

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 2.12.2014

PRONOUNCED ON 3.2.2015

CORAM

THE HON'BLE MR.JUSTICE R.MAHADEVAN

S.A.No.1354 of 2007

and

M.P.No.2 of 2007 and M.P.No.1 of 2011

Estate of T.S.Murugaian (deceased)
represented by his legal representatives

- 1) M.Rajendran
- 2) M.Sekar
- 3) M.Raja Srinivasan
- 4) M.Raja Sundara Pandian
- 5) Samidurai
- 6) Thirunavukkarasu
- 7) S.H.Ahmed

Cause title accepted vide order of
this court dt 23.11.2007 in MP.No.1
of 2007 in SA.SR.No.89127 of 2007. ...Appellants/Defendants.

vs.

- 1) T.K.S.Nagar Welfare Association
represented by its President
T.Padmanabhan
- 2) Dhanapal
- 3) Kulandaivel
- 4) Papathiammal

...Respondents

Second Appeal against the judgment and decree dated 18.09.2006
made in A.S.No.22 of 2003 on the file of the Subordinate Judge,
Ponneri, confirming the judgment and decree dated 04.09.2003 made in
O.S.No.181 of 1997 on the file of the District Munsif, Thiruvottiyur.

For appellants : Mr.R.Thiagarajan

For respondent-1: Mr.A.R.L.Sundaresan

senior counsel

for Mr.A.L.Gandhimathi

For R2 to R4 : No Appearance

JUDGMENT

Aggrieved against the concurrent findings of the courts below in decreeing the suit filed by the plaintiffs, the legal heirs of the deceased first defendant, the defendants 2, 3 and 7 have filed this second appeal.

2. The case of the plaintiffs before the Trial Court is as follows:-

(i) TKS Nagar at Tiruvottiyur consists of about 60 plots and the layout for the site is approved as early as in 1972 bearing TP/D/DTP 16/1972 under letter No.4040/2 S.S.M.2. The plot owners have formed an association, by name TKS Nagar Welfare Association, which is a society registered under the Tamil Nadu Societies Registration Act, to look after the affairs and grievances of the plot owners. In the layout, there is a 30 feet road (referred to as G20 in the layout plan), abutting the plots bearing the numbers 1 to 17 on the northern side, running East-West and joint with the 40 feet road abutting the Manali High Road and the plot owners of TKS Nagar have been using this 30 feet road from 1972 onwards, without any obstruction from anybody till recently.

(ii) On the southern side of the 30 feet road abutting the 40 feet road, there was a vacant site of about 99 cents in S.No.564/P. The first defendant and six others trespassed into the said land and divided into 7 plots with numbers A to G. The first defendant occupied his plot and others sold their respective portions to the defendants 2 to 5 and to one Chinnathamangam and one Mohamed Riasudien. The defendants 1 to 6 began to construct the 30 feet layout road by fencing the road abutting portion of property in their occupation. The plaintiff and its members protested the unlawful obstruction by the first defendant by sending several complaints to the Collector, Tahsildar and to the other authorities. Since no action was taken to remove the fencing, this suit has been filed.

(iii) The Thiruvottiyur Municipality had already laid 30 feet road from Plot No.17 to Plot No.1 and thereafter due to the obstruction made by the defendants, laying of the road is suspended.

(iv)
In the plots A to G abutting the 30 feet road, the defendants 1 to 5 are occupying the plots A to E. The persons who are in occupation of plots F and G have conceded and acknowledged that the property mentioned in the schedule ie., 30 feet road is a layout road and assured that they would not interfere in any manner with the suit property. Hence, they are not added as parties to the suit.

3. The suit was resisted by the defendants and the defendants 1 to 4 have filed their written statement which has been adopted by the other defendants, wherein, it is contended that there is no vacant site in S.No.564/P and they did not trespass in that land. It is further contended that they are not aware of the approval of the layout as alleged in the plaint and that there is no such road having the width of 30 feet on the northern side of the defendants' property. Even in the approval there is no 30 feet road as alleged in the plaint. It is incorrect to state that the 30 feet road is connecting with 40 feet road abutting Manali High Road and the members of the plaintiff using this road from 1971 onwards without any obstruction till recently. The said road is not in existence and the defendants never attempted to annex the said portion because the area on the northern side is within the defendants' respective portion and they have got every right to put up fencing in order to safeguard their property on the northern side to avoid third party encroachment. The municipality never laid the alleged 30 feet road. Nobody knows that there is a road on the northern side of their property. Even the parent documents of these defendants would make it clear that there is no 30 feet road on the northern side of their property.

