

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 09.11.2017

PRONOUNCED ON: 13.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.No.209 of 2010

A.No.7692 of 2017

1. Asha
2. Gobind Mahtani
3. Suresh Mahtani
4. Jamuna Maiyalagan

Plaintiffs

Vs

1. Jeffrey Mathuranayagam
2. Kishorkumar Gokaldas
3. P.Maiyalagan

Defendants

Prayer:- This Civil Suit is filed under Order IV Rule 1 of Original Side Rules read with Order VII Rule 1 of CPC, for the reliefs as stated therein.

For Plaintiff : Mr.P.L.Narayanan

For Defendants : Mr.T.V.Ramanujam, SC-D1
Mr.G.Jermiah-D3
D2-Set exparte

WEB COPY
JUDGEMENT

This civil suit has been filed, to pass a judgement and decree,
against the Defendants:-

- (a) for permanent injunction, restraining the 1st Defendant from in any manner interfering with the right, title, possession, interest and enjoyment of the Plaintiffs as co-owners in respect of the common areas and amenities in the land,

building and premises situated at 'KG Retreat' No.119, G.N.Chetty Road, T.Nagar, Chennai-17, more fully described in the Schedule, including the association room/library cum indoor games rooms and security room situated in the ground floor of the apartment.

(b) for mandatory injunction directing the 1st Defendant to restore the association room/ library cum indoor games room and security room situated in the ground floor of the apartment in the suit property to the original state by removing the door put up by the 1st Defendant in the back wall of the Association room and reconstructing the demolished wall portion and by re-fixing the door at the front and side wall of the room.

(c) for costs of the suit.

2. The Schedule of property is the land, building and premises, known as "KG Retreat" at Door No.119, G.N.Chetty Road, T.Nagar, Chennai-17, measuring 4 grounds and 252 sq.ft. Even though in the relief, there is mention about the Association room/ library cum indoor game rooms and security room, there is no separate Schedule shown for the same in the plaint.

3. According to the Plaintiffs, the Plaintiffs are the owners and occupiers of residential flats in the said 'KG Retreat Apartment', which was developed by the 2nd Defendant in a joint venture with the 1st Defendant. The development agreement was dated 9.12.1992. Ten flats were constructed. It is stated that all the owners, except two owners, who are the owners of flats 1A and 1B, were parties to the suit. The apartment consisted of a ground and three floors. Out of 10 flats, 9 flats are residential and one flat in the ground floor was non residential. According to the Plaintiffs the agreement for development dated 9.12.1992 indicated that the constructed area were to be

shared in the ratio of 50:50 between the 1st and 2nd Defendants. The 2nd Defendant agreed to allot 50% of the constructed area to the 1st Defendant and the 1st Defendant had agreed to execute and register sale deeds in favour of the 2nd Defendant or his nominees for 50% undivided share in the suit land.

4. It had been further provided that the apartment owners had right of enjoyment over the common area and that if there was any variation in the area of the flat or in the specifications agreed by the 2nd Defendant to be delivered to the 1st Defendant, the value of such variation would be paid by one party to the other. All differences must be mutually sorted out by the 1st and 2nd Defendants. It had been stated that 50% of the undivided share in the land, namely, 9630 sq.ft. of land, was sold and conveyed by the Power of Attorney Agent appointed by the 1st Defendant in favour of the Plaintiffs and other allottees/purchasers.

5. It had been stated that the 1st Plaintiff is said to have purchased an undivided 8.79% share of land of 9852 sq.ft. by a sale deed dated 10.6.2002 registered as Document No.1263 of 2002 in the Office of the Sub Registrar, T.Nagar. The 2nd and 3rd Plaintiffs had purchased an undivided 14.89% share of 50% of the land under a sale deed dated 21.1.1994, registered as Document No. 808 of 1994 in the Office of the Sub Registrar, T.Nagar. The 4th Plaintiff had purchased an undivided 7.64% share of the land by a sale deed dated 14.6.1993, registered as Document No. P605 in the Office of the Sub Registrar, T.Nagar. The 3rd Defendant had purchased an undivided 13% out of 50% of the land by a sale deed dated 6.6.2003, registered as Document No.1303 of 2003 in the Office of the Sub Registrar, T.Nagar. Similarly, the other

allottees/purchasers have also purchased undivided share of land for valuable consideration.

6. It had been further stated that after construction, the flats were handed over under individual letters of handing over possession. It was further mentioned that the extent of flat is the super built up area inclusive of proportionate share in the common constructed areas like, stair case areas, verandah, association room/library cum indoor games, head room, etc. It has been stated that the Plaintiffs had paid consideration for the common constructed areas also and they have right to use and enjoy the same in common with other co-owners. It has been further stated that the 1st Defendant retained 50% of the undivided share of land along 50% constructed areas, consisting of three flats on second floor, one flat on third floor and one flat put to non residential use on the ground floor, which under the sale deed dated 6.6.2003, registered as Document No. 1303 of 2003, he sold the flat in the third floor to the 3rd Defendant.

7. It has been further stated that construction of the flats was completed in 1995 and possession was also handed over in April 1995. The Developer had to maintain the apartments for a period of 12 months. Each one of the owners paid maintenance charges. A room measuring 198 sq.ft. in the ground floor was allotted to the members Association room/ library cum indoor games room and possession of the same was also handed over to the Association of the flat owners, which is an unregistered Association by the 2nd Defendant, under letter dated 22.9.1995. Maintenance account was closed between the Developer and the Association and the 2nd Defendant further

confirmed that all bills for the common areas up to 31.9.1995 will be paid by him and the bill from 1.9.1995 would be paid by the Association. It has been further stated that the security room measures 58 sq.ft. and the common lobby measures about 257 sq.ft. The Association room had been used by the Plaintiffs and other flat owners for all common usage and purposes including conducting association meetings, get together of the flat owners and families. There was also a mini stepper machine, board games, like carom, chess, ludo and chocolate pocket for the common use and enjoyment of the apartment owners.

