

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.08.2019

Pronounced on : 05.06.2020

CORAM: THE HON'BLE Mr. JUSTICE N.SESHASAYEE

S.A.No.1651 of 2004

1.Pedhu Konar
2.Rava Mani

...Appellants / Appellants / Plaintiffs

Vs.

1.Jagadeesan
2.Ramasamy
3.Kumarasamy
4.Uma
5.Pavunambal
6.Ranjitham
7.Poovambal
8.Vasanthi
9.Lakshmi
10.Ravindran
11.Balasubramanian
12.Somu
13.Soundararajan
14.Chelladurai
15.Sekhar
16.Varadarajan
17.Paruthimar Kalainjan
18.Rasagopal
19.Kandasamy
20.Pachamuthu
21.Purushothaman
22.The Commissioner, Virudhachalam Panchayat,
Virudhachalam.

...Respondents/Respondents /

Defendants 1 to 13, 15 to 22, 24

Prayer:- Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 26-3-2003 made in A.S.No.42 of 2002 on the file of the Court of the Principal Subordinate Judge, Virudhachalam, confirmed the Judgment and decree dated 15-2-2002 in O.S.No.1082 of 1991 on the file of the Court of the Principal District Munsif, Virudhachalam.

For Appellants : Mr.S.V.Jayaraman, Senior Advocate
Asst. by Mr.R.Agilesh

For Respondents : Mr.V.Anand for RR2,3,5,6,7,10 to 20
RR9,10,19 & 21 - Given up
R8-Notice dispensed with Vide Court
Order dt.18/01/2019
R4 – No Appearance

JUDGMENT

The plaintiffs who had lost successively both before the trial Court and the first Appellate Court in their suit for declaration that earmarking of the suit properties which they had purchased as common area in the layout approved as LPTP 29/1974 by the Deputy Director of Town & Country Planning is void, are the appellants herein. Parties would be referred to by their rank before the trial court.

2.1 The brief facts as disclosed by the plaint are:

- Certain Venugopal Naidu possessed properties in Sy.No. 217/5 and 218/5. In this case, this Court is concerned with the properties in Sy.No.218/5 measuring 1.15 acres. Venugopal Naidu died sometime in 1964, and he left behind him surviving his second wife Kanthammal and his two sons, Sanjivi Naidu and Ramachandra Naidu who were born to him through his first wife. On the demise of Venugopal Naidu, his widow and sons succeeded to his estate.
- While so, Kanthammal, Sanjivi Naidu and Ramachandra Naidu developed the property into a layout and this according to the plaint is said to have taken place sometime in 1973.
- While so, on 01.03.1973, under Ext.A.1, sale deed executed by Kanthammal and her co-sharers, the first plaintiff had purchased 5 cents. This plot is described as A schedule property in the plaint. Sometime in 1986, authorities were approached for approving the layout. Thereafter,

on 13.01.1992 under Ext.A.40, sale deed, the first plaintiff purchased 3 cents which is described in plaint as B schedule, and the second plaintiff had purchased 5 cents under Ext.A.46, dated 13.01.1992 and this plot is described in C schedule.

- While so, the plaintiffs faced resistance to their peaceful possession of their respective plots scheduled to in the plaint from the residents of the other plots on the score that in the approved layout, all the three items of suit properties were earmarked for common public utility such as for the use as playground, park and for putting up some shops. Therefore, the plaintiffs have come forward with the present suit for a declaration that notifying the suit properties in the approved layout as common public utility area as bad, and have also sought for a consequential injunction.

2.2 There are as many as 25 defendants, of whom, many are residents of various plots which they purchased after the layout was approved. In the written statement of the first defendant (adopted by defendants 4,6, 9 to 12, 14, 16, 19 and 20) it was contended that :

- The entire property is within Sy.Nos. 217/5 and 218/5 and they include the suit properties. They were developed into a layout and was approved by the Deputy Director, Town and Country Planning, Salem-Cuddalore Division in LPTP 29/1974, and that of the 24th defendant, the Municipality in 9268/1974, the suit properties were earmarked for common utility area, that the layout-road have all been surrendered to the Municipality for their maintenance and upkeep. This apart, a writ petition in W.P.1078/1992 has been laid on the same issue against the 24th defendant, the Municipality, and the same is pending.
- The 24th defendant-the Municipality did not file any written statement. The 25th defendant/the Tahasildar had filed his written statement, which in the context of the cause of action is inconsequential.
- In the replication filed by the plaintiffs, it is asserted that the approval for the layout was granted only to S.No:217/5 and the layout does not include S.No:218/5.

