

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 31ST DAY OF DECEMBER 2019

BEFORE

THE HON'BLE Dr. JUSTICE H.B.PRABHAKARA SASTRY

R.F.A.No.863 OF 2016

BETWEEN:

The Commissioner,
Corporation of City of Bangalore,
(BCC) (BBMP)
Bengaluru – 560 002.

...Appellant

(By Sri.Ashwin S. Halady, Advocate)

AND:

1. Dr. Arshad Hussain M.,
Aged about 47 years
Son of Sri. Khaja Hussain,
Residing at No.209/A,
54th Cross, 4th Block,
Rajajinagar,
Bengaluru – 560 010.
2. Dr. Meenakshi Guptha,
Aged about 47 years
Daughter of Ram Lakhan Guptha,
Residing at No.49-52, L.G. Halli,
RMV 2nd Stage,
Bengaluru – 560 094.

...Respondents

(By Sri. M.S. Shyam Sundar, Advocate)

This Regular First Appeal is filed under Section 96(1) read with Order XLI Rule 1 of the Code of Civil Procedure, 1908, against the judgment and decree dated:29-02-2016 passed in O.S.No.4449/2014 on the file of the XL Additional City Civil and Sessions Judge (CCH-41), at Bengaluru, decreeing the suit of the plaintiffs for perpetual injunction.

This Regular First Appeal having been heard and reserved on **20-12-2019**, coming on for pronouncement of judgment, this day, the Court delivered the following:

J U D G M E N T

This is a defendant's appeal. The present respondents as plaintiffs had instituted a suit against the present appellant, arraigning it as a defendant in O.S.No.4449/2014 in the Court of the learned XL Additional City Civil and Sessions Judge (CCH-41), Bengaluru (hereinafter for brevity referred to as the "Trial Court") for the relief of perpetual injunction.

2. The summary of the case of the plaintiffs in the Trial Court was that, they had purchased the suit schedule property which is property No.1-2, 3rd Cross

Road, Puttaiah Compound, Geddalahalli, Ashwathnagar, Sanjayanagar, Bangalore, having purchased the same under a registered Sale Deed dated 02-03-2012, consisting of a residential building with stilt, ground floor, first floor and second floor including a terrace floor. The khata with respect to the suit schedule property was made in the name of the plaintiffs. The building was constructed by the vendor under a sanctioned plan without any deviation whatsoever and had sold the same to the plaintiffs. While the plaintiffs were effecting minor repairs to the schedule building, such as, plastering and painting, the officials of the defendant authority approached them in the first week of April 2014, and made vehement threats to demolish a portion of the schedule building and to interfere with the repairs, that too, without any prior notice as required under

Section 321 (1) of the Karnataka Municipal Corporations Act, 1976 (hereinafter for brevity referred to as the "KMC Act"). The plaintiffs caused a legal notice to the defendant authority on 04-04-2014 as per Section 482(1) of the KMC Act. The defendant authority did not respond to the said notice. However, on 13-06-2014, once again they made a vehement threat of damage and interference to the suit building. Hence, the plaintiffs were constrained to institute the present suit against the defendant authority.

3. In response to the suit summons, defendant appeared through its counsel and filed its Written Statement, wherein, it denied that the suit property was constructed in accordance with the sanctioned plan and without any deviation. It also denied that the plaintiffs were effecting minor repairs to the suit property and that there was any threat to demolish a

portion of the building by the alleged interference from the defendant. However, the defendant admitted that the plaintiffs were the purchasers of the suit property consisting of stilt, ground floor, first floor and second floor only. It specifically contended that the terrace floor has been constructed presently by violating the building bye-laws and without any sanctioned plan.

It contended that the sanctioned plan dated 03-03-2005 was only to construct a residential building, consisting of a stilt, ground floor, first floor and second floor only, whereas the plaintiffs constructed the building in violation of the building bye-laws and deviated from the sanctioned plan. It also contended that the plaintiffs' vendor had put up the construction without leaving any set back and the plaintiffs had constructed terrace floor without any

sanctioned plan. Hence, a notice under Section 308 of the KMC Act was issued to the plaintiffs to bring the work in conformity with the sanctioned plan. However, the plaintiffs failed to comply the same. As such, the provisional order was passed and notice under Section 321(1) and (2) was issued to the plaintiffs. Sensing the future proceedings of the defendant authority, the plaintiffs approached the Trial Court.