4. In the additional written statement filed by the first defendant, which has been adopted by other defendants are as follows:-

a. If really the suit road was in existence, the plaintiff would have executed a registered document in favour of the municipality. The suit is bad for non-joinder of necessary parties, who have purchased from the present defendants. The entire extent of the land is 99 cents and the said item was divided into 7 plots and the said plots were duly sold by one Krishnamoorthy. During 1971, the vendor of the plaintiff was not the owner of the lands sold to defendants and the said plots were not duly approved by the competent authority. The defendants applied for sanction of plan and the plan was duly approved by municipality on 17.06.1980. There is no such welfare association functioning in the name and style of the plaintiff. In the documents purchased by the defendants and their vendors, the northern side boundary is shown as S.No.553. Taking undue advantage of the sale deed dated 30.12.1987 and by suppressing the rectification deed executed in favour of the 6th defendant, the plaintiffs are making a false claim in respect of the 30 feet road, which is not in existence. Hence, they prayed for dismissal of the suit.

5. Based on the material proposition of facts arising from the pleadings of the parties to the suit, the trial Court has formulated as nearly as four issues for the better adjudication of the suit.

6. In order to substantiate their respective cases, both the plaintiffs and the defendants were directed to face the trial. Accordingly, on the side of the plaintiffs five witnesses were examined as P.Ws.1 to 5 and during the course of their examination Exs.A.1 to A12 were marked. On the other hand, on the side of the defendant three witnesses were examined and during the course of their examination Exs.B1 to B14 were marked. That apart, Exs.C1 to C6 were marked by the Court.

7. On evaluating the evidences both oral and documentary, the trial court had proceeded to decree the suit.

8. Having been aggrieved by the impugned judgment and decree of the trial Court, dated 4.9.2003, the defendants had preferred an appeal in A.S.No.22 of 2003 on the file of the Sub Court, Ponneri.

9. That appeal was also dismissed and hence, the defendants have filed the present second appeal before this Court.

10. The second appeal has been admitted on the following substantial question of law:-

- i) Are the courts below right in granting a decree for declaration despite the fact that the plaintiff has not sought for easementary right over the suit property invoking the provisions of Easement Act ?
- ii) Are the courts below right in relying upon Ex.A11, viz., the Plan issued by Tiruvottiyur Municipality in the absence of any sanctioned plan pertaining to the said locality as approved by the Director of Town Planning under the Tamil Nadu Country and Town Planning Act ?
- iii) Is the conclusion reached by the trial court as confirmed by the appellate court in the light of Ex.A6 can be sustained by the Hon'ble High Court ?

11. The arguments advanced by Mr.R.Thiagarajan, learned counsel for the appellants and by Mr.A.R.L.Sundaresan, learned senior counsel appearing on behalf of Mrs.A.L.Gandhimathi, learned counsel for the respondents are heard in detail. The materials available on record are also perused.

12. The learned counsel for the appellants submitted that the respondents have not sought for declaration of any easementary

right over the suit property, but sought for declaration that the schedule mentioned property as a road.

13. The learned counsel for the appellants further submitted that in the absence of either oral or document evidences to prove that the suit property has been gifted to the municipality for the formation of the road, the conclusion arrived at by the courts below suffers from the non-consideration of the material facts.

14. The learned counsel for the appellants has argued that if a person sought for the relief of declaration and also for an injunction, the concerned person must have an interest in the property and in the absence of any such interest, no relief could be granted.

15. The learned counsel for the appellants has added that the plan issued by the Tiruvottiyur Town Municipality would not indicate the existence of any such road abutting the suit property which is connecting 40 feet road or the service road and the boundaries mentioned in the sale deeds furnished by appellants would indicate that there was no road adjacent to their property.

16. The learned counsel for the appellants has contended that the plaintiff society was defunct from 1994-95, but the suit was filed in the year 1997. Hence, there is no legal right to file the suit by the society and there cannot be any cause of action. He has further contended that all the purchases were effected only after 1972. The disputed area A to G were also purchased after 1972. Hence, there could not have been any attempt to close the road and there is no gift deed handing over the road to the Government.