8. It has been further stated that magazines were also provided and common tools were also kept in this area. It was stated that the rules and conditions regarding ownership in common area are applicable to all the flat owners including the Plaintiffs and the 1st Defendant and with regard to common area and amenities, no one can have exclusive right or claim. It has been further stated that the 1st Defendant, who was the owner of the entire extent of the said land continued to behave as if he was the absolute owner, without following the concept of common ownership. He had been creating lot of nuisance and hardship to the Plaintiffs and other individual flat owners. He is unmindful of the rights of the other flat owners and he behaves as if he is the landlord of the property.

9. It has been further stated that on 21.1.2010 at about 9.30 a.m., the people in the apartment were shocked to witness the outrageous act of a group of man including labourers, illegally entering into the Association room, who after throwing out all the articles from the room, started to remove the door

fitted on the front wall of the Association room. When enquired, they said that they were engaged by the 1st Defendant to modify the room with an intention to annex it to the 1st Defendant's portion in the ground floor. A complaint was also lodged with the Teynampet Police Station. The 1st Defendant had also put up two check posts, barricade inside the apartment premises, thereby obstructing the movement of the flat owners and occupiers and also blocking movement, causing a lot of inconvenience and problems even for parking the vehicles. It has been further stated that 1st Defendant has no such exclusive right and it was also claimed that he was blocking the common passage and parking areas and the 1st Defendant had demolished a portion of the wall and put up two additional entrances in the ground floor, facing South side. He had also encroached into the common area to put up structures to suit his convenience. It was under these circumstances, the suit came to be filed for the reliefs as stated above.

10. The 1st Defendant has filed a written statement, claiming that the suit is bad for non joinder of necessary parties since two flat owners in the first floor have not been included as parties to the suit. It has been further stated that in the Schedule to plaint, the common facilities have not been described and common areas have also not been specifically mentioned . It has been stated that two flat owners, who have not joined the Plaintiffs, are very much available. It has been stated that actually there are four commercial units, two in the ground floor and two in the second floor and 7 non residential units, three in the first floor, one in the second floor and three in the third floor.

He had entered into a joint venture agreement with the 2nd Defendant for

development, dated 9.12.1992 and he had agreed to sell 50% undivided share in the entire extent of property, measuring 4 grounds and 252 sq.ft. in exchange of minimum super built up area of 9630 sq.ft. or 50% of the total built up area of the total built up area. The 2nd Defendant had developed the apartments and handed over possession to an extent of 9630 sq.ft. to the 1st Defendant.

11. It has been stated in the written statement of the 1st Defendant that according to the letter dated 6.12.1994, in the ground floor, apartment A & B - 2790 sq.ft., in the second floor-Apartment A-2260 sq.ft., in the second floor-apartment B-1910 sq.ft., in the second floor-Apartment C-1335 sq.ft. and in the third floor-Apartment C-1335 sq.ft., measuring in all 9630 sq.ft. were handed over possession to the 1st Defendant. The 1st Defendant has stated that the entire ground floor area of 2790 sq.ft. absolutely belonged to him and he is occupying the area and has not encroached into any of the common area as alleged by the Plaintiffs. He had further stated that the 2nd Defendant has handed over to him the constructed area of 9630 sq.ft. and there is no dispute regarding the same.

12. It has been further stated in the written statement that there was no Association, which was registered. There was no Association room or library cum indoor game room. The 2nd Defendant had agreed to construct a room for the Association in the fourth floor of the building. The ground floor absolutely belonged to the 1st Defendant. It does not come under the common area of the apartment. The Plaintiffs have not paid any consideration for common constructed areas, particularly, association rooms/ library cum indoor games room, etc. No such room ever constructed by the 2nd Defendant. The

Association was not registered only because of lack interest by the flat owners. There was no regular meeting and in the past 15 years, only two meetings were held and they were not held in the disputed room. His room measuring 198 sq.ft. does not belong to the Association or is not the common area. Even according to the sanctioned plan, there was no Association room. In fact, there was no Association at all. In the sanctioned plan, the portion claimed by the Plaintiffs is mentioned as Lumber Room which is within the FSI in the ground floor. The entire ground floor is commercial unit and he has been occupying a total area of 2790 sq.ft. The letter mentioned in the plaint dated 22.9.195 has not been sent by the 2nd Defendant and cannot be relied upon. The letter is false and has been created for the purpose of the suit.

13. It has been further stated that in the letter, there is no specification about the Association room or the extent of the Association room. The said letter was signed by the 3rd Plaintiff as Secretary, whereas at that time, the 2nd Plaintiff was the Secretary of an unregistered Association. The 3rd Plaintiff had become Secretary only on 22.11.2009. The said letter had been concocted by the 3rd Plaintiff. But, 1st Defendant specifically denied his signature in the letter and also denied the averment that the room was used for Association meeting, get together functions, etc. On the date of filing of the suit, there was no Association room or library cum indoor games room or security room. The entire property had been let out to Indian Bank and put up a strong room there at their request

14. It has been stated that the Plaintiffs did not have any right over the built up area in the ground floor. It has been further stated that there is no

prayer for declaration of title. The reliefs in (a) and (b) are mutually contradictory. It was specifically denied that there was a security room measuring 58 sq.ft., a common lobby measuring 257 sq.ft. It has been stated that the 2nd Defendant handed over 2790 sq.ft. in the ground floor wherein the built up area in the ground floor is only 2486 sq.ft. and the carpet area is 2260 sq.ft. which is inclusive of 198 sq.ft. disputed room, security room and toilet. The Defendant is occupying only the said portions.

