

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9TH DAY OF SEPTEMBER, 2024

BEFORE

THE HON'BLE MR.JUSTICE M.G.S.KAMAL

R.S.A.NO.722 OF 2023

BETWEEN:

M/s. SHANGRILA FLAT
OWNERS ASSOCIATION
AN ASSOCIATION FORMULATED AND
REGISTERED UNDER SECTION 2
OF KARNATAKA APARTMENT OWNERSHIP ACT 1972,
REPRESENTED HEREIN BY ITS FORMER TREASURER
MR. GREGORY F. PERES
AGED ABOUT 61 YEARS
S/O LATE MICHAEL PERE
PRESENTLY R/AT
301, SHANGRILA APARTMENTS
BALIKASHRAM ROAD
KANKANADY, MANGALURU-575 002.

... APPELLANT

(BY SRI.REGO, L.P.E., ADVOCATE AND
SRI. ARJUN REGO, ADVOCATES)

AND:

CAPT. MOHAN PRABHU
@ MOHAN DAS J. PRABHU
S/O LATE J V PAIS
AGED ABOUT 70 YEARS
PRESENTLY R/A CAPTAIN HOUSE
"MARIA", OPPOSITE RYSHIVANA INSTITUTE
KEMMADY, PERMANNUR VILLAGE
MANGALURU-575 017.

... RESPONDENT

(CAPT: MOHAN PRABHU -PARTY-IN-PERSON-VC)

THIS RSA IS FILED UNDER SEC.100 R/W. ORDER LXII RULE
1 OF CPC., AGAINST THE JUDGMENT AND DECREE DATED

12.01.2023 PASSED IN RA NO.17/2021 ON THE FILE OF THE III ADDITIONAL DISTRICT JUDGE, D.K.MANGALURU, ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGMENT AND DECREE DATED 16.11.2021 PASSED IN OS.NO. 242/2016 ON THE FILE OF THE III ADDITIONAL SENIOR CIVIL JUDGE AND JMFC, MANGALURU, D.K.

THIS APPEAL HAVING BEEN RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT THIS DAY, DELIVERED THE FOLLOWING:

CORAM: HON'BLE MR JUSTICE M.G.S. KAMAL

CAV JUDGMENT

This regular second appeal is filed by the plaintiff aggrieved by the Judgment and order dated 12.01.2023 passed in R.A.No.17 of 2021 on the file of III Additional District and Sessions Judge Dakshina Kannada, Mangaluru (hereinafter referred to as the First Appellate Court) in and by which the first appellate court while allowing the appeal filed by the defendant- respondent set aside the Judgment and decree dated 16.11.2021 passed in O.S.No.242/2016 on the file of III Additional Senior Civil Judge and JMFC, Mangaluru Dakshina Kannada (hereinafter referred to as trial Court) and consequently, dismissed the suit.

2. The said suit in O.S.No.242 of 2016 was filed by the plaintiff-M/s.Shangrila Flat Owners Association for the relief of recovery of sum of Rs.6,58,695/- with interest at 12 percent per annum from the date of suit till realization with cost.

3. Brief facts of the case are that;

(a) Plaintiff is an Association registered under the provisions of Karnataka Apartment Ownership Act, 1972 in terms of Deed of Declaration dated 29.12.1995. Defendant is the owner of an apartment bearing No. 104, morefully described in the schedule to the plaint and is also member of the plaintiff association.

(b) Defendant, along with 20 other persons, had entered into an agreement for construction of apartment building with one Mr.Antony Alfred Kutina. Defendant had been the office bearer of the plaintiff association and had participated in the

meetings of the plaintiff association in fixing the maintenance charges payable per month towards sinking fund and other ancillary expenses from time to time.

(c) Plaintiff association is incharge of common areas, maintenance, common facilities, cleanliness, employment of watchmen paying for fuel and AMC of generator, paying consumption bills for common areas and facilities, maintenance charges. The deed of declaration which was executed provides for fixing of maintenance charges payable every month by all apartment owners. It is also agreed that if there is any delay in making the payment the member was liable to pay the late fee as fixed by the board of Managers.

