apartment till the year 2010. It was alleged that as on 12.5.2010, the defendants suddenly claimed that a portion of the terrace belonged to them exclusively and had erected an iron grille and locked the same. The appellant was thus prevented from accessing that area. This is the controversy which led to the filing of the suit in OS 3275/2010, on the file of the Court of the City Civil Judge, Bangalore.

Initially, the suit was filed for the relief of permanent injunction, however, it was later amended to include the prayer for a declaration.

The defendants, on entering appearance, had filed their written statement to contend that they were indeed the joint owners of an apartment bearing No. 201 in the second floor of the apartment building - Revelstoke, and the super built area of their apartment was 1226 Sq.ft. with 17.4% of undivided interest in the land along with exclusive rights to the terrace area situated on the southern side, measuring an extent of 859.94 Sq.ft. and two car parking spaces in the basement under their sale deed dated 28.6.2007, read with a Rectification Deed dated 9.7.2010.

It was their further case that the terrace area was not a common area, and there are no common facilities, such as the water tank, plumbing lines and other installations in the terrace area earmarked as their exclusive area and it is situated away from wooden door which provides access to other apartment owners to reach the utilities that are installed on the terrace, for inspection and maintenance. The small fence erected to demarcate their exclusive area on the terrace does not cause any hindrance or nuisance to any body much less the plaintiff.

It was alleged that the plaintiff's suit only carries nuisance value and was brought only to cause inconvenience and annoyance to the defendants as she was compelled by the developer to pay her share of the common maintenance expenses shared by all the apartment owners, by filing a suit, which was decreed. This had apparently rankled her and had resulted in the present frivolous suit being filed.

On the basis of the above pleadings, the trial court had framed the following issues.

"1. Whether the suit of the plaintiff is maintainable without seeking relief of

declarations claimed in the suit?

2. Whether the plaintiff proves her lawful possession and enjoyment of the "C Schedule with proportionate share in the common areas such as passages. Lobbies, terrace, sump, toilets, generator, lift staircases and other common use and the dpt and the joints between the sealing of the apartment above it and the internal and external walls between such levels?

3. Whether the plaintiff proves right of terrace area and the interference made by the defendants?

4. Whether the plaintiff proves the interference made by the defendants on the relief sought in the plaint as contended in the plaint averments?

5. Whether plaintiff is entitled for relief claimed in the suit?

6. What order or decree?

Additional Issues:

1. Whether the plaintiff proves that she is the co-owner in the apartment as mentioned in the D schedule and she is entitled for relief of declaration?

2. Whether the suit of the plaintiff is bad for non joinder of necessary parties? Whether the suit of the plaintiff is barred by Law of Limitation?"

The trial court has answered additional Issue No. 1 and Issue No. 3 in the negative and other issues, except issue No. 1, in the affirmative and partly decreed the suit of the plaintiff, holding that there shall be no restraint on the plaintiff to access the terrace for inspection and maintenance of utilities installed therein. It is that judgment which is under challenge.

4. The learned Senior Advocate, Shri S. Sreevatsa, appearing for the counsel for the plaintiff- appellant would contend, that the trial court was in error in placing reliance on the Joint Development Agreement, as it was a compulsorily registrable document and had not been duly stamped, the same having been impounded before another court for collection of stamp duty and penalty did not clothe the same with registration. The same was not admissible in evidence.

That the trial court was in error in concluding that the suit was bad for non-joinder, in the land owner not having been made a party. The land owner had no claim over the portion of the terrace claimed by the defendants and hence the finding is inexplicable.

It is contended that the finding of the trial court that the terrace could not be considered as a common area, was in negation of Schedule "C" to the Sale deed of the plaintiff, which provided that she had unconditional access to the terrace area. The reliance placed wholly on a clause appearing in Schedule "D", to the Sale deed of the plaintiff to ignore Schedule "C", was contrary to the rule of interpretation - that in the event of inconsistent clauses appearing in a document, the clause appearing first would be given effect to, except in the case

of wills.

It is also contended that the finding as to the suit being barred by limitation was also erroneous as the plaintiff was obstructed from using the terrace by the defendants only in the year 2010.

It is pointed out that the common areas had been earmarked, including the terrace area and the saleable area was calculated only after excluding the same. Hence, the question of conveying any exclusive and absolute right in respect of the terrace area was unavailable and could not be claimed by the defendants. The share in undivided interest in the land is the same for the plaintiff and the defendants and the additional claim over the terrace is in effect a claim for additional saleable area, which was not envisaged in the sanctioned plan or taken in to account whilst computing the interest in land corresponding to the built saleable area that is purchased. In other words, the total saleable area was only 7089.73 Sft. This having remained unchanged, an additional terrace area of 859.94 Sft was not available for being transacted and sold to the defendants.