5. Based on the pleadings of the parties, the Trial Court framed the following issues for its consideration:-

"1] Whether the plaintiffs prove that their vendor has constructed the suit schedule residential building in accordance with the sanctioned plan without any deviation?

2] Whether the plaintiffs further prove the alleged threat of damage or interference to the suit building by the defendant?

3] Whether the plaintiffs are entitled for the relief sought for?

4] What order or decree?"

6. In support of their case, the first plaintiff got examined himself as PW-1 and got marked documents at Exs.P-1 to P-9. The defendant neither adduced any evidence nor marked any documents as exhibits from its side.

7. After hearing both side, the Trial Court by its impugned judgment and decree dated 29-02-2016, while answering all the three issues in the affirmative, proceeded to decree the suit of the plaintiffs. It is against the said judgment and decree, the defendant has filed this appeal.

8. The Lower Court records were called for and the same are placed before this Court.

9. Heard the arguments of the learned counsel for appellant/defendant, learned counsel for respondents/plaintiffs and perused the material placed before this Court including the memorandum of appeal and the impugned judgment.

10. For the sake of convenience, the parties would be henceforth referred to with the ranks they were holding before the Trial Court respectively.

11. In the light of the materials placed before this Court and the arguments addressed by the parties, the following points arise for my consideration in this appeal:-

[1] Whether the plaintiffs have proved that the officials of the defendant have interfered in their peaceful possession of the suit schedule property as alleged in the plaint?

[2] Whether the plaintiffs are entitled for the relief as sought for?

[3] Whether the judgment and decree under appeal deserves any interference at the hands of this Court ?

12. It is not in dispute that the plaintiffs are in the possession of the suit schedule property as purchasers of the same under a registered Sale Deed dated 02-03-2012 which is marked at Ex.P-1. The defendant authority has admitted that the plaintiffs are the purchasers in possession of the suit schedule property, in their Written Statement itself, still, the evidence of PW-1 as well the certified copy of the Sale Deed at Ex.P-1, the Khata Certificate at Ex.P-2 and the Khata extract at Ex.P-3, the property tax payment receipt, for the year 2014-15 which is at Ex.P-14 further corroborate the said contention of the plaintiffs. However, the dispute is with respect to the

alleged construction of the terrace floor upon the suit schedule building.

13. According to the plaint averment, as well the evidence of PW-1, the suit schedule property comprises of a stilt, ground floor, first floor, second floor and a terrace floor. The same has been constructed in accordance with the sanctioned plan, as such, there is no deviation of any sort. PW-1 while reiterating the same even in his evidence, has also produced the sanctioned plan and got it marked at Ex.P-7.

14. The contention of the defendant authority is that, the sanctioned plan was only for putting up construction of stilt, ground floor, first floor and the second floor, but, the construction of a terrace floor was by the plaintiffs and the same was in violation of the sanctioned plan.

15. Admittedly, the plaintiffs are the purchasers of the constructed building from its vendor under the registered Sale Deed at Ex.P-1. The mother document for the plaintiffs to claim the ownership and possession of the property is the very same Ex.P-1. Admittedly, the schedule shown in the said Sale Deed mentioned that the property consists of a construction with stilt, ground floor, first floor, RCC roofed building with vetrified flooring. Thus, the Sale Deed neither speaks about the putting up of the construction of the second floor nor even the terrace floor. The existence of the second floor and the terrace floor is not in dispute since the plaintiffs themselves, both in the plaint as well in the evidence of PW-1 have stated that the suit schedule property comprises of a stilt, ground floor, first floor, second floor and a terrace floor. Thus, the question that remains is as to, who built the