(d) Board of Managers are functioning as per clause 19 of Chapter 4 of Deed of Declaration. Defendant is a party to the said deed of declaration and therefore he is bound by all the obligations and

to pay the maintenance charges and also the delayed fees.

(e) Defendant is a chronic defaulter in the matter of payment of maintenance charges. That despite several reminders and requests, defendant has not paid the amount due to the plaintiff association.

(f) Whenever demand was raised, defendant is in the habit of writing defamatory letters making allegations against the association members. The defendant instead of paying the amount as demanded, had filed a suit for damages on the ground of defamation in O.S.No.218 of 2004 on the file of Senior (II Additional) Civil Judge, Mangalore against the then office bearers. The said suit was dismissed. He had filed an appeal against the said decree which was also dismissed. Plaintiff Association had filed a suit for recovery of amount due from the defendant in O.S.No.774 of 2003 and

the file of I Additional Civil Judge Mangalore, the said suit was decreed in favour of plaintiff association. Defendant filed an appeal before the Civil Judge Senior Division in R.A. No.28 of 2014 alleging the said suit and regular appeal pertain to a different period.

(g) Defendant was intimated in writing by the Board of Managers with regard to exact amount due towards the maintenance charges and sinking fund and also towards late fee payable by the defendant. As per clause Nos.16, 18 and 19 of the Deed of Declaration, the sum assessed form the first charge on the apartment owned by the defendant. Therefore, defendant had no manner of right to avoid liability arising out of the ownership of the apartment. Plaintiff had issued notice explaining the exact amount due and payable by the defendant from the month of January, 2003 till the date of notice. Thus, the total amount due and

payable by the defendant as on 01.10.2016 was Rs.6,54,195/-. Since the defendant deliberately failed, attempted to make the payment, plaintiff filed the above suit seeking decree to recover the amount.

4. Defendant filed his written statement;

(a) Admitting that the plaintiff is an association registered under Section 2 of the Karnataka Apartment Ownership Act, 1972, as per Deed of Declaration dated 29.12.1995. It is also admitted that the defendant is the owner of an apartment described in Schedule A to the plaint, having purchased the same in terms of deed of Sale dated 02.06.1992. It is also admitted that the defendant had entered into an agreement for construction along with other 20 persons, as contended in the plaint. The defendant has also admitted that he had been the office bearer for some years and had actually participated in all the

meetings of the plaintiff association, while fixing the maintenance charges payable per month, sinking fund and other ancillary expenses from time to time. The defendant has also admitted that the plaintiff's association is in charge of common areas, maintenance of common facilities, cleanliness, employment of watchmen, paying for fuel and AMC of generators, paying electricity consumption, billing for common areas and facilities, cleaning of the entire building, painting, and many other duties.

(b) However, he has denied that, as per the Deed of Declaration, the Board of Managers are required to fix the maintenance charges payable every month by all the apartment owners. It is contended as per the Deed of Declaration, maintenance charges cannot be fixed by the Board of Managers.

(c) He, however, admitted that he has an obligation to pay the maintenance charges and contribution to the sinking fund if it is lawfully done.

(d) He denied payment of late fee if there was a delay in payment of maintenance charges.

(e) He also admitted that, since he's a party to the Deed of Declaration, he is bound by all the obligations, payment of maintenance, and if delay takes place for payment of late fee, contribution towards sinking fund, contribution towards building, painting, repairs of the terrace portion, watchmen, etc., provided same is lawfully made. He also admits that the plaintiff's association, represented by its managing committee, have legal rights to collect the maintenance and other charges under the statute and also as per the Deed of Declaration.

(f) He further denied that he is a chronic defaulter in the matter of payment of maintenance charges. He also denied allegation that, despite several reminders and requests, he did not pay the amount due to the plaintiff's association. He admitted filing of suit in O.S.No.218/2004 against the plaintiff's association.