15. The 1st Defendant has further stated that there are 14 car parking slots available in the apartment. He had been allotted 7 car parking slots. He further stated that the Plaintiffs deliberately parked their vehicles in his slot on the Northern side. It was under these circumstances that he had put up a check post. The 1st Defendant has specifically stated that he had not caused any hardship to the other flat owners as alleged. The allegation that a group of men entered into the Association room and thrown out the articles, was specifically denied. The complaint before the Police Station was found to be false. It was for that purpose that no action had been taken. With respect to additional entrance, the 1st Defendant has stated that it was put up to enable the customers to visit the Bank without obstructing the other residents. The 4th Plaintiff had actually put up a door in the common area in the third floor to combine her flat and the flat of the 3rd Defendant.

16. The Defendant claimed that as a senior citizen, he has been put to much harassment and had suffered mental agony and false allegations made by the Plaintiffs. It was the Plaintiffs who had encroached upon the common area. He also stated that he come from very respectable Christian family and

had studied in UK and worked as Technical Director of National Textiles Corporation of India. His mother and his brother were famous Doctors. His two daughters studied in USA and UK. He is living alone with the help of his Personal Assistant, Sudhir Paul and his servant maid, who helps him with his day today activities. He has been residing in the same address for the past 70 years. The Plaintiffs have deliberately dragged him into court and he also suffers from hypertension, chronic renal failure and other medical ailments owing to the acts of the Plaintiffs. In these circumstances, the Defendants have also raised a counter claim for Rs.30 lakhs and claimed that the suit should be dismissed.

17. The Plaintiffs have also filed a written statement to the counter claim, stating that non joinder of two flat owners would not preclude the co-owners from approaching the court, seeking suitable reliefs. The Plaintiffs denied the allegations in the counter claim. It has been stated that in the CMDA approved plan in the ground floor, there is a lumbar room, which according to the Plaintiffs, is the Association room and the security room and toilet and there is a wall that runs across the whole length without any access or opening between the 1st Defendant's apartment and the aforesaid three common rooms. It has been stated that this has also been confirmed by the report of the Advocate Commissioner. It has been reiterated that the Association meetings were held in the said room.

18. The Plaintiffs reiterated that by letter dated 22.8.1995, the 2nd Defendant delivered possession of the Association room/library cum indoor games room, security room and the keys of the room and other common areas

were handed over to the unregistered Association. The Plaintiffs reiterated that the room was used for Association purposes. The Plaintiffs have also reiterated that the cars were parked only by convenience and that the barricade was put to obstruct the movement of the flat owners and occupiers. The Plaintiffs stated that they are not liable to pay any counter claim and consequently, claimed that the relief of counter claim should be dismissed and the suit must be decreed as prayed for.

19. On consideration of the pleadings, the following issues were framed in CS.No.209 of 2010:-

1. Whether the Plaintiffs are entitled for the relief of permanent injunction?
2. Whether the Plaintiffs are entitled for the relief of mandatory injunction?
3. Whether the Plaintiffs are liable to pay any damages to the 1st Defendant?
4. Whether the 1st Defendant is entitled for the decree of counter claim?
5. Whether the Plaintiffs are entitled for any other reliefs?
6. Whether the 1st Defendant is entitled for any other relief?
7. Whether the suit is liable to be dismissed for non joinder of necessary parties being the owners of Flat Nos.1A and 1B in the first floor of the Apartment?
8. Whether the suit is liable to be dismissed for specifically not describing the common areas in the Schedule property?
9. Whether the Association had functioned or used the disputed room measuring 198 sq.ft. in the ground floor at any point of time?
10. Whether the disputed room measuring 198 sq.ft. in the ground floor comes under the common area?

11. Whether a bare injunction suit will lie without seeking declaration of their title to the disputed room?

12. Whether the bare injunction suit is maintainable when the Plaintiffs were not in possession of the room in the ground floor measuring 198 sq.ft. at the time of filing the suit?

13. Whether the 4th Plaintiff and the 3rd Defendant have encroached the common area approximately 50 feet of passage in the third floor by combining their flats?

14. Whether there is any cause of action for filing the suit?

15. Whether the 1st Defendant is entitled to damages of Rs.30,00,000/-?

16. Whether the 1st Defendant is entitled for a relief directing the fourth Plaintiff and the third Defendant to remove the door put by them in the common passage?

17. Whether the fourth Plaintiff and the third Defendant are liable to pay damages of Rs.5000 to the Association of flat owners from the date of the counter claim to the date of removal of the encroachment?

18. Whether the 1st Defendant is entitled to the relief prayed in the counter claim?

20. The parties were invited to adduce evidence before the Court.

On the side of the Plaintiff, one witness was examined, namely, the 3rd Plaintiff, Suresh Mahtani, as PW.1 and he marked Ex.P1 to Ex.P22 during his chief examination. Ex.P1 dated 9.12.1992 is the agreement for development. Ex.P2 is the builders agreement of the 2nd and 3rd Plaintiffs dated 24.5.1993 and Ex.P3 is the builders agreement of the 4th Plaintiff dated 9.6.1993. Ex.P4 to Ex.P7 are the sale deeds in favour of the 1st, 2nd and 3rd Plaintiffs, 4th Plaintiff and the 3rd Defendant respectively. Ex.P8 is the letter by the builder dated 22.8.1995. Ex.P9 is the letter from the 1st Defendant dated 22.11.2009.

Ex.P10 is the minutes of EGM held on 22.11.2009. Ex.P1 and Ex.P12 are the copies of the complaint to the Police and receipt for the same, dated 21.1.2010. Ex.P13 and Ex.P14 are the letters to the Bank dated 21.1.2010. Ex.P15 is the copy of the legal notice dated 28.1.2010. Ex.P16 is the letter to the 1st Defendant. Ex.P17 is the ground floor plan. Ex.P18 and Ex.P22 are photographs. Ex.P20 and Ex.P21 are letters from the builders, dated 7.11.1995 and 2.9.2000 respectively.