3.The trial Court dismissed the suit in entirety. The plaintiffs preferred first appeal in A.S.No.42 of 2002 before Principal Subordinate Judge, Virudhachalam. The first Appellate Court had entered a finding that the sale under Ext.A.1 was long prior to the approval of the layout and upheld the sale. However, it dismissed the suit as concerning A schedule property on the ground that the first plaintiff has not chosen to seek a declaration of his title when his title was threatened by the action of the Authorities. So far as B and C schedule properties are concerned, the first Appellate Court confirmed the decree of the trial Court. The plaintiffs therefore have preferred this second appeal.

4.The appeal is admitted to consider the following substantial question of law:

Whether the judgments and decrees of the courts below are sustainable in law, as the entire evidence which is relevant to decide the issue and the relevant question of law applicable to the facts of the case were not taken into consideration?

5. There was a preliminary objection from the counsel for the respondents. He submitted that the defendants 2, 7, 12, 14 and 18, all of who are purchasers of

various plots in the approved layout, have died but, their legal representatives were not brought on record and hence the appeal itself is abated because the cause of action is indivisible. In other words, he raised an issue on the maintainability of the very appeal.

6. This can be instantly addressed. There are two major reliefs, of which one is for declaration to declare that earmarking the suit properties as a public utility area such as park etc. in the approved layout is void. The other relief is for permanent injunction against the the various residents of the plots. Indisputably, the defendants who are dead are residents, and the relief of injunction is directed against them. Inasmuch as injunction relief is a remedy *in personam*, it dies with the person who posed a threat to plaintiffs' right, unless the threat perception continued with the legal representatives of such deceased defendants. And, the fact that a defendant against whom a relief of injunction is sought has died, will not take away the relevance of the declaratory relief sought, as the two reliefs are primarily independent. Therefore, the appeal passes the test and can be heard.

7. Turning to the merit, the learned counsel for the appellants submitted that as admitted, the first plaintiff had purchased the A schedule property on 01.03.1973, which is about 13 years prior to the time when the application seeking approval was made in 1986. Whatever that was done was behind the back of the plaintiffs, and a duty is cast on the Authority concerned to ascertain the facts placed before them. The title which was vested in the first plaintiff under Ext.A.1 cannot be divested by administrative act of approving a layout, and it cannot happen without the concurrence of the title holder. So far as B and C schedule properties are concerned, they are said to have been purchased under Ext.A.40 and Ext.A.46, post the approval of the layout. However, no documents have been filed to indicate that approval has been so granted in 1986. Here, it may be mentioned that the plaintiffs have filed Ext.A.41, communication addressed to Kanthammal, one of the promoters of the layout, by the Commissioner of Municipality. This communication is dated 03.02.1992, wherein the Commissioner has requested Kanthammal to deliver vacant possession of the suit properties. This implies, till 1992 no gift deed had been executed nor the properties were handed over to the Municipality.

Therefore, till the gift deed is executed and possession is formally handed over, plaintiffs' possession cannot be disturbed.

8. Per contra, the learned counsel appearing for some of the defendants/purchasers of plots in the approved layout would argue that;

- So far as Ext.A.1 sale deed, under which the first plaintiff has purchased the A schedule property is concerned, the description of the property in the sale deed itself indicates that the layout had been formed even in 1973. In other words, the first plaintiff had walked voluntarily to purchase the property in the layout knowing full well that the property covered under Ext.A.1, is part of the layout. Therefore, he cannot plea ignorance nor can he take exception to such official acts duly done by the Authorities.
- So far as B and C schedule properties are concerned Ext.B.2 to B.14 and Ext.A.14 go to establish that the plan indeed had been approved. This also finds expression in the prayer column in the plaint itself. So far as plaintiffs' title in this regard is concerned, the law is settled on this aspect

vide ratio in ***PT.Chet Ram Vashist(dead) by LRs. Vs. Municipal Corporation of Delhi*** [(1995)1 SCC 47], and ***Krishna Nagar Residents Welfare, Association rep. by its Secretary Mr.A.V.Dhakshnamurthy Vs. The Director of Town and Country Planning*** [2001-3-L.W. 828], which are pointer to the point of law that while the owner of the plots, which are marked for common public utility in an approved layout can retain the ownership, they cannot transfer it, and that they can hold the property only as a trustee for the other residents of the colony.

- If at all the plaintiffs are aggrieved by the inclusion of the A schedule property in the layout, they ought to have approached the Authority under Section 101 of the Tamil Nadu Town and Country Planning Act.