17. The learned counsel for the appellant relying on Order 1 Rule 8 CPC., and Sections 38, 39 and 40 of the Specific Relief Act and also Section 41(j) of Specific Relief Act, has argued that the society cannot file the suit.

18. In support of his contentions, the learned counsel for the appellants relied on the following decisions:-

i)

To support his contention that in view of Section 41 of the Specific Relief Act, the suit for injunction is not maintainable, the learned counsel has relied on the decision in AIR 2006 Rajasthan 114 (Municipal Board, Niwai .v. Bhura & others), wherein it is held as under:-

"6. It appears that despite the pendency of litigation in Revenue Court the plaintiff approached the civil court. In my opinion suit for injunction was not maintainable in view of Section 41 of the Specific Relief Act, 1961, according to which injunction could not be granted where equally efficacious remedy was available.

7. it is well settled that where the plaintiff does not have possession of suit property, relief of injunction can not be granted. In *Jemma v. Raghu*, the Division Bench of Orissa High Court indicated that a plaintiff not in possession of suit property is not entitled to the relief of injunction without claiming recovery of possession.

10. In the instant case where the Assistant Collector Tonk on May 13, 1981 categorically observed that the defendants were In possession of the suit land and restrained the plaintiff from making interference In the possession of defendants, the suit for permanent Injunction was not maintainable. There Is nothing on record that could establish that the defendants were ousted from the suit land by the plaintiff. Extension of municipal limits by notification does not mean that the defendants were automatically dispossessed from the suit land. "

ii) In 2001 (3) MLJ 13 SC (*Saraswati .v. Ganapathy*), the Hon'ble Apex Court has held as follows:-

"18. The Commissioner, in his Report, notes that the description of the property given in the Sale Deed of the Appellants is not accurate. the Commissioner, on actual measurements, gives a positive finding to the following effect:

"9. As the memo of instructions given by the respondent warranted me to note the actual extent of enjoyment by the petitioners and respondents with respect of T.S. Numbers, this respondent is in possession and enjoyment of an extent of 533 Sq. feet as follows i.e. 98 Sq. feet in T.S. No. 7/288-PART; 423 Sq. feet in 7/219 PART; and 12 Sq. feet in 7/232 PART. The Petitioners are in possession and enjoyment of 2506 Sq. feet in T.S. 7/232 PART and an extent of 235 Sq. feet in T.S. 7/231 and an extent of 350 Sq. feet in T.S. No. 229 PART used as lane thus totally measuring an extent of 3091 Square feet.

10. The 4th para of the memo of instructions by the respondent specifically directed me to note down

whether the respondent is within the limit as per Ex.A-1 I found that the area of enjoyment and possession of the respondents/defendants exceeds only to the tune of 21 Sq. ft. and that is too on the northern side. The specific measurements and area of enjoyment by the Respondent is shown in a separate diagram in the Diagrams 1 to 4 may be read as part and parcel of this report."

Thus, it is to be seen that it is the Appellants who are encroaching upon 350 Sq. ft. in Survey No. 7/229. The 1st Respondent has excess area to the extent of 12 Sq. ft. in Survey No. 7/232. The Commissioner has also found that the 1st Respondent has lad to the extent of 21 Sq.ft. over and above what he had purchased under his Sale Deed. Both the trial Court and the 1st Appellate Court had this factual position before them. One fails to understand the logic by which both these Court concluded that the encroachment was to the extent of 338 Sq. ft. Both these Courts ignored the fact that the encroachment, to the extent of 338 Sq. ft. could only be there provided the measurements and description given in the Sale Deed of the Appellants were correct. As set out above, those measurements and the description are entirely incorrect. The factual position was that the Appellants, who had purchased Survey No. 7/232 was in possession not only of entire Survey No. 7/232 (less 12 Sq. ft.) but was in possession (without any right) of 350 Sq. ft in Survey No. 7/229 which was purchased by 1st Respondent. The Appellants having only purchased Survey No. 7/232 is not entitled to more than 2481 Sq. ft. The Appellants are now in possession of more than what was purchased by them. The Appellants were seeking to claim possession of property which they had never purchased under their Sale Deed. The High Court has rightly not allowed this. "

iii) In the learn AIR 2004 Mad 333 (Ammani .v. Tiruchengode Municipality),d Single Judge of this Court has observed as under:-

"17. ... In this case, the appellant's vendor after leaving plots for public purposes obtained sanction to the layout contravention of the same it is sold to the appellant. Such conduct

cannot entitle them to any relief at the hands of a Court of equity. Hence, the argument that the appellant is in lawful possession and entitled to injunction cannot be accepted."