(g) It is contended that the defendant used to regularly pay the maintenance charges and other charges to the association in advance for the period of one year in lump sum. However, as the payment made by him on 20.03.2001 for a sum of Rs.5,400/- was returned by the association without assigning any reason by putting the same in the post box of the defendant, he demanded for the accounts of the association and the resolution. That is when he learnt that the Board of managers then constituted were not the Board of Managers at all, that the allegation of resolution for increased

maintenance and levying of the late fee and other charges had not been lawfully made as there was no quorum as contemplated under the deed of Declaration and therefore, the said resolution was invalid. It is further contended that persons who are representing the plaintiff Association at the time when the alleged resolution for increase in maintenance and levying of the late fee were not the owners of apartments as contemplated under the deed of Declaration as such, the resolutions were *void ab initio*. So also the members of association, themselves included, present treasurer, who had signed the plaint on behalf of the association, have themselves resolved to declare the resolution for increased maintenance to be legally invalid and unenforceable.

(h) That the defendant had repeatedly requested the association to furnish the accounts, which have been ignored. Even the order passed by

the Court in O.S.No.774 of 2003 directing the Association to furnish the accounts to the defendant has also not been complied with. It is denied defendant instead of making the payment, filed a suit for damages on the ground of defamation as false. The allegation of defendant having been intimated in writing by the Board of Managers regarding the exact amount due by the defendant towards maintenance and sinking fund is also denied.

(j) The defendant has further denied the details of the amount being claimed by the plaintiff in a sum of Rs.6,54,195/- as on 01.10.2016. The defendant has further contended that Shri. Gregory Peres, who is engaged in the real estate business with a vested interest of extorting money from the defendant, has filed the present suit only to harass the plaintiff. That he has no locus standi to file the

present suit. Thus, on these grounds, the defendant has sought for dismissal of the suit.

5. The defendant has also filed a counterclaim, seeking action against Gregory Peres, Deepthi Sharon Martis, for misrepresenting themselves to be the owners of Shangrila Apartments and to file a false case against him.

6. Based on the above, the trial Court framed the following issues:

1. Whether the plaintiff proves that the defendant being member of Association and owner of the apartment bearing number 104 on the first floor, a chronic defaulter and he stopped the payment of maintenance charges as alleged?

2. Whether the plaintiff further proves that the defendant is liable to pay Rs.6,58,695/- towards the building maintenance amount?

3. Whether the plaintiff further proves that the defendant is trying to alienate A schedule apartment as alleged?

4. Whether the defendant proves that the plaintiff association has violated the norms and conditions set out in the Karnataka Apartment

Ownership Act and Deed of Declaration as alleged?

5. Is the plaintiff entitled for recovery of Rs.6,58,695/- as prayed for?

6. Is the plaintiff entitled for the relief of permanent injunction as prayed for?

7. What order or decree?

*Re-cast issue number 3 framed on 28/10/2021:
3. Whether the plaintiff proves that he is entitled to charge on the apartment owned by the defendant for the amount due from the defendant?*

Additional issue framed on 28/10/2021:

1. Whether the plaintiff is entitled to interest at 12% per annum on the amount due from the defendant as sought for?

2. Whether the defendant is entitled to counterclaim as sought for?

7. The plaintiff examined one Gregory F. Peres as PW-1, and seven documents have been marked as Exhibits P-1 to P-7. The defendant has examined himself as DW1 and does not mark any documents. The trial court held that the plaintiff's answer to issue Nos.1 to 3,

5 and 6 in the affirmative, additional issue No.1 partly in the affirmative, and issue No.4 and additional issue No.2 in the negative, and consequently decreed the suit, directing the defendant to pay the amount as claimed by its judgment and decree dated 16.11.2021, aggrieved by the said judgment and decree, the defendant preferred a regular appeal in R.A.No.17 of 2021. Considering the grounds urged in the memorandum of appeal, the First Appellate Court framed the following points for its consideration:

1. Whether the plaintiff association proves that maintenance amount of Rs.1,64,100/- sinking fund of Rs.26,000/- and water/power generator disconnection and reconnection charges of Rs.3,500/- is due from the defendant?

2. Whether the plaintiff further proves the defendant was required to pay late fee and the total late fee is Rs.4,23,190?