second floor and the terrace floor of the building. Though the plaintiffs say that the entire structure including the terrace floor was built by the vendor only, then, it should have necessarily reflected in the absolute Sale Deed at Ex.P-1. PW-1 in his cross-examination, though has admitted that, a reference to the second floor including the terrace floor is not made in the Sale Deed at Ex.P-1, but, he calls it as a sheer mistake. The said explanation of PW-1 is not acceptable, because, no purchaser of a valuable immovable property would just ignore the non-mentioning of certain important structures in the form of two upper floors of a building while purchasing the same under a registered Sale Deed. Even by mistake, if the same has not been mentioned in the Sale Deed, then, the purchaser was expected to take immediate steps to get the Rectification Deed executed, so that,

all the alleged floors in existence upon the site are mentioned in the said Deed. Admittedly, no such effort has been made by the plaintiffs till date, in that regard. Therefore, the contention of the plaintiffs that, as on the date they purchased the suit schedule property, it also contained the structure at second floor and the terrace floor is not acceptable.

16. The sanctioned plan which is at Ex.P-6 also goes to show that, the plan was sanctioned only for stilt, ground floor, first floor and second floor and no sanction was accorded to put up any terrace floor. Therefore, even if it is assumed for a moment that, the building is constructed upon a sanctioned plan, still, there is no sanctioned plan or building plan to put up a terrace floor. Admittedly, the existence of a terrace floor is an undisputed fact. The plaintiffs themselves, at the earliest point of time, in their legal

notice at Ex.P-7 and subsequently in their plaint have clearly stated that the suit schedule property not only comprised of stilt, ground floor, first floor and second floor, but it also has a terrace floor on the top. Therefore, when the plaintiffs could not able to show that the construction of the terrace floor was upon a sanctioned plan, the entire construction of the terrace floor becomes an un-authorised and illegal construction.

The other point that the said construction was built by the vendor of the property to the plaintiffs is also not proved, because, as already observed, the Sale Deed at Ex.P-1 does not mention about the existence of second floor and a terrace floor in the suit schedule property. As such, the putting up of construction in the form of second floor and terrace

floor was only by the plaintiffs, but not by the vendor to them.

However, the Trial Court, without noticing these aspects has accepted the sanctioned plan as the plan including the terrace floor and enlarged the fact that the defendant did not enter the witness box and proceeded to hold that, the vendor to the plaintiffs has constructed the suit schedule residential building in accordance with the sanctioned plan without any deviation. In the said process, it also did not bother to analyse the other contention of the defendant that the plaintiffs had not left the set back according to the sanctioned plan.

17. Thus, the finding of the Trial Court on issue No.1 framed by it proves to be an erroneous finding. The plaintiffs, both in their plaint as well in the evidence of PW-1, have stated that when they were

effecting minor repairs and plastering in April 2004, the officials of the defendant authority appeared at the spot and threatened them of demolishing a portion of the building. Despite the plaintiffs causing a legal notice upon them dated 04-04-2014, the officials of the defendant repeated the same act on 13-06-2014. Except denying the said statement of PW-1 in his cross-examination, the defendant has not put any effort in its support to overcome the evidence of PW-1, both oral and documentary, regarding the alleged interference from the defendant's officials.

On the other hand, the evidence of PW-1 is further corroborated by their legal notice at Ex.P-7 which is dated 04-04-2014. In the said legal notice, the plaintiffs have clearly stated that the officials of the defendant have interfered in their peaceful possession and enjoyment of the property with a

threat of demolition of a portion of the suit schedule property. The postal receipt and the acknowledgment card at Exs.P-8 and P-9 respectively go to show that, the said legal notice was served upon the defendant. In such a case, nothing had prevented the defendant authority from responding to the said legal notice by sending a reply, denying the said interference in the peaceful possession of the property by the plaintiffs. Since the defendant has not chosen to react or respond to the notice served upon it, and also did not choose to enter the witness box and to lead their evidence, it has to be inferred that, the contention of the plaintiffs that, the defendant's officials interfered in their lawful possession of the property in June 2014 stands established.

18. As such, the plaintiffs are entitled for the relief of permanent injunction against the defendant

authority from interfering in their lawful possession and enjoyment of the suit schedule property, except in accordance with law.