The definition of "common areas" as understood and as defined under the Karnataka Apartment Ownership Act, includes the "roof, which is the terrace over the last floor. The trial court was thus in error in providing a limited access to the plaintiff to a common area. The plaintiff is not at the mercy of the defendants.

It is pointed out that the court below has failed to take note of the conduct of the defendants in the following circumstances.

The suit having been filed on 21.5.2010, the defendants had got executed a Rectification deed dated 9.7.2010, by their vendor, to alter the phrase "exclusive use of terrace area" to "(and)/(with) absolute ownership and exclusive rights to the terrace area", in four places as it appeared in the sale deed. The vendor could not have conveyed any such right or ownership to the defendants, as he had already sold the same to the appellant as a common area.

It is contended that the trial court has not perceived the concept that the saleable area in an apartment building is equal to 100% of the undivided interest in the land. Therefore, the saleable area purchased by an apartment owner is equated to the corresponding percentage of the undivided interest in land. This exercise is predetermined even at the time of sanction of plan of the building. The undivided interest in the land conveyed to the plaintiff would diminish and that of the defendants would increase, if the terrace area is permitted to be treated as the exclusive area conveyed to the defendants, this would be inconsistent with the computation as to the saleable area and the undivided interest in land, on the basis of which, the apartments are conveyed.

Hence, it is contended by Shri Shreevatsa, that the suit be decreed as prayed for.

5. The learned counsel for the defendants, on the other hand, seek to justify the judgment of the trial court and would urge that the omnibus reliefs sought for by the plaintiff are enough indication of the unreasonable attitude of the plaintiff

That the trial court had clearly found that the exclusive use and occupation of the terrace area as a private area, and that it was not a common area, and that as per Appendix-2 to the Joint Development Agreement, the Owner and Developer have exclusively reserved the terrace area to themselves in the proportion of 762.59 Sft and 859.54 Sft, respectively. And it was categorically stated in Schedule - D of the plaintiffs sale deed also that the terrace area was a private area and not a common area. And therefore, it is only a limited right of inspection and maintenance of utilities which the plaintiff could claim on the terrace area and not any other use as a common area. It is hence contended that the trial court has rightly rejected the omnibus reliefs sought by the plaintiff, while saving the limited right which the plaintiff could claim.

6. In the light of the above contentions and from a perusal of the record, it is to be examined whether the findings of the trial court could be sustained.

In so far as the plaintiffs contention that the terrace area could not be treated as the exclusive area of the owner or developer and that they would not also have a right to convey any such right reserved to themselves to any body, is negated by the trial court with reference to an Appendix to the Joint Development Agreement, whereby the Owner and the Developer have agreed between themselves as under. The same has been allowed to be produced and marked as Exhibit P-4(a):

"Clause 20 shall be expanded and read as follows. It is agreed between the owners.... the Developer and Owner at 53% and 47% shall be further expanded to include the following "Both the owner and the Developer have agreed that the usable terrace area is 1622.537 sq. ft., (according to the Architect's report) and shall be shared as 859.94 being the exclusive property of Masonite Construction Company Private Limited, and 762.59 Sq.Ft, shall be the exclusive property of Ms. Gunavathi, this terrace area shall be divided according to the Architect's plan into southern and northern area - the southern area shall be the property of Masonite Construction Company Private Limited., and the northern side shall be the property of Ms. Gunavathi." In the light of the above and read with the clause found in Schedule- D to the Sale deed in favour of the plaintiff, the trial court has negated the claim of the plaintiff that the terrace was a common area.

However, a closer reading of the arrangement as between the Owner, the Developer and the rights and interest conveyed to the apartment owners, it would appear that the terrace area could not be treated as a private and exclusive area.

Clause 20 of the Joint Development Agreement dated 9.11.1995, reads as follows:

"20. It is agreed between the Owners and the Developers that the rights of further construction on the Schedule properties due to change in FAR policy and rights on the terrace shall be held by both the Developer and Owner at 45% and 55% respectively." The said Clause 20 was amended by Appendix-2 dated

21.12.2000. The expanded Clause in Appendix - 2 would indicate the object of the Owner and Developer in reserving the terrace area as between themselves and in taking it outside the definition of a common area. The same is reproduced hereunder.