3. Whether the trial court has committed any error in decreeing the suit of the plaintiff in toto?

4. What order?

8. The First Appellate Court, on re-appreciation of evidence, answered point No.1 and 2 in the

negative, point No.3 in the affirmative and consequently allowed the appeal and set aside the judgment and decree passed by the trial court, and dismissed the suit.

9. This Court by order dated 20.11.2023 admitted the appeal, and the court framed the following substantial question of law:

"Whether the finding of the appellate court that plaintiff having succeeded in establishing that defendant is liable to pay maintenance in terms of deed of declaration vide Ex.P-7 erred in non-suiting the plaintiff on the ground that plaintiff has not produced evidence to substantiate the rate of maintenance chargeable and the said finding is perverse, palpably erroneous and contrary to Exhibit P3, which is the ledger account extract indicating the rate of maintenance collected from all the flat owners?"

10. Sri. Arjun Rego, learned counsel appearing for the appellant reiterating the grounds urged in the memorandum of appeal submitted that;

(a) the first appellate Court grossly erred in setting aside the judgment and decree of the

trial court on the erroneous premise of plaintiff not having proved its case. The first appellate Court has not appreciated the document produced at Exhibit P3 and Exhibit P7. That the amount of monthly maintenance, sinking fund, late fee charges, which are payable as stated in Exhibit P3, are made applicable to all the members of the plaintiff association and same have been paid by all those members who are liable to pay in terms of the deed of declaration.

(b) Further drawing attention of this Court to Clauses 16, 18, and 19 of the deed of declaration produced at Exhibit P7 learned counsel for the appellant submits that each of the apartment owner is under obligation to pay the maintenance charges as and when demanded by the association towards the maintenance and other funds of the association.

(c) He further submits that all the members of the association are entitled to have access for inspection of the accounts of the association, which are presented annually and also displayed on the notice board. Thus, he submits entire transaction of the association is transparent and made known to the defendant. As such there is no case made out by defendant of he having been selectively been made to make the payment.

(d) Thus he submits that the first appellate Court has not appreciated these aspects of the matter, but has proceeded to dismiss the suit on erroneous premise, hence seeks for allowing of the appeal.

11. Per contra, the defendant who appeared in person through video conferencing repeatedly contended that;

(a) the suit as filed by one Gregory Peres claiming to be the treasurer of plaintiff association is not maintainable as he is not the owner of the apartment.

(b) That no audited accounts are produced to prove the claim made against him. The demand therefore made cannot be granted.

(c) That there are other owners of the apartments similar to that of the petitioner. They being in their advanced age are not able to defend themselves. Therefore they are succumbed to the demand of the said Mr.Gregory Peres which is illegal.

(d) He submits that he is ready and willing to make the payment if the same is demanded by a person who is appointed lawfully by the association an authorized legally to collect the amount.

(e) On a query by this Court as to whether he has paid the amount as demanded, the respondent-party-in-person submits that he would make the payment only if

it is demanded by the person rightfully appointed by the association.

On these grounds, he seeks for dismissal of the appeal.

12. Heard and perused the records.

13. Before proceeding further, it is necessary to extract Clauses 16, 18, 19, and byelaws 48, 49 and 50 of the deed of declaration produced by the plaintiff at Exhibit P7, which reads as under:

"Clause 16: That each apartment owner shall comply with the provisions of this Deed of Declaration, the byelaws, the decisions and resolutions of the Association of Apartment Owners or its representatives; and failure to comply with any such provisions or decisions or resolutions, shall be grounds for action to recover sums dues, for damages or for injunction, etc.

Clause 18: That no apartment owner may exempt himself from liability for his contribution towards the common expenses by waiver of use or enjoyment of any of the common areas and facilities or by the abandonment of his apartment.

Clause 19: All sums assessed by the association but unpaid for the share of the common expenses chargeable to any apartment shall constitute a charge on such apartment prior to all other charges, except only (a) charge, if any, on the apartment, for payment to government or municipal taxes or both

and (b) all sums outstanding on a first mortgage of the apartment.

48. ACCOUNTS:

(i) A bank account shall be opened by the Association in such bank and all moneys received by the Association shall be paid into it, provided that the Treasurer may retain in his personal custody an amount not exceeding Rs.500/- for petty expenses. All the payments above Rs.100/- shall be made by cheques, signed by the Treasurer and Secretary.