21. During the cross examination of PW.1, Ex.D1, which is the copy of the Contempt Petition, Ex.D2, which is the letter from the 1st Plaintiff to the 1st Defendant and Ex.D3, which is the copy of the draft plan, Ex.D4 and Ex.D5, which are orders in Sub.A.No.139 of 2010 on Cont.P.No.476 of 2010, dated 18.4.2010 and 14.6.2010, were also marked.

22. On the side of the Defendants, one witness was examined as DW.1. He was Sudir Paul, a relative of the 1st Defendant. He examined himself on behalf of the 1st Defendant. Ex.D7 is the letter from the builder dated 6.12.1994. Ex.D8 is the assessment order dated 29.8.2008 and Ex.D9 is the lease deed by the 1st Defendant to the Indian Bank dated 21.1.2010. During the cross examination of DW.1, on the side of the Plaintiff, Ex.P24 and Ex.P25 were also marked. These included the photographs showing the entries and showing the parking by the Plaintiffs.

23. During the proceedings, an Advocate Commissioner had also been appointed and he was called upon to tender evidence as CW.1. The Advocate Commissioner, Azhagar Perumal alias S.A.Perumal marked his report as Ex.C1, a copy of the engineers report dated 26.6.2010 as Ex.C2 and

copies of photographs as Ex.C3 (series) and the proceedings as Ex.C4 (series). He also marked rough notes as Ex.C5 and the letter from the 1st Defendant counsel as Ex.C6 and a plan as Ex.C7.

24. A.No.7692 of 2017 has been filed by the 1st Defendant in the suit, seeking an enquiry to ascertain all the persons involved in the forgery of signatures and impersonation in the affidavits and execution petition in EP.No.20 of 2015 and in the vakalat filed in the Cont.P.No.1783 of 2014 and punish them accordingly.

25. The circumstances surrounding the filing of A.No.7692 of 2017 were that this Court had, during the hearing of the suit, directed the parties to appear before the Mediation and Conciliation Center. The Applicant, who was the 1st Defendant and the 3rd Plaintiff had appeared during the mediation process. The share of minors to be paid by the Applicant/ 1st Defendant alone was assessed. Since, according to the Plaintiff, there was a failure in payment of arrears of maintenance in accordance with the opinion given by the Mediation and Conciliation Center, EP.No.20 of 2015 had been filed. An exparte order of attachment had been passed on 15.7.2015. The Applicant had filed A.No.5517 of 2015 to raise the order of attachment. With respect to the same relief, the 3rd Plaintiff had also filed Cont.P.No.1783 of 2014. He had withdrawn the same with a liberty to file an execution petition. The execution petition was also signed by the 4th Plaintiff. As a matter of fact, the signatures of the Plaintiffs differ from the signatures as found in the vakalat. A supporting affidavit had been filed by one Ramanathan, who proclaimed himself to be the Power of Attorney of the 1st Plaintiff, but it was not signed by the said

Ramanathan, but signatures which closely resemble the signatures of the 3rd Plaintiff were affixed. It was subsequently found that the vakalat was given only by the 1st Plaintiff. A complaint dated 13.9.2015 had been given to the Honourable Chief Justice on 7.10.2015. The Registry had advised the Applicant/ 1st Defendant to file a separate application. It is under these circumstances that A.No.7692 of 2017 has been filed.

26. A counter has been filed in A.No.7692 of 2017 by the 3rd Plaintiff on behalf of the other Respondents in the application, denying the allegations. It was stated that by cut and paste method wrongly the affidavit which should have been signed by Ramanathan had been signed by the 3rd Plaintiff. It was further stated that subsequently EP.No.20 of 2015 had in fact been dismissed.

27. This Court heard the arguments advanced by Mr.P.L.Narayanan, the learned counsel for the Plaintiffs and Mr.T.V.Ramanujam, the learned senior counsel for the 1st Defendant, who alone contested the suit. The Defendants 2 and 3 did not contest the suit.

28. The learned counsel for the Plaintiffs took the Court through the pleadings and stated that the suit had been instituted by the flat owners primarily against the 1st Defendant, who was the owner of the land prior to construction of flats by the 2nd Defendant. The 1st Defendant had entered into an agreement with the 2nd Defendant. There was a clause with respect to the common room. The learned counsel has stated that the suit had been filed, seeking interim injunction against the 1st Defendant from interfering with the right, title and possession and enjoyment of the Plaintiffs as co-owners in respect of the common areas and amenities in the land, building and premises

and also for the relief of mandatory injunction, directing the 1st Defendant to restore the three rooms to its original state of affairs.

29. The learned counsel for the Plaintiffs has further stated that a perusal of the CMDA approved plan, Ex.D3 would show that there is no access from the ground floor flat of the 1st Defendant to the three common rooms. The access was only from outside the building. The lumber room, which the Plaintiffs claim is the Association room, security room and toilet room, has a wall which runs across the whole length without any access or opening between the 1st Defendant apartment and the three rooms. This has also been confirmed in the report of the Advocate Commissioner, who also took photographs. When the 2nd Defendant delivered possession, he had delivered possession without any access from the apartment of the 1st Defendant. The thickness of the wall is 9" and this itself shows that it is a outer wall and not an interior wall, which would normally be 4.5". Consequently, the learned counsel has insisted that the three rooms had not been given to the 1st Defendant.