(iv) In an unreported judgment of this Court in W.P.No.17591 of 2014 (C.K.V.Krishnamurthy .v. The Special Commissioner, Town Planning, Chennai and others), this Court has held as under:-

"7. Another material aspect is that the grievance is sought to be alleged after fourteen years of what was happened. The only subsequent development is of the year 2006, when the Municipality requested that the vacant land be 'gifted' to the Municipality. This would itself mean that the Municipality did not have rights over the land. Otherwise, there is no necessity to seek a gift from the Society."

19. The learned counsel for the respondents/plaintiffs submitted that the courts below have properly considered the oral and documentary evidence and has come to a correct conclusion, which does not warrant any interference of this Court and hence, prayed that the same may be confirmed and the second appeal may be dismissed.

19a. Further, the learned counsel has contended that even if the land is earmarked for the public purpose that cannot even be de-reserved by the Government by converting into housing plots.

19b. In support of his contentions, the learned counsel has relied on the following decision:-

(i)
In 2011 (1) CTC 257 (K.Rajammal v. Alamunagar Residents' Welfare Association), this Court set aside the Government Order de-reserving the land earmarked for public purpose in the layout into housing plots and in paragraph 22 held thus,

"22. The contention of Mr.K.M.Vijayan, learned Senior Counsel for the Appellants is that the law relating to open space would be available only in case of apartments, where the purchaser of an apartment would have right to seek for maintenance of public space as such, as he/she has an undivided share in the open land as well and that law is not applicable to a layout. In our opinion, the said contention is totally on a misconception. The purpose for leaving open space is not only to meet the future developmental activity, but also

to meet the recreational activity of the inhabitants. The provision of open space in a development plan is to provide green space as well which is an essential feature in the development of an area. In a layout leaving of certain area of land as open space for use of park is in conformity with the Development Control Rules. Hence, there cannot be a different yardsticks to the de-reservation of land left for open space in the case of an apartment and layout. Only in this context, the provisions of Section 432(10)(b) of the Coimbatore City Municipal Corporation Act relating to the power of the Municipal Corporation to make bye-laws in respect of protection of avenues, trees, grass, other appurtenances of public streets and other places was referred to by the learned Judge which, in our considered view, requires no interference. Hence, the learned Judge has rightly quashed the order of the Government in de-reserving the land earmarked for public purpose in the layout into housing plots and we are not inclined to interfere with the same."

20. In the same breath, the learned counsel has also argued that the land earmarked for public purpose, the same cannot be utilised for any private purpose including the local body restricting the usage of the public. To support his view, the learned counsel has relied on the following decision.

(ii) In 2013 (6) CTC 441 (Kirubakaran and others .v. The Commissioner (east), Corporation of Coimbatore), this Court after referring the decision reported in 2011 (1) CTC 257 (K.Rajammal v. Alamunagar Residents' Welfare Association) held that the land earmarked for public purpose cannot be used for private use by any one, including the Local Body restricting the usage of the public.

21. It is the case of the plaintiff association that abutting the plots Nos.1 to 17 on the northern side, there is a layout road having the width of 30 feet and it runs east west and it joins with the 40 feet road abutting the Manali High Road. The 30 feet road is shown and referred as G.20 in the layout plan. The plot owners of T.K.S. Nagar have been using the 30 feet road from 1972 onwards without any obstruction from anybody.

22. It is also the case of the plaintiff association that on the southern side of the 30 feet road abutting the 40 feet road, there was a land measuring 99 cents in S.No.564/P. The first defendant and other six persons conspired together and trespassed into the said land and divided the same into 7 plots and the letters

A to G. The first defendant occupied the first plot, viz., plot A. The other persons have sold their respective portions. About a year back, the first defendant had occupied the 30 feet road by fencing it abutting his portion and the other defendants have also occupied the 30 feet road by fencing it abutting their respective portions.

23. On the other hand, it is the case of the defendants, that there was no 30 feet road at all and the area on the northern side is within their respective portion and therefore, they have every right to put up the fencing to safeguard their property.

