

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
06~02~2019	15~02~2019

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

S.A.Nos.218 and 219 of 2008
and M.P.Nos.1 and 1 of 2008

S.A.No.218 of 2008

Namakkal House Building Society No.943
Rep.by its Secretary
Mohanur Road, Namakkal

... Appellant/2nd Respondent/
3rd Defendant

Vs

1.Dr.M.Mallika

2.K.Saravana Rajamanickam

...Respondents 1&2/Appellants 1&2/
Plaintiffs 1 & 2

3.Namakkal Municipality
Rep. by its Commissioner,
Paramathy Road,
Namakkal.

...Respondent 3/Respondent 1/
Defendant 1

S.A.No.219 of 2008

No.943 Namakkal House Building Society
Rep.by its Secretary
Mohanur Road, Namakkal

...Appellant/2nd Respondent/
3rd Defendant

Vs

1.Dr.M.Mallika

2.K.Saravana Rajamanickam

..Respondents 1&2/Appellants 1 & 2/
Plaintiffs 1 & 2

3.District Collector
Namakkal,
Namakkal.

..Respondent 3/Respondent 1/Defendant 1

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Second Appeal No.218 of 2008 filed under Section 100 C.P.C. against the Judgment and Decree dated 29.09.2006 in A.S.No.34 of 2002 on the file of Subordinate Judge, Namakkal, reversing the Judgment and decree dated 30.01.2002 in O.S.No.38 of 2000 on the file of the Additional District Munsif, Namakkal.

Second Appeal No.219 2008 filed under Section 100 C.P.C. against the Judgment and Decree dated 29.09.2006 in A.S.No.34 of 2002 on the file of Subordinate Judge, Namakkal, reversing the Judgment and decree dated 30.01.2002 in O.S.No.428 of 2000 on the file of the Additional District Munsif, Namakkal.

For Appellant ... Mr.C.R.Prasanan
In both appeals

For Respondents ... Mr.T. Dhanyakumar for R1 & R2
In both appeals

... Mr.N. Manoharan for R3
in S.A.No.218/2008

No appearance for R3
in S.A.No.219/2008

COMMON JUDGMENT

Aggrieved over the Judgments and decree of the First Appellate Court in reversing the judgments and decree of Trial Court dismissing the suits, the present Appeals came to be filed.

2. Since the issues are same and the parties are one and same except one Defendant, this Court is decided to dispose of both the Second Appeals in a Common Judgment.

3. For the sake of convenience, the parties are arrayed as per their own ranking before the trial Court.

4. The Plaintiffs in both the suits are one and the same. Subject matter of the both the suits are one and the same. The Plaintiff filed two suits before the Additional District Munsif Court, Namakkal. One in O.S.No.38 of 2000 and another is O.S.No.428 of 2000. Suit in O.S.No.38 of 2000 has been laid against the Namakkal Municipality represented by its Commissioner (D1) and Namakkal Co-operative House Building Society(D2). Suit in O.S.No.428 of 2000 was laid against the Government of Tamilnadu represented by District Collector, Namakkal(D1) and one Mr.Velusami(D2). During the pendency of

the suit, the Namakkal Co-operative Society impleaded themselves as one of the Defendants(D3) and both the suits were filed for Declaration and Permanent Injunction restraining the Defendants 1 and 2 in both the suits not to deal with the suit property.

5. It is the case of the Plaintiffs in both the suits that originally Namakkal Co-operative House Building Society has formed layout and sold various sites to its members. The suit item are two sites covered under the said layout formed by the Namakkal House Building Society. First item of the suit property was sold to one Mr.S.Rajagopal on 16.06.1953 and the second item was sold to one Mr.N.Srinivasan on 11.3.1953. The first item was purchased by the First Plaintiff from the legal heirs of Mr.S.Rajagopal and the second item was purchased by the Second Plaintiff from the legal heirs of Mr.N. Srinivasan. While forming the lay out, the House Building Society not only divided the plots but also roads set apart for access and use of the plot owners apart from sites set apart Park, School, Shops etc., The open space existing between item No.1 and 2 was set apart as North-South 40 feet Road portion branching from 50 feet wide East-West Main Road. The 40 feet road has shown clearly as one of the boundaries for the suit properties with a right of access to that road granted for the two items of suit properties i.e., for Item-1 from the West and for Item-2 from the East. The vendors of the Plaintiffs had put up opening on their respective walls abutting 40 feet road to have direct access from their place into the said 40 feet road. Such a road has been conferred to assess into 40 feet road portion which is the subject matter of the suit. The Plaintiff is not aware whether the open space was vested with the Second Defendant. The Second Defendant put up a barbed wire fence in October 1998. The Plaintiffs are living about a furlong away from the suit locality keeping the suit properties unoccupied by themselves. Taking advantage of that the Second Defendant committed the said mischief. Hence, legal notice was issued for removal of the barbed fence. However, no reply was sent by them. Hence, suit filed for injunction restraining the Defendants in O.S.No.38 of 2008 from committing any act of transfer of the suit road portion and also for mandatory injunction for removal of the barbed wire fencing.