19. The defendant contends that with respect to the violation of the building plan and alleged unauthorized and illegal construction, they had caused notices upon the plaintiffs under Sections 328 and 321 of the KMC Act, followed by a confirmation order under Section 321(3) of the same Act. A suggestion made to the said effect to PW-1 in his cross-examination has not been admitted as true by the witness. In such a case, it was incumbent upon the defendant authority either to confront those documents to PW-1 in his cross-examination and/or to enter the witness box and to lead their evidence and produce the said documents. However, the defendant

authority, for the reasons best known to it, has not done either of these two.

20. Consequently, the Trial Court has rightly observed that, the defendant has not issued any notice under Section 321(1) of KMC Act nor passed any confirmation order under Section 321 (3) of the same Act. Therefore, the contention of the defendant that it caused such notices and passed such a confirmation order in the matter does not stand established.

21. In that circumstance, the act of the defendant's officials in approaching the plaintiffs and threatening to demolish the alleged unauthorised and illegal construction results in unlawful interference and possession of the suit schedule property by the plaintiffs. Had really the defendant Corporation intended to take appropriate legal action against the

plaintiffs for the alleged violation of the building plan and construction of unauthorised and illegal upper/terrace floor and for not leaving the set back in the suit schedule property by the plaintiffs, then, the defendant was required to take appropriate steps in the manner known to law.

22. However, the Trial Court, without noticing that the defendant, which is a statutory body cannot be prevented from taking appropriate action in accordance with law, has passed a decree in such a manner that, it perpetually restrained the defendant, its agent, men or anybody through it, from demolishing any portion of the suit schedule property or in any way interfering with the plaintiffs' peaceful possession of the schedule property, which may also interfere in the defendant taking appropriate legal action against the plaintiffs, for ever. The said order

being not a justifiable order in the circumstance of the case, the same requires to be modified, giving liberty to the defendant authority to take appropriate action against the plaintiffs, if required, in accordance with law.

23. This view is further supported by a judgment of the Co-ordinate Bench of this Court in the case of ***The Commissioner, Corporation of the City of Bangalore, Bangalore Vs. Smt. Shahataz M. Shariff and another reported in 2014 Supreme Court Cases Online Kar.12957***, which judgment was relied upon by the learned counsel for the appellant in his argument.

In the said judgment, a Co-ordinate Bench of this Court, in a similar case, has observed that, the owner of the building against whom the allegation of violation of sanctioned plan is made and the confirmation order is passed under Section 321 of the

KMC Act, cannot seek a bare permanent injunction and in a case of that nature, the relief of permanent injunction can only be consequential to the relief of declaration. In the absence of any challenge to the confirmation order, the consequential relief of permanent injunction cannot be granted.

24. Since in the instant case, the defendant Corporation has not established that it has issued notice under Section 321(1) of the KMC Act, the consequential passing of the confirmation order under Section 321(3) of the same Act, would not arise. In such a situation, the appellant being a statutory body, its right to take appropriate legal action cannot be taken away by issuing a blanket perpetual order of injunction, as in the instant case. As such also, the impugned judgment and decree requires to be modified.

Accordingly, I proceed to pass the following:-

ORDER

*[i] The appeal is **allowed in part**;*

[ii] The judgment and decree dated 29-02-2016 passed in O.S.No.4449/2014 by the learned XL Additional City Civil and Sessions Judge (CCH-41), Bengaluru, is modified, to the extent that, though the defendant, its agent, men or anybody under it are restrained from demolishing any portion of the suit schedule building or in any way interfering with the plaintiffs' possession of the schedule property, but they are not prevented from taking appropriate legal action in accordance with law with respect to the alleged non-leaving of the set back and the unauthorized and

illegal construction of the terrace floor in the suit schedule property, in accordance with law.

[iii] Draw the modified decree accordingly.

In view of disposal of the main appeal, I.A.No.1/2016 for stay does not survive for consideration.

Registry to transmit a copy of this judgment along with the Lower Court records to the concerned Trial Court, without delay.

**Sd/-
JUDGE**

BMV*