24. To prove the case of the plaintiffs, the plaintiff association have filed Ex.A2 to A5 and Exs.A7 to A10 copy of the sale deeds. A perusal of all the sale deeds shows that on the northern side of the property, there is a 30 feet road. Ex.A6 plan also shows the existence of 30 feet road.

25. Further, the plaintiffs have examined three witnesses and they have also deposed that there is a 30 feet road on the northern side of the defendants plots A to G.

26. A perusal of Advocate Commissioners' report also reveals the existence of the 30 feet road.

27. In Ex.C1 Advocate Commissioner report, it is stated as under:-

"தாவா சொத்தில் வடக்கில் தியாகர் தொழிற்சாலையின் கம்பவுண்டு சுவர் கிழக்கு மேற்காக கட்டப்பட்டிருந்தது. மேற்படி சுவரில் தெற்கு பகுதியில் வரைபடத்தில் உள்ளவாறு டி.கே.எஸ். நகர் 30 அடி சாலை எம்.ஆர்.எல் சாலையுடன் இணைகிறது என்று எழுதப்பட்டிருந்தது. தாவா சொத்திற்கு செல்லும் 30 அடி ரோடிற்கு இருபக்கங்களிலும் டி.கே.எஸ். நகர் குடியிருப்பு வீடுகள் உள்ளன. "

28. Further, it is the case of the plaintiff association that one Papathi, who is the owner of the plot in Nanjai S.No.564/B at T.K.Shanmugam Nagar, Thiruvottiyur, Madras-19, which is the part of the 99 cents, had filed a suit in O.S.No.413 of 1989 on the file of the District Munsif Court, Ponneri, against the President, T.K.S. Nagar, Samuga Nala Sangam and the Secretary, T.K.S. Nagar Samuga Nala Sangam, for the relief of permanent injunction.

29. In the said plaint, it is stated as under:-

"As per the lay out there is a road on northern side, which is measuring 20" which is running East to West on the northern side of the suit property. The 1st and 2nd defendants wants to widen the road by way of trespassing into the plaintiff's and others property to an extent of 10 feet on the northern side of the suit property in order to extend the road from 20" to 30" from 26.6.1989 onwards. The defendants has also dumped gravel for extending the road."

30. The above averments clearly show that there is a road on the northern side of the plots A to G, which belongs to the defendants.

31. On the other hand, even in Ex.B.14 sale deed, which has been marked on the side of the defendants, in the details of the properties, it is stated as "North by : 20 feet Road." This would corroborate the case of the said Papathis, who had filed the suit, referred supra, and it would lend support to the case of the plaintiffs.

32. Further, no oral and documentary evidence has been produced to prove that no road is in existence, measuring 30 feet on the northern side of the defendants' plots A to G.

33. At this juncture, it would be pertinent to refer the decision in K. Rajammal vs. Alamunagar Residents' Welfare Association (2011 (1) CTC 257), wherein, this Court set aside the Government order de-reserving the land earmarked for public purpose in the layout into housing plots. When this should be the legal position, no individual can be allowed to occupy the road earmarked for public purpose for their own use as a rightful owner.

34. Further, in 2013 (6) CTC 441 (Kirubakaran and others .v. The Commissioner (east), Corporation of Coimbatore), the Division Bench of this Court has referred to the decision in 2011 (1) CTC 257 (K.Rajammal v. Alamunagar Residents' Welfare Association) wherein, it is held that the land earmarked for public purpose cannot be used for private use by any one, including the Local Body restricting the usage of the public.

35. As rightly put it by the Division Bench of this Court, when the land earmarked for public purpose, it cannot be allowed to use for any private purpose, including the Local Body restricting the usage of the public and therefore, the individuals cannot be allowed to use the public road as of their own property restricting the public from using that road that too the plaintiffs, who are the residents of nearby plots.

36. A perusal of the judgments of the courts below reveal that based upon the oral and documentary evidence, they have come to the right conclusion that the plaintiffs are entitled to the reliefs sought for and this Court cannot interfere with the findings of the courts below in the absence of any material evidence to the contra on the side of the defendants.

37. Moreover, it is the contention of the appellants/defendants that the respondents/plaintiffs have not sought for declaration of any right of easementary over the suit property but sought for declaration that the schedule mentioned property as a road.