30. The learned counsel has also pointed out that originally the lumber room, which was the indoor games cum reading room, had a window. This window was removed by the 1st Defendant and replaced with a wall. A perusal of the photographs taken by the Advocate Commissioner would show that there was originally a window and this has been reaffirmed by Ex.C2, which is the report of the Engineer. The learned counsel has also stated that the 1st Defendant had dishonestly taken over the three rooms even though he is not entitled for them.

31. As a matter of fact, there is a oil painted kolam outside the newly

plastered wall where the door was in existence. This also shows that the door was removed and the wall was built. The kolam was for the entries of the Association room. It has been further pointed out that according to Ex.P1, the 1st Defendant got a minimum super built up area of 9630 sq.ft. or 50% of the total built up area. According to the learned counsel, 2790 sq.ft. has got to be super built up area and the 1st Defendant had been delivered with such area and cannot claim extra area like the three rooms.

32. The learned counsel for the Plaintiffs further pointed out that the 2nd Defendant had delivered possession of the Association room, library cum indoor games room and security room and had handed over the keys of the rooms to the unregistered Association. They had also taken signatures of the office bearers. If the statement of the 1st Defendant is to be taken, then the 2nd Defendant should have delivered the keys to the 1st Defendant. In Ex.P8, the 2nd Defendant has not signed, but the 1st Defendant has put his signature. If the 1st Defendant disputes the signature, onus is on him to show that his signature has been forged. Ex.P21 is the corroborative letter dated 2.9.2000 and it relates to lift and it also establishes that Ex.P8 is the genuine letter.

33. The learned counsel for the Plaintiffs also stated that the Tamil Nadu Apartments Owners Act applies to the present case. The learned counsel stated that the suit as framed is perfectly in order and it was not necessary that relief of declaration should be sought and according to him, merely seeking relief of injunction would not make the suit not maintainable. The learned counsel further stated that the provisions under Order 1 Rule 8 of CPC do not apply since the suit is not in a representatives capacity. The learned counsel

further stated that Order 2 Rule 3 of CPC is not applicable to the suits filed under the Original Side Rules.

34. The learned counsel for the Plaintiffs has further stated that the counter claim filed by the 1st Defendant has to be rejected since the 1st Defendant has not entered into the witness box to prove the same. He has not established the loss and damages suffered by him. Unless the damages are proved, they cannot be awarded. The 1st Defendant should establish that the three disputed rooms belonged to him in order to maintain the counter claim. The learned counsel therefore stated that the counter claim should be dismissed.

35. In this connection, the learned counsel for the Plaintiffs has relied on **1991 1 LW 371 (Palaniammal Vs. Pechimuthu)**. That was a suit for injunction, restraining the Defendant from interfering with the Plaintiff's possession and for mandatory injunction for removal of construction made by the Defendant. Even in that case, a defence was raised that a relief of declaration was not sought. However, this Court had held that the entire plaint must be read for understanding. It has been stated that there was no necessity for the Plaintiff to seek declaration of title or recovery of possession. In the said case, on facts, it was found that the disputed property was adjacent to the suit property.

36. The learned counsel for the Plaintiffs has also relied on **1981 ILR 3 P&H 28 (Tarsem Kaur Vs. Mehall Singh)** wherein it was held that one of the co-sharers can file the suit for possession against the trespasser.

37. It has been stated that in the present case, the fact that the suit

had not been filed in a representative capacity had not been taken in the written statement and consequently, the 1st Defendant cannot raise that issue.

38. The learned counsel for the Plaintiffs has also relied on **MANU/TN/3194/2011 (K.A.Chandran Vs. Grinder Care Enterprises Limited represented by Power of Attorney and Executive Director)**, for the proposition that an application under Order 3 Rule 2 of CPC should have been filed by the Plaintiff as contended by the Defendant. In the said judgement, it was stated that Order 3 Rule 2 of CPC is not necessary when an application under Order 2 Rule 7 of the Original Side Rules had been obtained.

39. The learned senior counsel for the 1st Defendant, however, contended that the 1st Defendant was the original owner of the land, measuring 4 grounds 825 sq.ft. He had entered into a joint development agreement with the 2nd Defendant. There was an agreement to share 50% of the undivided land. The learned senior counsel has stated that the lumber room was the Association room is not based any fact or record. With respect to Ex.P8, which has been heavily relied on by the learned counsel for the Plaintiffs, it has been stated that it was not signed by the 2nd Defendant and there is no evidence to point out as to who put the date in ink and it has been further stated that the date had been fabricated to suit the document and it was stated that it was not mentioned as to when the keys were given, to whom it was given and the details about the Association room, namely, its extent and floor in which it is situated.

40. The learned senior counsel for the 1st Defendant has further stated that it is the unilateral letter and moreover, the 2nd Defendant did not

enter into the witness box to substantiate the letter. The person named therein, namely, Kumar, has also not been examined. The learned senior counsel has further stated that in the Town and Country Planning Act, FSI alone has been mentioned . The learned senior counsel has also stated that there was no commitment to construct an Association room and there was only a reading cum indoor games room. As a matter of fact, the keys were also not produced.

41. The learned senior counsel has further stated that the 3rd Defendant, who called himself as the Secretary, was not actually the Secretary at that particular point of time. He also pointed out that the storage room forms part of the ground floor and is part of the commercial area. The plan shows a lumber room and a toilet room. The learned senior counsel has further stated that the suit will lie only against the 2nd Defendant, builder since FSI was available. He also stated that there was no cause of action.

42. The learned senior counsel has further stated that there was an attempt to mediate the issues and thereafter, a contempt petition was also filed. The learned senior counsel stated that in the ground floor, there was 2671.36 sq.ft. and including the lumber room and other room, the area allotted to the 1st Defendant comes to 2790 sq.ft. The report of the Advocate Commissioner was also relied upon. The learned senior counsel has further pointed out the property tax and other records and insisted that since there was no prayer for declaration, the suit is not maintainable.