6. In the suit filed in O.S.No.428 of 2000, it is the contention of the Plaintiffs that the Co-operative House Banking Society has filed written statement in O.S.No.38 of 2000 contending that the suit property was not vested with the municipality, whereas the First Defendant has taken a defence that the road has classified as Puramboke land. Hence sought for declaration against the Defendants 1 and 2 that they have no right or interest in the suit property.

7. It is the contention of the First Defendant, viz., the Government of Tamilnadu in O.S.No.428 of 2000 that each and every lay out formed by the Housing Society and access have been given in the front side of each lay out and no right was given sideway. The same is also shown in all the plans. Only southern portion road measuring 100 feet width from East west was given to the site owners. The suit property was classified as Government Puramboke land in the year 1960 and 4628 sq.ft. has been sub-divided separately in T.S.No.21 Block No.28, since same has not been used as road at any point of time. Thereafter the above land has been allotted for construction of M.L.A. Office after obtained no objection from the municipality. Necessary funds also allotted for construction of M.L.A. Office. Hence, prayed for dismissal of the suit.

8. The Second Defendant has also contended that the suit property was never given to the site owners. The Third Defendant in O.S.No.428 of 2000 is the Appellant herein. It is the contention of the Third Defendant /House Building Society that both the suit properties, at the time of forming of lay out shown as road. From the year 1953 onwards the same has not been used as a road and the suit property continuous to be in possession of the Third Defendant. Suit property vested with neither the Government nor the Municipality. It is further contention of the Third Defendant that the Government has no right to classify the suit property as puramboke land as the property never vested with them. Hence, it is the contention of the learned counsel for the Third Defendant that they are absolute owner of the property.

9. In O.S.No.38 of 2000 the First Defendant viz., the Municipality has filed written statement to the effect that since the property has classified as Government property they were given no objection to the Government for allowing the above property for construction of the M.L.A.Office. Since the Government has not made as a party in the above suit, the suit is not maintainable. The suit property is not a road it is only vacant space. Based on the above pleadings the trial of the two suits were taken separately.

10. In O.S.No.38 of 2000 the following issues have been framed:

1. Is it true that the Second Defendant has no right over the suit property?

2. Whether the plaintiffs have any right over the suit property?

3. Whether the plaintiff is entitled for mandatory injunction as prayed for?

4. Whether the suit property is Government Puramboke land as stated by the 1st Defendant?

5. Whether the Plaintiffs are entitled to the reliefs as prayed in the plaint?

6. To what relief the Plaintiffs are entitled for?

7. Whether the suit is bad for non-joinder of necessary parties?

11. In O.S.No.428 of 2000, the following issues have been framed:

1. Whether the Defendants have no right in the suit property situate in between Item Nos.1 and 2 and the Plaintiffs are entitled for permanent injunction?

2. Since the suit property has not been vested with the Municipality, whether the Defendants 1 and 2 are the real owners of the property and whether the Government has no right in classifying the same as Puramboke land?

3. Whether the suit is bad for non-joinder of Namakkal Municipality?

4. Whether the contention of the First Defendant that the right to assess given on the western side to Item No.1 and Eastern side to Item No.2 is true?