38. When this Court has come to the conclusion in the foregoing paragraphs that the suit property is a layout road, which can be used by the plaintiffs and the public and cannot be occupied by any private party or person for his own use, the question of seeking the relief of easementary right does not arise and therefore, the plaintiffs have sought for the relief of declaration and both the courts below and this Court also have concluded in favour of the plaintiffs and based upon such conclusion, the relief of declaration is granted to the plaintiffs, and therefore, the suit property, namely, 30 feet road, is a layout road which can be used by the plaintiffs and other people in and around the area and nobody claim any right over the suit property, including the defendants and in such circumstances, the decision reported in 2001 (3) MLJ 13 (SC) relied on by the learned counsel for the appellants is not applicable to the case on hand.

39. The learned counsel for the appellants further submitted that in the absence of either oral or documentary evidences to prove that the suit property has been gifted to the municipality for the formation of the road, the conclusion arrived at by the courts below suffers from the non-consideration of the material facts.

40. In the municipal plan, the suit property is shown as 30 feet road as public road and the case of the plaintiffs is also that the suit property is a 30 feet road for the usage of the plaintiffs and others and as stated above. When the courts below and this Court have come to the conclusion that there is a provision of 30 feet road in the layout plan and also in the municipal plan, which have been supported by the documentary evidence produced on the side of the plaintiffs, the question of gifting the same to the municipality does not arise and the decision in C.K.V. Krishnamurthy vs. The Special Commissioner, Town Planning, Chennai and others, relied on by the learned counsel for the appellants is irrelevant to the case on hand.

41. The learned counsel for the appellants has contended that the plaintiff society was defunct from 1994-95, but the suit was filed in the year 1997. Hence, there is no legal right to file the suit by the society and there cannot be any cause of action. He has further contended that all the purchases were effected only after 1972. The disputed area A to G were also purchased after 1972. Hence, there could not have been any attempt to close the road and there is no gift deed handing over the road to the Government.

42. The plaintiff is the T.K.S. Nagar Welfare Association and it is a registered society under the Tamil Nadu Society Registration Act with the Registration No.67 of 1988 and it is

represented by its President Mr. T. Padmanaban and therefore, the contention of the appellants that the plaintiff Association is a defunct one cannot be accepted.

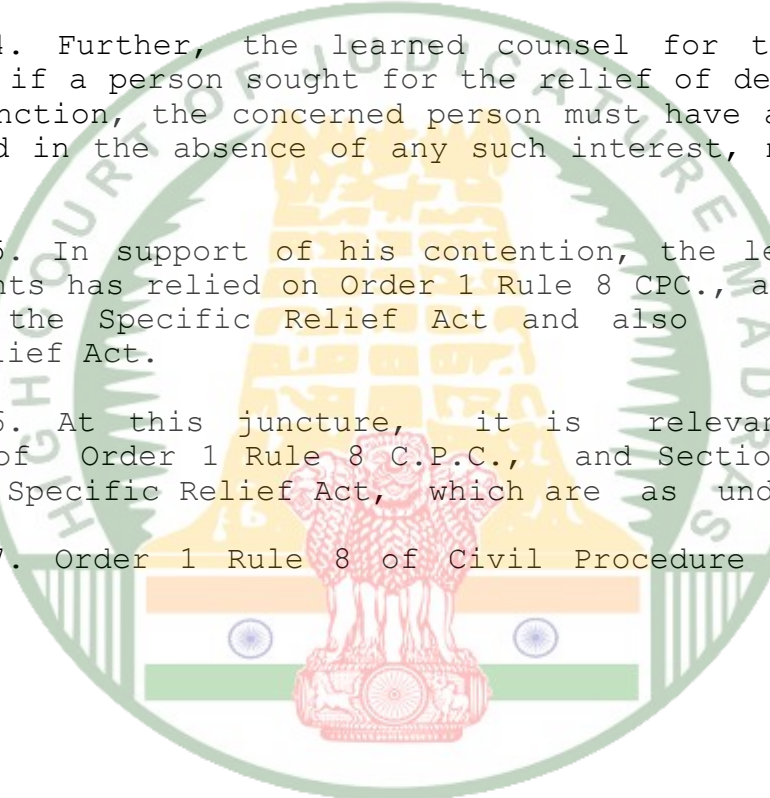
43. Further, on 13.10.1987 when the defendants had started to obstruct the members of the plaintiffs and plot owners of T.K.S. Nagar from using the 30 feet layout road and subsequently when the defendants have attempted to fence the property, the cause of action arose for the plaintiffs as they are having the right to use the 30 feet layout road as decided by this Court as well as the courts below and therefore, it cannot be said that there is no cause of action for filing the suit.