9. In response, the learned counsel for the plaintiffs/appellants would argue that in terms of the authority of a Division Bench of this Court reported in ***The District Collector, Kancheepuram District Vs. S.Rajasekaran*** [2015-3-L.W. 626] and another recent judgment of this court in ***The Corporation of Tiruppur Vs Vasanthakumari*** [2019-5-LW 849] the ownership will not be divested and

the plaintiffs have to execute a gift deed and that they will be entitled to compensation, and further added that as regards A schedule property, the respondents have not pleaded any fraud by the promoters nor have they come forward with a case that the layout formed in 1973 was altered when the same was presented for approval in 1986.

10.1 The ownership over a plot of land is entirely different from how it can be utilised. Jurisprudentially, ownership is a compendious term to describe two facets of owner's right which he has over a real property: The right of enjoyment of the property and power of alienation. In the absence of any regulation affecting these rights, a owner has unfettered right of enjoyment, but when the statute steps in to regulate the user of the land, the right of ownership is restricted to the extent the statute regulates. Contextually, Sec.48 and Sec.49 of the Tamil Nadu Town and Country Planning Act, 1971 (hereinafter 'TCP Act') regulate the mode of enjoyment of the land, when they insist that a block of land, if it were to be developed into a layout, should have been approved by the appropriate authority, who might be a regional or a local planning authority. On the face of it, they regulate the nature of user and does not deal with transfer

of right, or power of alienation or vesting of right. Therefore, when a piece of land is developed into a layout and a space therein is earmarked for common public facilities or utilities, the ownership over the land would continue with the owner thereof, but he cannot alter the character of the user in contravention to the approval given. Even if he alienates, the consequence would remain the same. See: ***PT.Chet Ram Vashist(dead) by LRs. Vs. Municipal Corporation of Delhi*** [(1995)1 SCC 47], ***The District Collector, Kancheepuram District Vs. S.Rajasekaran*** [2015-3-LW.626], and ***The Corporation of Tiruppur Vs Vasanthakumari*** [2019-5-LW 849].

10.2 Therefore, the fact that the plaintiffs might be the owners of the plots does not imply that they could put those plots to such use as they might consider as possessing as part of their right of ownership. They may be the owner, but with restricted right of user. It could not be adequately ascertained with requisite accuracy if these plots are handed over to the Municipality, since the Municipality chose not to participate in the litigation, and to assist the court with necessary particulars. It is very unfortunate that it has chosen not even to file its written statement.

11. Here, the plot covered under Ext.A-1 stands at a different footing. Admittedly, the plot was sold to the first plaintiff in 1973. And, the statements made in the course of the argument indicates that the layout was approved only in 1986. If that is so, then it is inconceivable that a plot, whose right of ownership has already vested in the first plaintiff, could be included in the layout. No right, howsoever inconsequential it may appear, cannot be divested for any purpose howsoever holy it might be, except in the manner that law prescribes. Ext.B-14 plan shows a certain writing as LPTP 29/74/D.D.T&C.P. and the signature of the Deputy Director of Town Planning gives the year as 1986. What does the expression 29/74 refers to? In the absence of any material to make a conclusive statement, this Court *prima facie* holds that if the layout had been approved only in 1986, then it is evident that the authority who accorded approval had not even cared to ascertain who the owner of the A-schedule property was at the time when he granted approval. His negligence, if any, cannot affect the plaintiff of his right over any property that he had purchased prior to grant of approval by the authority concerned.

12. In this context, it is necessary to mention that, even though the trial court had held that Ext.A-1 is prior to grant of approval of layout, had proceeded to hold that the first plaintiff has to lose his right over A schedule property since he had not sought a relief for declaring his title. This Court holds that, declaratory relief now sought would render another relief for declaring first plaintiff's title to A schedule property superfluous. It is already noted that mere earmarking of a portion of the land in an layout for certain common purposes, does not ipso facto affect the title. Therefore, the plaintiffs have rightly questioned only the approval to the layout granted by the authority concerned, earmarking their plots of land for common purposes. When the title to a schedule property has already vested in the plaintiffs, then earmarking his property by a statutory authority as a public utility area without his consent, grants him a right to eliminate the obstruction so caused on his title, and if the court grants the declaratory relief as sought, it would have the effect of removing the cloud on first plaintiff's title over A schedule property.

13.1 Here this Court finds that the framing of the suit itself is seriously flawed,

the fact that it has crossed trial court as well as the first appellate court notwithstanding.