43. The learned senior counsel for the 1st Defendant has also advanced arguments in support of A.No.7692 of 2017. He pointed out the address of the 1st Plaintiff, Asha in the plaint, who was said to be represented

by a Power of Attorney Agent, S.Ramanathan. He pointed out the signatures and stated that the execution petition had not been signed by all the Plaintiffs and also pointed out the affidavit of Ramanathan, which had been actually signed by the third Plaintiff. Claiming that the 3rd Plaintiff had committed an act of forgery, the learned senior counsel insisted that this Court should forward all the relevant papers for appropriate enquiry.

44. On the other hand, the learned counsel for the Plaintiffs denied this allegation and stated that there was a genuine mistake in the 3rd Plaintiff signing the affidavit sworn by S.Ramanathan. He also stated that subsequently EP.No.20 of 2015 had been dismissed and consequently, the matter does not survive.

45. I have carefully considered the arguments of the learned counsel on either side and also perused the materials placed on record.

46. **Issues (1) and (7) to (12) in CS.No.209 of 2010:-** These issues relate to the first relief sought in the plaint, namely, permanent injunction restraining the 1st Defendant from in any manner interfering with the right, title, possession, interest and enjoyment of the Plaintiffs as co-owners, in respect of the common areas and amenities in the land, building and premises, situated at 'KG Retreat', 119, G.N.Chetty Road, T.Nagar, Chennai-17, including the Association room/ library cum indoor games room and security room situated in the ground floor of the apartment.

47. The Schedule, which has been appended to the plaint, is as follows:-

“SCHEDULE

All that piece and parcel of this land, building, and premises known as KG Retreat, bearing No.119, G.N.Chetty Road, T.Nagar, Chennai 600017, situated in Block No.109, T.S.No.8431 with sub division 3 and TS.No.8432 with sub division 2 admeasuring an extent of 4 grounds and 252 sq.ft. and bounded on the

North by : No.2,Giri Road
 South by : G.N.Chetty Road
 East by : No.120, G.N.Chetty Road
 West by : No.118, G.N.Chetty Road

including the residential apartment put up thereon along with the amenities, common areas, common facilities, etc.”

48. Very specifically, it must be mentioned that injunction is sought primarily with respect to common areas and amenities, which the Plaintiffs claim to be in possession. However, the common areas and amenities have not been specifically described. In the second half of the relief, it is stated that the Schedule included the Association room/library cum indoor games room and security room in the ground floor of the apartment. Again, it is not specifically mentioned whether the Plaintiffs are in actual possession of those rooms. This issue shall be discussed later.

49. At the outset, the Plaintiffs before the Court were four individuals, namely, Asha, wife of N.Sridhar, represented by Power of Attorney Agent, S.Ramanathan, Gobind Mahtani, Suresh Mahtani and Jamuna Maiyalagan. Even at the outset, it must be mentioned that the four Plaintiffs claim to be owners of various flats at 'KG Retreat', 119, New No.26, G.N.Chetty Road, T.Nagar, Chennai 600017. According to them, after narrating the manner in which the flats have been constructed by the 2nd Defendant, pursuant to a joint venture agreement entered into with the 1st Defendant,

possession had been handed over in the year 1994. It has been further stated that the 1st Defendant was the owner of the land. He had entered into a joint venture agreement with the 2nd Defendant on 9.12.1992. The 2nd Defendant had constructed 10 flats. It has been stated that one flat owner was not arrayed as a party since he was not heard for some time and another flat owners was not available in Chennai at the time of institution of the suit and it was held out that she would join the proceedings in due course. One of the flat owners has joined as the Defendant. This was quite strange because he happened to be the spouse of the 4th Plaintiff.

50. Even without going into the merits of the claim of the Plaintiffs, frame of the suit does not inspire confidence. The 1st Plaintiff has not produced her Power of Attorney document, which authorised her Agent to sign and verify the pleadings. In this connection, the learned counsel for the Plaintiffs has relied on MANU/TN/3194/2011, wherein it was held that if an application under Order 2 Rule 7 of the Original Side Rules had been filed and leave had been obtained, then an application under Order 3 Rule 2 of CPC to recognise the Power of Attorney Agent need not be filed. In the present case, there is no such record to show that the 1st Plaintiff had sought permission under Order 2 Rule 7 of the Original Side Rules.

51. Order 2 Rule 7 of the Original Side Rules is as follows:-

“**R7.** Except as provided for by the Code, if a plaint is subscribed and verified by a person other than the party on whose behalf it is presented, it shall not be admitted or filed, unless it is made to appear, upon affidavit, that such person is a recognised agent of the party as defined by Order III, Rule 2 of the Code, and is duly authorised and competent to do so.”

52. Even in the said provision, an agent must be recognised under

Order 3 Rule 2 of CPC. In the present case, there is no indication from a perusal of the record that the application had been filed with respect to the 1st Plaintiff, who is represented by her Power of Attorney Agent, S.Ramanathan.

53. The second aspect is that permission under Order 1 Rule 8 of CPC had not been obtained. The learned counsel for the Plaintiffs has stated that the suit is not one in a representative capacity and it is one seeking an individual right. However, it is transpired during the course of the arguments that among the four Plaintiffs, not all them are today in physical occupation or owners of the respective flats. They have been subsequent purchasers. Even in the plaint, two flat owners have been left out. They have not subsequently joined. Moreover, one of the flat owners has been shown as the Defendant. All these issues complicate the matters still further.

54. It would have been perfectly in order if an application under Order 1 Rule 8 of CPC had been filed and any person interested would have been permitted to join in the proceedings. Here, since the Plaintiffs are assuming in their individual capacity, once there has been an encumbrance or alienation made or if there has been a change in the ownership, then the right cannot automatically vest to the new purchaser unless he is added as a party to the suit. Even on that ground, the suit cannot be taken on its face value.