44. Further, the learned counsel for the appellants has argued that if a person sought for the relief of declaration and also for an injunction, the concerned person must have an interest in the property and in the absence of any such interest, no relief could be granted.

45. In support of his contention, the learned counsel for the appellants has relied on Order 1 Rule 8 CPC., and Sections 38, 39 and 40 of the Specific Relief Act and also Section 41(j) of Specific Relief Act.

46. At this juncture, it is relevant to refer the provisions of Order 1 Rule 8 C.P.C., and Sections 38, 39, 40 and 41-J of the Specific Relief Act, which are as under:-

47. Order 1 Rule 8 of Civil Procedure Code is extracted hereunder:-



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8. One person may sue or defend on behalf of all in same interest.- (1) Where there are numerous persons having the same interest in one suit,-

(a) one or more of such persons may, with the permission of the court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule (1), may apply to the court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3) of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the court has given, at the plaintiff's expenses notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation: For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to

Sections 38, 39 and 40 and 41 (i) of the Specific Relief Act are extracted hereunder:-

"Section 38. Perpetual injunction when granted

(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:-

(a) Where the defendant is trustee of the property for the plaintiff;

(b) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) Where the invasion is such that compensation in money would not afford adequate relief;

(d) Where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Section 39. Mandatory injunctions

When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts, which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Section 41. Injunction when refused

An injunction cannot be granted. -

(a) To restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restrain is necessary to prevent a multiplicity of proceedings;

(b) To restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

(c) To restrain any person from applying to any legislative body.

(d) To restrain any person from instituting or prosecuting any proceeding in a criminal matter;

(e) To prevent the breach of a contract the performance of which would not be specifically enforced;

(f) To prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(g) To prevent a continuing breach in which the plaintiff has acquiesced;

(h) When equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(i) When the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;

(j) When the plaintiff has a personal interest in the matter."

48. A perusal of the provisions of the Order 1 Rule 8 C.P.C., do not put any bar to the plaintiff for filing the suit. It clearly says that where there are numerous persons having the same interest in one suit, with the permission of the court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

49. On behalf of the members of the plaintiff association, its President representing them, who are all having the same interest, has filed the suit and therefore, this Court does not find any bar for the plaintiff for filing the present suit for declaration.

50. As discussed above, since the members of the plaintiff association is having the interest in the suit property being the 30 feet layout road, they can very well file the suit for declaration and the contention of the learned counsel for the appellants that the plaintiffs do not have any interest in the suit property and that they cannot seek for declaration and consequently, they cannot also seek for the relief of permanent injunction and mandatory injunction cannot be countenanced in the light of the

provisions of Sections 38 and 39 of the Specific Relief Act as the plaintiffs are entitled to the relief of permanent and mandatory injunction when the plaintiff association is entitled to get the relief of declaration.

50a. Further, the learned counsel for the appellants has contended that as per the provision of Section 41-J of the Specific Relief Act, the plaintiff is not entitled to injunction and that it has to be refused cannot be accepted for the reason that, as decided above, as the members of the plaintiff association are having interest in the suit property, they are entitled for injunction and it cannot be refused.

51. In the light of the foregoing discussions, this Court is of view that the defendants have encroached the road and in occupation of the same as of their own property.

52. Further, the decisions relied on by the learned counsel for the appellants are not relevant and applicable to the case on hand as discussed supra.

53. For the reasons stated above, the second appeal fails and the same is dismissed without costs. The judgment and decree of the courts below are confirmed. The appellants are granted three months time to vacate the suit property. Consequently, connected Miscellaneous Petition are closed.

mra/rnb

s/d-
Assistant Registrar (CS-III)

True Copy

Sub-Assistant Registrar

To

1. The Subordinate Judge, Ponneri.
2. The District Munsif, Thiruvottiyur.
3. The Section Officer, V.R. Section, High Court, Madras.
- + 4 ccs to Mr.R.Thiagaraj, Advocate SR 5448
- + 1 cc to M/s.AL.Ganthimathi, Advocate SR5603

tej(co)
prk6/5

S.A.No.1354 of 2007
and
M.P.No.2 of 2007 and M.P.No.1 of 2011