5. Whether the First Defendant is the owner of the suit property?

6. To what relief the plaintiffs are entitled to?

12. In O.S.No.428 of 2000 one Mr.Kuzhandaivel was examined as P.W.1 and Exs.P.1 to P.10 marked. On the side of the Defendants D.Ws.1 to 3 were examined and Exs.D1 to D10 were marked. Commissioners' Report, Sketch are made as Exs.C.1 to C4. In O.S.No.38 of 2000 said Mr.Kuzhandaivel was examined as P.W.1. and Exs.P.1 to P.8 marked. On the side of the Defendants D.W.1 and D.W.2 were examined and Exs.D1 to D8 marked. Commissioner's Report and Commissioner's sketch were marked as Exs.C.1 and C.2.

13. Though both the suits were tried independently, documents and evidence are one and the same and the issues involved are also one and the same. The trial Court dismissed both the suits filed by the Plaintiffs. First Appellate Court reversed the findings of the trial Court and granted permanent injunction in O.S.No.38 of 2000 and granted Declaration and Permanent Injunction against 1st Defendant viz., the Government of Tamil Nadu. The Government of Tamil Nadu has not filed any appeal challenging the finding rendered by the First Appellate Court. Only the Appellant was impleaded as one of the respondents, has filed second appeal challenging the decree and judgments. It is curious to note that in O.S.No.428 of 2000 no relief whatsoever sought against the Appellant herein. Despite Appellant was brought on record as one of the Defendants, Plaintiffs have confined relief only against the Government of Tamilnadu, First Defendant in O.S.No.428 of 2000. Whereas the First Appellate Court granted a decree in favour of the plaintiff as prayed for. Virtually there was no executable decree as against the Appellant. However, the finding recorded by the First Appellate Court is challenged in this appeal.

14. As far as O.S.No.38 of 2000 is concerned, the First Appellate court not only granted injunction against the appellant but also against the First Defendant Municipality. While admitting the Second Appeal in S.A.No.218 of 2008, which arose against the decree and judgment in A.S.No.34 of 2002 in O.S.No.38 of 2000, the following substantial questions of law have been framed:

1. Whether in law the lower Appellate Court erred in reversing the Judgment of the trial Court and by granting a decree for permanent injunction restraining alienation, without even framing an issue with regard to the Plaintiff's alleged user and right to the suit property and by rendering a finding in non-compliance of Order 41 Rule 31 of C.P.C.

2. Whether in law the Lower Appellate Court erred in presuming the suit property as pathway to be used in common, when admittedly the right of suit property is not annexed to the ownership of the property purchased by the Plaintiff coupled with the factum of non-pleading of the character of right to the suit property either as easement by prescription or necessity or as joint owner?

15. Similarly, in S.A.No.219 of 2008 filed against the findings of the First Appellate Court in A.S.No.35 of 2002 in O.S.No.428 of 2000, the following substantial question of law has been framed:

"1. Whether in law the lower Appellate Court erred in reversing the judgment of the trial Court and by granting a decree for declaration and for injunction restraining the first defendant from interfering with possession of the plaintiffs, without even framing an issue with regard to the plaintiff's alleged user and possession and without even a finding whether the plaintiff is in possession of the same, in non-compliance of Order 41, Rule 31 of C.P.C."

16. The learned counsel appearing for the Appellant would submit that though the decree in O.S.No.428 of 2000 is against the Government, the Government has not challenged the findings. Whereas the appellants who is the owner of the sites, their right has been affected, who is also party to the suit, challenged the findings. The trial Court and First Appellate Court have factually found that the suit property is about 4628 sq.ft. is never used as road and the courts also found that as per the approved plan, the suit property was never vested with the Municipality nor Government for laying roads. When the First Appellate Court found that the suit property never vested with the Government nor Municipality, failed to consider the fact that House Building Society is continuous to be the owner of the property. Merely because the suit property was shown as road in one of the boundaries of the property before 1953, it cannot be concluded that the suit property was set apart as a road for the benefit of the members of the society. In fact the evidence clearly established on record that the suit property was never used as road by any of the members who have purchased the plots from the Society and further, the suit property cannot be connected to any other area of the Society. It is also established not only by the oral evidence of the Plaintiffs and Defendant and also by the Commissioner's Report. Hence submitted that when the properties have not been vested with the Government for laying road nor left for use by the members who have purchased various plots, that property cannot be termed as property set apart for public purpose. It is also established on record that except the Plaintiffs no other can use the property in the lay out. The First Appellate Court having recorded the finding, ought not to have granted injunction against the Appellant in A.S.No.35 of 2002. Hence submitted that the judgment of the First Appellate Court is not based on proper appreciation of evidence and also against the well settled law. In fact, separate road were formed, all the plot owners for

given access to the road from the front side of their respective plots. Hence, submitted that the finding of the First Appellate Court against the Appellant is certainly liable to be interfered.