"Clause 20 shall be expanded and read as follows. It is agreed between the owners.... the Developer and Owner at 53% and 47% shall be further expanded to include the following "Both the owner and the Developer have agreed that the usable terrace area is 1622.537 sq. ft., (according to the Architect's report) and shall be shared as 859.94 being the exclusive property of Masonite Construction Company Private Limited, and 762.59 Sq.Ft, shall be the exclusive property of Ms. Gunavathi, this terrace area shall be divided according to the Architect's plan into southern and northern area - the southern area shall be the property of Masonite Construction Company Private Limited., and the northern side shall be the property of Ms. Gunavathi. The Architects report and plan shall be considered a part of this Appendix. This terrace areas shall be sold, disposed off or utilized in any manner Ms. Gunavathi or Masonite Construction Private Limited, deem fit, both the owner and developer shall exclusive rights to their portion of the terrace, and the terrace is not a common area for the apartment owners of tenants as the case may be residing in the building, both the owner and developer jointly state that they will not rent out or allow this terrace area allotted to them under this agreement to be used, more specifically rented out of marriage, restivities, or as a sleeping area, illegal purposes or to create any nuisance, inconvenience or annoyance by any third parties who are not owners or tenants of the Apartments constructed.

The terrace right to the portion allotted to Masonite Construction Company Private Limited, shall vest only in the two bed room apartment directly below it, the two one bedroom apartments in the northern portion of the second floor are excluded from using this terrace space. The terrace space of Miss. Gunavathy may be used at her discretion, limited for her portion of the property.

In case, in the future the building bye-laws changed allowing the construction of another floor, or its equivalent, with retrospective effect to include this plan sanction - LP No. (BN)133/99-2000 dated 26.10.1999. This right shall vest exclusively with the owner and developer, according to their shares in the terrace, as specified in the architectural plan annexed with this agreement."

This arrangement to reserve the terrace area as the exclusive property of the Owner and Developer with a right to alienate such reserved area, as has been done in favour of the defendants, was impermissible without a reworking of the saleable area and the corresponding undivided interest in the land, on which the building stands. That computation having remained unchanged, there could be no conveyance of any area over and above the saleable area.

The following calculation in arriving at the total saleable area which is approximately divided as between 8 apartment owners is as provided under

Appendix - 2:

"The architectural certificated based on the sanctioned plan has been divided into geographical areas, based on the sanction plan in which the building is east facing, the division of the property has been decided inter alia as:--

Miss. Gunavathi shall reimburse Masonite Construction Co. Pvt. Ltd., for the extra 10.08 sq. ft., the minimum of Rs. 14,112/- (Rupees Fourteen Thousand One Hundred and Twelve only)"

Therefore, it was not in accordance with the above calculation for any additional area to be utilized exclusively or for future construction, as is evident from the expanded Clause 20, without a novation of the contract with the other apartment owners as regards the corresponding undivided interest in the land, corresponding to the saleable area purchased by them. Hence the arrangement as between the Owner and Developer in so far as dealing with the terrace area is in deprivation of a vested right of the plaintiff That right could not be taken away under Clause 18 of her sale deed, which may have passed muster by the plaintiff

The further finding of the trial court that the reliance placed on the definition of "common areas" as found in clause (f) of Section 3 of the KAO Act, not being relevant and the opinion that the said definition does not include a "terrace", is an incorrect opinion. The definition clearly includes "roofs", a roof in an apartment building would mean the roof of the top most floor, which is also called the "terrace" of a building. The agreement between the Owner and the Developer that the terrace area shall be a private area and shall not be considered a common area, is clearly opposed to law and the contract entered into with plaintiff

The finding of the trial court that the suit prayer for a declaration was barred by time, since she had sought such a relief many years beyond the prescribed period, having regard to the date of the sale deed. This view may not also be correct, for as claimed by the defendant the import of the arrangement as between the Owner and Developer and alienation of the terrace area in favour of the Defendants has dawned on her only when she was prevented by the Defendants from accessing the terrace area. Hence, the suit was in time.

Consequently, the appeal is allowed, the judgment and decree of the trial court is set aside, the plaintiff is entitled to free access to the terrace area of the apartment building described in Schedule C to the plaint. It is declared as a common area along with other common areas as contemplated therein. The defendants are not entitled to any exclusive use or right over the suit Schedule - D property.

The defendants or anybody claiming under them are permanently enjoined from restraining the free access of the plaintiff to the terrace area, for any lawful purpose. The defendants shall forthwith remove any obstruction preventing the free access to the terrace area.

The other reliefs prayed for by the plaintiff are not germane to the suit in its present form and are not considered. This shall not however, be construed as denying any such relief, which the plaintiff may claim in an appropriate suit, if so inclined. The suit is decreed in terms as above. No order as to costs.