55. In this connection, the learned counsel for the Plaintiffs has relied on 1981 ILR 3 P&H 28 (**Tarsem Kaur Vs. Mehall Singh**). However, that suit was filed by a co-sharer as against the trespasser. It was therefore held that all the co-owners need not be impleaded as the Respondents.

56. In the present case, the Plaintiffs are not in possession of the

areas, for which they seek the reliefs. However, they seek the relief of permanent injunction. Consequently, it has to be held that permission under Order 1 Rule 8 of CPC is necessary.

57. The other issue which comes up for consideration even before going into the facts of the case is whether a bare injunction suit would lie without seeking a relief of declaration. In this connection, the learned counsel for the Plaintiffs has relied on 1991 1 LW 371 (Palaniammal Vs. Pechimuthu) . Again the facts of that case are totally different. In that case, it was found that the property was adjacent to the property of the Plaintiff therein. It was also pointed out that the Plaintiffs had approached the Court immediately after commencement of the construction, which was the commencement of encroachment. It was also found that if the construction was removed, the Plaintiff would be in possession as the property was adjacent to their admitted property and it was really part of the same.

58. In the present case, the facts are totally different. Three rooms for which the Plaintiffs claim possession are situated in one corner of the ground floor. The Plaintiffs had purchased the properties in the year 1994. In Ex.P8, which is the document under which possession was given, was dated 22.8.1995. The Plaintiffs have come to court in the year 2009. The claim of the Plaintiffs, even though cannot be considered to be barred by law of limitation, since it was not specifically pleaded, the facts are totally different from the judgement relied on by the learned counsel for the Plaintiffs. As pointed out, the disputed rooms are in the ground floor which is under the total possession of the 1st Defendant. Therefore, I hold that the suit as framed without obtaining

permission under Order 3 Rule 2 of CPC or Order 2 Rule 7 of the Original Side Rules or Order 1 Rule 8 of CPC and without seeking a relief of declaration, is not maintainable.

59. It is the contention of the learned counsel for the Plaintiffs that these contentions were not raised in the written statement. However, the Court has an inherent right to examine the plaint as to the maintainability and whether it conforms with the rules regarding the procedure for the frame of the plaint.

60. Irrespective of the above, examination of the facts reveals the following:-

- a) The 1st Defendant was the owner of the land over which the present flats had been constructed.
- b) The 1st Defendant had entered into a joint venture agreement with the 2nd Defendant and there was an agreement to share the constructed area in the ratio of 50:50.
- c) The 2nd Defendant had agreed to allot 50% of the constructed area to the 1st Defendant.
- d) The 1st Plaintiff had purchased an undivided 8.79% share of the land of 9852 sq.ft. by a sale deed dated 10.6.2002.
- e) The 2nd and 3rd Plaintiff had purchased an undivided 14.89% share of 50% of the land under the sale deed dated 21.1.1994.
- f) The 4th Plaintiff had purchased an undivided 7.64% share of the land by a sale deed dated 14.6.1993.
- g) The 1st Defendant after construction had handed over possession by way of Ex.P8. This was dated 22.8.1995. However, the 1st Defendant disputes his signature in Ex.P8.

61. Ex.P8 is as follows:-

“ This is to confirm that you have received the keys of the Association Room/Library cum Indoor Games Room, in full and final settlement. You have received from us Cheque

No.022598 on Global Trust Bank, Madras 00004 for Rs.18,762/- (Rupees Eighteen Thousand Seven Hundred and Sixty Two only) towards maintenance as per the statement enclosed and the maintenance accounts stand closed.

All bills for common areas pertaining to the period upto 31.8.1995 will be paid by us even if received late and bills for the period from 1.9.1995 onwards will be paid by you.

We hope 'KG RETREAT' will be one of the best maintained buildings in Madras under your supervision.

With best wishes,

Yours faithfully

Confirmed the above
for KG RETREAT OWNERS' ASSOCIATION
(SECRETARY/TREASURER)."

62. It has been very seriously pointed out by the learned counsel for the Plaintiffs that the Association Room/Library cum Indoor Games room have not been specifically described in Ex.P8. It is not mentioned as to in which floor they situated and the area of the said rooms.

63. On the other hand, the 1st Defendant has very specifically stated that he was allotted 2790 sq.ft. of built up area. In the ground floor, he has 2790 sq.ft. He has let it for rent. He has further specifically stated that the Plaintiffs do not have any right over the ground floor. In this connection, the 3rd Plaintiff was examined as PW.1. As stated above, the fact that the other Plaintiffs are today in occupation is a question. It has not been properly mentioned by the Plaintiffs. In his cross examination, PW.1 has stated that "I became Secretary in or about October or November in the year 2009" . Ex.P8 was of the year 1995 or in the year 1995, the 3rd Plaintiff, who was PW.2, was

not the Secretary. However, he had signed Ex.P8 as if he was the Secretary of the Association. As a matter of fact, at that particular date, Association was not even registered. During the cross examination, PW.1 had further admitted that “other owners of the flats in the said apartment have not joined in the present suit. The witness adds: some of the owners have joined in the suit and other did not join.” However, the suit had not been framed under Order 1 Rule 8 of CPC to overcome this issue.

64. PW.1 has further admitted during the cross examination that “As per Ex.P1, the 2nd Defendant has handed over 9630 sq.ft. of super built up area to the 1st Defendant.” He has further stated to a specific question as to the area covered under the ground floor that “2790 sq.ft. of super built up area of the ground floor is allotted to the 1st Defendant by the 2nd Defendant.” With respect to a specific question whether there was an Association room mentioned in Ex.P17, the witness answered: “It is mentioned in a different name. I am not able to recollect now as to what is the name given in the approved plan for Association room mentioned in Ex.P17. Further, he had deposed as follows:-

“Q: I put it to you that place shown in the Association room in Ex.P17 is mentioned as lumber room in approved plan?