13.2 The principal prayer in the suit is to declare invalid the proceedings of the Deputy Director of Town & Country Planning in LPTP 29/1974 by which the suit properties were earmarked as common utility area while according approval to the layout. It is seen from the cause title, the concerned Deputy Director constituted under the relevant provisions of Tamil Nadu Town & Country Planning Act, is not made a party-defendant.

14. Sec.49 of the TCP Act mandates that permission for layout for developing a land must be obtained from the '*appropriate planning authority*'. Sec.2(3) of the Act has defined the '*appropriate planning authority*' to mean *inter alia*, '*a regional planning authority*' and '*a local planning authority*'. Sec.11(2) provides that the Deputy Director (Town Planning) is part of the Regional Committee while Sec.11(3) provides that a local committee to include a representative of the local body such as Corporation or Municipality. Reading these provisions wholesomely, it would mean that the approval for the layout

has to be granted by the appropriate authority, that is to mean, a Regional Authority or a Local Authority. As mentioned earlier, Ext.B-14 layout plan shows that the approval to the same has been accorded by the Deputy Director Town Planning of Salem-Cuddalore Region, that is to mean, the Regional Planning Authority, who in terms of Sec.49 read along with Sec.2(3) of the TCP Act is the appropriate authority to grant approval. In this setting if Sec.8 of the TCP Act is turn to, it declares that,

*“Every regional planning authority, local planning authority or the new town development authority **shall be a body corporate** and shall have perpetual succession and a common seal and, subject to such restriction or qualification imposed by or under this Act or any other law **may sue or be sued in its corporate name**, or acquire, hold or dispose of property, movable or immovable, or enter into contracts and do all things necessary, proper or expedient for the purpose of its constitution.”*

15. Inasmuch as the challenge in the suit is to an action of the Regional Planning Authority, and the relief of declaration is directed only against the said authority, it is important that the Regional Planning Authority is sued in its Corporate name. The suit was laid in 1992, and nobody has

brought to the notice of the trial court or the first appellate court that the suit has not been properly framed. Not even the contesting defendants. When the party against whom the relief is sought is not before the Court, both the Courts below have decided the cause involved in the action had demonstrably proceeded under a mistaken belief that the suit is properly laid, there was no occasion for the plaintiffs even to correct the mistake and bring on record the Regional Planning Authority in the party array.

16. Now the Regional Authority is the best entity to defend what it has decided, and it should be in possession of the best evidence to decide the issue. A solitary correspondence that the 24th defendant Municipality has addressed to one of the promoters of the layout (who had sold the suit properties to the plaintiff) is too inadequate to decide the issue, even on the rule of preponderance of probability.

17. Right to property is a substantial right as it is intertwined with the fundamental right to live with dignity, and no such right can be divested by a wrong administrative action of a statutory authority. This Court therefore, has

little option than to remand the matter back to the trial court to decide the real issue involved in the presence of the party who in law has the right to defend.

18. Either the plaintiffs, or the trial Court within its powers under Order I Rule 10 CPC suo motu, implead the concerned appropriate authority under Sec.49 of the Tamil Nadu Town and Country Planning Act, 1971, and grant the newly impleaded authority an opportunity to file the written statement, and to hold trial as concerning the cause of action involved in seeking the declaratory relief alone. This would imply that only the plaintiffs and the authority to be impleaded alone have right to lead in evidence and the other defendants will have only right of cross examination.

19. In conclusion, this appeal is allowed, and the judgement and the decree of the first Appellate Court in A.S.No.42 of 2002, is set aside, and the suit is remanded back to the trial Court. Since the case is close to 28 years old, this Court requires the learned trial Judge to bestow best attention to dispose of this matter at the very earliest. No costs.