(ii) Each Apartment Owner shall have a pass book, in which the Treasurer shall enter the amounts received by him towards contributions, towards expenses and his share of assessment and other dues, if any, in respect of his Apartment.

(iii) The Association shall on or before the 31st May, in each year, have an audited Annual Financial Statement for the year ended 31st March, in respect of the Common Areas and Facilities, containing:-

(a) Profit and Loss Account.

(b) The receipt and expenditure of the year ended 31st March.

(c) Summary of the properties and assets and liabilities of the common areas and Facilities of the Association, giving such particulars and disclosing the general nature of these assets and liabilities and how the value fixed for the assets is arrived at.

(d) Audited Financial Statement shall be open for inspection by any member of the Association and copy thereof shall be submitted to the Competent Authority, not later than the 31st December every year.

(e) Every Financial Statement shall be accompanied by a complete list of the Apartment Owners and a complete list of liabilities.

(f) A copy of the last Financial Statement and Audited report shall be available for inspection by the members.

49. PUBLICATION OF ACCOUNTS AND REPORTS:

A copy of the last Financial Statement and of the report of the Auditor, if any shall be kept in a conspicuous place in the office of the Association.

50. APPOINTMENT OF AUDITORS:

The Association shall appoint at its general meeting, an auditor who shall audit the accounts of the Association to be prepared by the Board as herein before provided and shall examine the annual return and verify the same, with the accounts relating thereto and shall either sign the same as found by him to be correct, duly vouched and in accordance with law, or specially report to the Association in what respect he finds it incorrect, un-vouched or not in accordance with law.

14. Defendant does not dispute the contents of the deed of declaration produced at Exhibit P7. In fact, the defendant is one of the signatory to the said deed of declaration. His name being found at Sl.No.9. Perusal of the written statement would also indicate that the defendant specifically and categorically has admitted that he is under obligation in terms of the deed of declaration

to pay the maintenance charges. He has also admitted that the association which is formed for the maintenance of the building is incurring monthly expenses towards maintenance and other charges.

15. Further perusal of the written statement reveals that except making a bald allegation of the resolutions passed by the association not being valid, the defendant has not made out as to why the said resolutions are invalid. He has not produced any details as to whether he has made the payments, even as admitted by him in paragraph 6 of the written statement. When deed of declaration -Exhibit P7, to which the defendant himself is a party/signatory which mandates and contractually compels all the members to make the payments towards the common expenses, there is no gain-saying by the defendant that he would not make the payment merely because the resolutions, according to him, were invalid without proving how and why the said resolutions were invalid.

16. Defendant admits to have filed a suit against the Association in O.S.No.218/2004, which even according to him was dismissed. An appeal filed by him against the said judgment of dismissal was also dismissed. It appears defendant had sought direction to furnish the accounts. No further details are made available on record as to whether the defendant had challenged the resolutions passed by the association on and after the year 2004 till 2016. Mere bare denial or the validity of the resolutions would not be denial in the eye of law, unless the defendant makes out the reason and justification why the resolutions were not acceptable.

17. Exhibit P3 is a document containing statement of dues payable by the defendant from the year 2003 till 2016. Even as per the written statement averments defendant had paid the maintenance charges of Rs.5,400/- on 20.03.2001, which was allegedly returned by the Association without assigning any reason. Thus, on and after the said payment, the defendant has not

stated anything with regard to he having paid the maintenance charges.

18. In fact during his Cross examination he has admitted that he has not furnished the details as to the actual amount due from him. He admits that after his term as president of the Association he has neither participated nor tried to ascertain the proceedings of the Association. Even when the defendant himself cross examined the plaintiff witness, there is no specific denial or suggestion either of his liability to pay the amount or to the correctness of the demand made by the plaintiff association.

19. The trial Court in its judgment has taken into consideration these aspects of the matter, more particularly the clauses of the deed of declaration-Exhibit P7, mandating the members to make the payment.