A: I think so.

Q: Definitely it is not mentioned as Association room in approved plan?

A: I do not think so.

Q: I put it to you that in the approved plan, the portion shown as Association room in Ex.P17 is only mentioned as lumber room in the approved plan and therefore you have not filed the

approved plan and Ex.P17 is created for the purpose of this case?

A: It is not true.”

65. This Court also had the benefit of appointment of an Advocate Commissioner. The Advocate Commissioner had also filed a report along with photographs. The Commissioner had given the physical features. He had specifically stated that the Indian Bank is a tenant in the ground floor premises. The strong room is under construction. This is claimed by the Plaintiffs as Association room. He has also filed a sketch and photographs. These have been relied on by the learned counsel on either side. However, it is clear that if at all the case of the Plaintiff is to be accepted and if it is to be held that the 1st Defendant is in possession of the larger area than what he is entitled to, then the Plaintiffs have to seek relief only against the 2nd Defendant. For the strange reasons, they have not pursued the case against the 2nd Defendant, but have concentrated on the 1st Defendant.

66. It has come out that the 1st Defendant is quite aged person, who has also filed a counter claim primarily against the suit as it is not maintainable and since all the flat owners have not joined in the proceedings, individual right cannot be granted. In these circumstances, issue (1) is answered against the Plaintiffs since they have not sought any relief of declaration.

67. Issue (7) is also answered against the Plaintiffs since all the flat owners have not joined seeking the relief and Issue (8) is also answered against the Plaintiffs since they have specifically not given common area in the Schedule. With respect to issues (9) and (10), I hold that the Plaintiffs have not

proved that they have used the disputed room measuring 198 sq.ft. at any point of time and it does come under the common area and it comes under the area allotted to the 1st Defendant.

68. **With respect to issue (11) in CS.No.209 of 2010**, the suit for bare injunction without seeking declaration of title is not maintainable and the judgement relied on by the learned counsel for the Plaintiffs in **1991 1 LW 371 (Palaniammal Vs. Pechimuthu)** is not applicable to the facts of the present case.

69. **With respect to issue (12) in CS.No.209 of 2010**, I hold that the bare injunction suit is not maintainable since admittedly the Plaintiffs are not in possession and it is the Indian Bank which is in possession of the disputed area and the Indian Bank is in possession pursuant to the lease deed by the 1st Defendant.

70. **Issues (13), (16) and (17) in CS.No.209 of 2010:-** There is no evidence on these issues with respect to whether the 4th Plaintiff and the 3rd Defendant have encroached the common area approximately 50 feet of passage in the third floor by combining their flats. Neither the Plaintiffs nor the 1st Defendant has let in any positive evidence with respect to the same. Consequently, these issues are also answered against the Plaintiffs and there can be no relief granted with respect to the said issues.

71. **Issue (2) in CS.No.209 of 2010:-** It is made clear that the Plaintiffs have not made out any case for seeking permanent injunction against the 1st Defendant. Consequently, I hold that the 1st Defendant is in possession of the disputed area in his own right as owner. Consequently, there cannot be

any mandatory injunction granted against the 1st Defendant to demolish or restore the Association room. There is Association room in the ground floor and this issue is answered against the Plaintiffs.

72. **Issues (3), (4) and (18) in CS.No.209 of 2010:-** These issues surround the grant of counter claim to the 1st Defendant. However, the 1st Defendant had not thought it fit to enter into the witness box to prove the counter claim. DW.1 is an Agent by name, Sudhir Paul and for claim of damages which is a personal right, the party has to enter into the witness box and give evidence. Since the 1st Defendant had chosen not to enter into the witness box, he is also not entitled to counter claim. Accordingly, these issues are answered against the 1st Defendant.

73. **Issue (5) in CS.No.209 of 2010:-** The suit has to be dismissed with the costs of the 1st Defendant.

74. **Issue (6) in CS.No.209 of 2010:-** The counter claim of the 1st Defendant has to be dismissed without costs.

75. With respect to A.No.7692 of 2017, it is a fact that the papers containing wrong signatures had been filed before the Court. The 3rd Plaintiff has explained it that he had mistakenly signed the affidavit sworn by S.Ramanathan. It is also seen that EP.No.20 of 2015, in fact, had been dismissed. This Court had found that the conduct of the 3rd Plaintiff cannot

C.V.KARTHIKEYAN, J.

Srcm

stand scrutiny and consequently, had dismissed the suit, with costs of the 1st

Defendant. An explanation has been given by the learned counsel for the Plaintiffs that it was a genuine mistake and the affidavit of the Power Agent was mistakenly signed by the 3rd Plaintiff. It was stated that it was a mistake carried out in the Office of the Advocate. With respect to the signatures, again the filing procedure goes through the Office of the Advocate. Since an explanation has been given regarding the bona fide mistake and simultaneous lack of mala fide, I feel that it would only be appropriate that the issues are not taken forward and therefore, the application is to be dismissed.

76. In the result, this civil suit in CS.No.209 of 2010 is dismissed with the costs of the 1st Defendant. The counter claim of the 1st Defendant in CS.No.209 of 2010 is also dismissed, without costs. A.No.7692 of 2015 is dismissed, without costs.

13.02.2018

Index:Yes/No
Web:Yes/No
Speaking/Non Speaking
Srcm

Note to Office:-

Issue on 19.02.2018

To:

1. The Record Keeper, VR Section, High Court, Madras

Pre-Delivery Judgement in
CS.No.209 of 2010
A.No.7692 of 2017