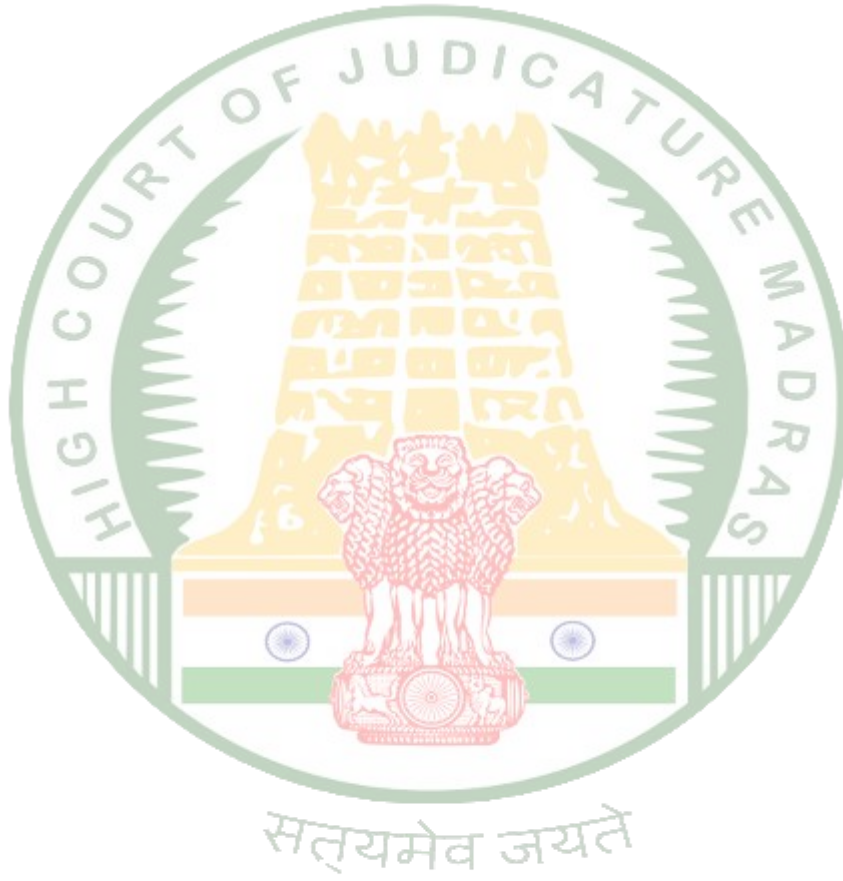
05.06.2020

tsg/ds

Index :Yes/No

Internet :Yes/No

Speaking order / Non speaking Order



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To:

- 1.The Principal Subordinate Court,
Virudhachalam.
- 2.The Principal District Munsif Court,
Virudhachalam.
- 3.The Section Officer
VR Section, High Court, Madras.

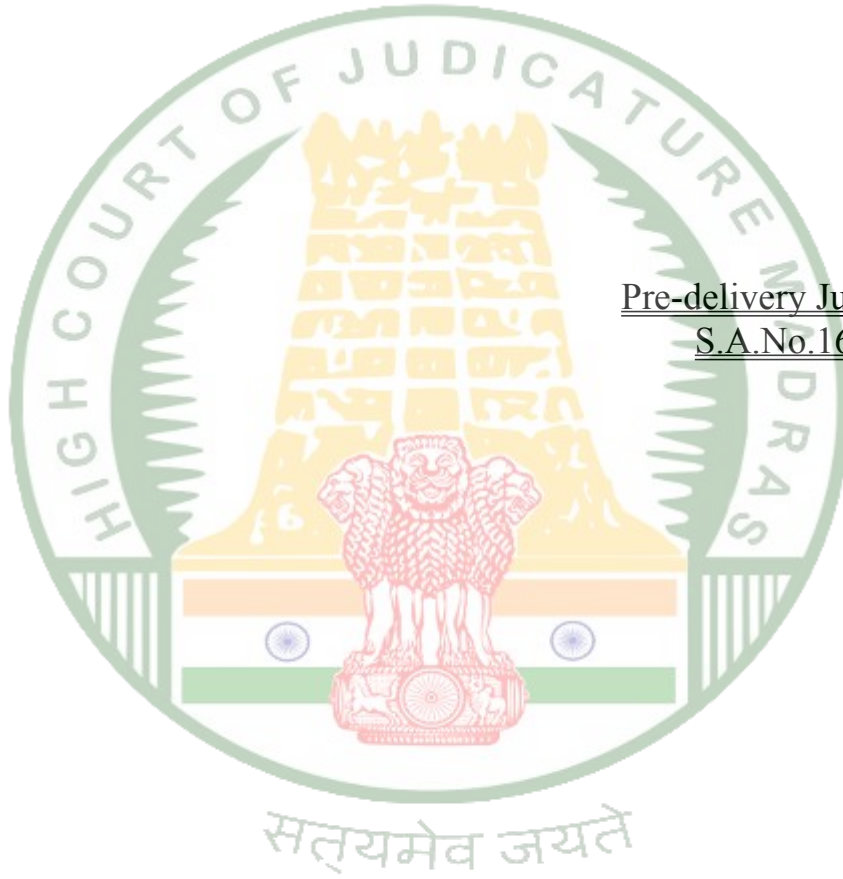


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