17. Learned counsel appearing for the Respondent submitted that suit property was shown as one of the boundaries of Plaintiffs property, wherein it is clearly shown as road. Once road was set apart for the purpose of enjoyment of the members. The property never remains with the Society. Therefore, it is the contention of the learned counsel for the respondent that the First Appellate Court has rightly come to the conclusion that only with the concurrence of the other members of the lay out the appellant can deal with the property. Therefore, the First Appellate Court has rightly granted injunction against the Appellant. Hence the judgment of the First Appellate Court does not require and interference.

18. I have perused the entire materials. From the materials it can be seen that the suit property and other properties originally acquired by the Government and handed over to the Appellant Society. The Appellant Society has formed various layouts and sold the plots to various members. This fact is not in dispute. Item No.1 of the suit property was sold on 16.6.1953 to one Mr.Rajagopala Iyer and Item No.2 of the suit property was sold on 11.3.1953 to one Mr.Srinivasan. In the above sale deeds, sale deed dated 16.6.1953 was marked as Ex.A.7 in O.S.No.428 of 2000. No doubt the suit property shown as one of the boundaries in the above sale deed, as a road. It is curious to note that layout was approved in the year 1972. Ex.B9 approved plan filed in O.S.No.428 of 2000 clearly indicate that except the suit properties other properties shown and formed as roads were vested with the Namakkal Municipality. Thereafter, Namakkal Municipality has laid road and maintaining the same. From Ex.B.9 it is made clear that the suit properties were never vested with the Municipality nor with the Government by the Appellant. This fact has been factually recorded by the Courts below that the lands never intended to be used as roads nor vested with the Municipality. Merely because at the time of sale of the property in the year 1953 it shown as road in one of the boundaries of the sale deed, it is highly improbable to contend that the property is also set apart for the use of road. It is curious to note that it is the case of the Appellant though it was shown as road originally it never used as road in the year 1953 onwards.

19. The evidence of the parties clearly established that the northern portion of the suit property one school was constructed and third parties also built houses. The suit properties cannot be connected to any other existing roads in the lay out. The plaintiffs have also accepted the above facts in their evidence.

P.W.1 husband of the First Plaintiff has admitted this fact. The First Appellate Court has recorded a categorical finding that the suit property cannot be used as road at the present situation. However, come to the conclusion that since the property was shown as road the Appellant cannot claim any right over the property. It is also to be noted that specific findings also recorded by the Courts below to the effect that except Plaintiffs 1 and 2 no other member could use the suit property for any other purpose and no benefit would enure to the other members of the Appellant. The First Appellate Court also recorded the finding to the effect that the property could be used for some other purpose with the consent of all the members. It is to be noted that admittedly the suit properties have not vested with the Municipality for laying roads. Merely it is shown as road. Thereafter, it is never used as a road. Northern road completely blocked by the construction of school and buildings. It cannot be said that the suit properties also earmarked for the use of road. It is not the case of the Plaintiffs that except the suit properties they have not provided any road in the lay out. It is to be noted that the Plaintiffs are the subsequent purchasers. They have purchased the land only in the year 1988. This fact is not in dispute. Every part has connected with the well laid roads in the layout, which is also not in dispute. P.W.1 has also admitted that in front of his house there is a road connected with layout road and Gandhi Nagar. There were many roads connected to his house and he has also admitted that this road is not used by any of the members.