20. The first appellate Court though has taken note of the admission made by the respondent/defendant with regard to he being a party/signatory to the deed of declaration at Ex.P7 and his admission with regard to his liability to pay the amounts towards common maintenance, has however proceeded to cast the burden on the plaintiff to prove the basis on which the amount is charged by them. When the defendant has categorically and in unambiguous terms admitted to his liability to make the payment of maintenance charges, the question of requiring plaintiff to prove the basis of the claim is uncalled for. Though the first appellate Court has opined that the defendant has denied the quantum of the amount claimed, has lost sight of the fact that such denial is bald and general without any specific. Order VIII Rule 5 CPC contemplate specific denial of the allegations in the plaint.

21. The first appellate Court though has referred to Clauses 16, 18, 19 and byelaws 48, 49 and 50 of the

deed of declaration extracted hereinabove, which is the basis for the plaintiff association to make demand for payment of maintenance charges, has failed to appreciate that in terms of said clauses of deed of declaration the documents are always available for inspection, accounts are audited by the auditor appointed by the association and the members as that of the defendant are expected to have participated in the proceedings unless otherwise proved in the manner known to law. Defendant has not produced any acceptable evidence to the contrary.

22. It is not the case of the defendant that the amount shown at Exhibit P3 is charged only against the defendant. He has not even put a suggestion to the plaintiff witness that the other members of the association have not been charged or paid the amount as demanded by the plaintiff. In the absence of the same, this Court is of the view that the first Appellate Court has not appreciated Exhibit P3 and P7 in its proper

perspective. It has grossly erred in further holding the plaintiff has not proved the basis on which the amount is charged.

23. Necessary to note at this juncture, the amount being claimed by the plaintiff association is towards the common maintenance and upkeep of the apartment building which even according to the defendant he is liable to pay along with other members. This is not a transaction of borrowing and lending or any other commercial transaction. This is towards meeting the recurring expenses of maintenance of apartment building which is admittedly payable by all the members. The liability to pay the maintenance amount is in terms of the deed of declaration -Exhibit P7 mutually agreed by all the members for a common good and welfare of all the members. Plaintiff is an association registered under the provisions of Karnataka Apartment Ownership Act, 1972 and is accountable for its affair to a competent authority appointed under the said Act. Admittedly plaintiff is

having an auditor appointed in terms of the deed of declaration as noted above. Should there be any illegality or irregularity in maintaining the accounts the defendant is entitled under law to bring to the notice of the competent authority under the Act, 1972. Instead mere refusal by the defendant to pay the amount, which is a collective and common liability of all the members, in the absence of any evidence of he paying the dues, would not only be unjustified but would also hinder the welfare of other members of the association, apart from being in breach of terms of deed of declaration as noted above. Therefore, the approach and appreciation of the evidence by the first Appellate Court ought to have been taking a holistic view to the nature of dispute between the parties, their status and their inter-se contractual relationship. In the absence of this approach, the Judgment passed by the first Appellate Court is not sustainable.

24. As regards the contention of the respondent-party-in-person that the association is run by a person without authority, no evidence of any nature has been brought on record in this regard.

25. The counterclaim made by the defendant has been rightly rejected by both the courts. When the first Appellate Court confirms the rejection of the counterclaim made by the defendant with regard to locus standi of a person, who has filed the suit, which is the only ground urged by the defendant before the trial court as well as before this Court refusing to make the payment, the consequence ought to have been directing the defendant to make the payment.

26. In that view of the matter, this Court is of the view that the first appellate Court has grossly erred in not appreciating Exhibit P3 and P7 and has thereby erred in dismissing the suit of the plaintiff. Substantial question of law is answered accordingly, Hence the following :

ORDER

Appeal is allowed. Judgment and order dated 12.01.2023 passed in R.A.No.17/2021 by the III Additional District and Sessions Judge, Dakshina Kannada, Mangaluru is set aside. Judgment and decree dated 16.11.2021 passed in O.S.No.242/2016 by the III Additional Senior Civil Judge and JMFC, Mangaluru, D.K., is confirmed.

**SD/-
(M.G.S. KAMAL)
JUDGE**

SBN