20. The report of the Commissioner clearly indicate that the suit property was covered with lot of bushes and tress it never used by anybody. Therefore, the suit property cannot be connected in view of the buildings erected other side of the property which is northern side and P.W.1 also admitted in his evidence that at the time of laying the original road in the layout there were no entries on the western side and eastern side and other members never used the suit property. This also established before the trial Court. Therefore, merely because at the time of sale of plots in the suit field the suit property as shown as road when the same is not vested with any Government authorities for laying of the road, the same coupled with the fact that the suit property has completely blocked other side and surrounded by bushes and trees more than 18 feet height probabalise the Appellant's case that the suit property never intended to be set apart as a road. The suit property is more than 4600 sq.ft., it cannot be used by any other member except the Plaintiffs. It is not the case of the Plaintiffs that they were not given access to the respective plots. There are well laid roads available in the entire colony. This fact is clearly admitted by the Plaintiff.

21. Therefore, merely because some reference in the document at the time of sale of some sites as to the character of the property, that cannot be a ground to hold that the property was reserved for members in general. Only the property set apart for open space, park, school campus or road etc., then it can be said that is ear marked for public purposes, then the owner of the land ceases to be owner and the property left for the public in general. Namakkal Municipality in this case categorically admitted that the suit property never vested with them. Ex.B.9 approved plan of layout also established the above fact. When the land is not vested with the Municipality for any public purpose, this court is of the view that merely the land continues to be the vacant land and shown as road at the time of earlier sale in the year 1953 the Plaintiff can not take advantage of the same to use the entire 4658 sq.ft. which is situated in the prime locality.

22. Admittedly, the entire lands originally acquired by the Government were handed over to the Appellant Society. This being the position, in the absence of any evidence to show that the vacant land was set apart for any public purpose, it cannot be said that the appellant has no right over the suit land. The Plaintiffs cannot take advantage of the description in the boundaries in the sale deed, to claim title or use of the property of the Appellant. Therefore, when the title of the property still remains with the Appellant, the First Appellate Court granting injunction against the Appellant, who are the real owners, not to deal with the properties, cannot be sustained in the eye of law. The same is required to be interfered. Accordingly the question of law is answered in favour of the Appellant and the appeal filed by the Appellant In S.A.No.218 of 2008 as against the finding of the First Appellate Court in A.S.No.34 of 2002 is allowed and the Judgment of the trial Court dismissing the suit alone restored.

23. As far as the Second Appeal in S.A.No.219 of 2008 filed against the finding of the First Appellate Court is concerned, the First Appellate Court in A.S.No.35 of 2002 reverse the finding of the trial court dismissing the suit which is filed for declaration against the Government of Tamil Nadu and one Mr.Velusamy, the Second Defendant in the suit and also for consequential injunction. The First Appellate Court negatived the defence of the Government of Tamil Nadu that the land is classified as Puramboke Land. The First Appellate Court took note of the fact that there is no evidence to show that the land is vested with the Government to classify as Puramboke land. Hence, the proceedings of the Government classifying the land as Government land is set aside and held that the Government has no right in the suit property. Having found that the Government has no right in the suit property, the First Appellate Court has

also found that the suit property is now not used as road or path and has also held that all the members of the Appellant Society cannot use the suit property as path or road. Only the plaintiff alone can use the suit property and observed that the Appellant with the permission of other members can use the suit property for some other purpose. Having held so, the finding of the trial Court was reversed by the First Appellate Court. It is to be noted that O.S.No.428 of 2000 originally filed against the Government of Tamil Nadu and one Mr.Velusamy. The relief is sought only against First and Second Defendants and not against the Appellant. Despite the Appellant/House Building Society was impleaded in the above suit no relief was sought against the Plaintiffs. Since the road is not vested with the Government, the above appeal is also not challenged by the Government of Tamilnadu. The findings of the First Appellate Court granting declaration and injunction against the Government of Tamilnadu stand confirmed. However as discussed above, the appellant continues to be the owner of the property. There cannot be any injunction against them. With the above observation S.A.No.219 of 2008 is disposed of.

24. In the result, S.A.No.218 of 2008 is allowed and S.A.No.219 of 2008 is disposed of. Connected M.Ps. are closed. No costs.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

ggs.

To

- 1) The Subordinate Judge,
Namakkal.
- 2) The Additional District Munsif,
Namakkal.

+2 ccs to M/s.C.R.Prasanan, Advocate, S.R.No.14298, 14299

+2 ccs to M/s.T.Dhanyakumar, Advocate, S.R.No.14325, 14328

S.A.Nos.218 and 219 of 2008

GJ-II(CO)
SSM(17/10/2019)
SSM(08/11/2019)