

**(1955) 02 MAD CK 0020**

**In the Madras High Court**

**Case No :** Original Side Appeal No. 121 of 1950

Chairman, Town-Planning and Improvement Committee

APPELLANT

Vs

N.P. Natesa Chetty

RESPONDENT

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**Date of Decision :** 24-02-1955

**Acts Referred:**

Constitution of India, 1950 — Article 13, 19, 31(2), 31(5)

Government of India Act, 1935 — Section 299, 299(2), 299(4)

Land Acquisition Act, 1894 — Section 6

**Citation :** (1956) ILR (Mad) 262

**Hon'ble Judges :** P.V. Rajamannar, C.J.; Rajagopala Ayyangar, J

**Bench :** Division Bench

**Advocate :** V.K. John, for John and Row, for the Appellant; K. Narasimha Iyer, for R. Venkatasubba Rao and B. Punyakoti Chetti, for the Respondent

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## Judgement

P.V. Rajamannar, C.J.—This is an appeal against the judgment of Rajagopalan, J., disposing of a suit Civil Suit No. 175 of 1949 on the Original Side of this Court. The Defendant is the Appellant. It is a statutory body constituted under the provisions of the Madras Town-Planning Act and described as the responsible authority under the Nungambakkam North Town-Planning Scheme. Actually, this body is identical with the Standing Committee for Town- Planning and Improvement, Corporation of Madras, represented by the Chairman, Town-Planning Scheme. The Plaintiff who is the Respondent in the appeal is the owner of the houses and premises called "Unsworth" and "Sandown", bearing door numbers 10 and 11 respectively in Sterling Road, Nungambakkam, and the adjoining vacant sites bearing Survey No. 537, measuring in all about 4 acres 70 cents in Nungambakkam High Road, Madras. By their order, dated 13th June 1941, the Provincial Government sanctioned under Sub-section 3 of Section 14 of the Madras Town-Planning Act, 1920, a scheme called the Nungambakkam North Town-Planning Scheme, Madras, which had been approved by the Madras Corporation Council subject to certain modifications. The scheme was duly notified in the Fort St. George Gazette in September 1941. The area to which the

scheme applied was delineated of two maps attached to the scheme, which was appended to the Government Order sanctioning it. Admittedly, the Plaintiff's properties fall within this area. For purposes of this appeal, the following are the only material provisions of the scheme:

7. (1) All new and future streets given in Schedule III (Form No. 8 of the Rules) shall be constructed by the responsible authority or the owners, as the case may be, on the lines shown in Map Nos. 3 and 4 (T.P. No. 23/38-39) provided that reasonable modifications may be made by the Council with the approval of the Director.

(2) New streets AA, GG, H-3 and widening of streets all round the temple shown on Map Nos. 3 and 4 (T.P. No. 23/38-39) shall be constructed by the responsible authority within such time and in such order the Council may decide. Whenever any owner has been required to leave or has left lands freely for any of these streets, the council shall levy only such portion of the betterment contribution as it may decide or may forego its claim entirely.

(3) All other streets shown on Map Nos. 3 and 4 (T.P. No. 23/38-39) shall be constructed by the owners in accordance with Sections 215 and 216 of the Municipal Act subject to the provisions of the scheme.

(4) Any private streets that may be permitted in the area shall conform to the scheme lay-out and comply with the following conditions, unless otherwise sanctioned by the responsible authority in consultation with the Director:

(a) Every private street shall be at least 33 feet in width except in the areas declared under Clause 8(b) for hutting or poor class housing where it shall not be less than 20 feet.

(b) Every lane or secondary access that shall be provided whenever necessary to any premises for giving access to the latrine or for the removal from the premises of house refuse or other matter so long as such lane or access is not intended to form the principal approach or means of access to any building shall be at least 10 feet width.

(5) Sections 215 to 219 of the Municipal Act shall apply to the construction of new private streets in so far as they do not contravene the provisions of the scheme.

9. Any land in the area required for the purposes of the scheme may be acquired by purchase, exchange or otherwise subject to the provisions of the Act.

The notification of the scheme under Sub-section (5) of Section 14 of the Act in the Fort St. George Gazette shall in respect of any land mentioned in Schedule V (Form No. 9 of the Rules) operate as a declaration u/s 6 of the Land Acquisition Act, 1894, for acquisition for purposes of the scheme.

Schedule 3 gives a list of new streets and existing streets which had to be widened. Among the new streets is one shown in the map DD running north to

south of a total length of 1,600 feet x 40 feet as being one of the roads to be constructed by private parties. This proposed road runs through the entire extent of the Plaintiff's land and through the compound of one of his two houses, mentioned above, namely, "Sandown". On 12th December 1946, the responsible authority appointed as such to carry out the scheme made a provisional order in exercise of the powers conferred on them u/s 19(1) of the Town-Planning Act, requiring inter alia the Plaintiff to execute within a specific period that part of the road DD which ran through the Plaintiff's property. A copy of the order was served upon the Plaintiff on 7th January 1947. The Plaintiff objected to this notice by his letter, dated 16th January 1947. But this objection was overruled and the Plaintiff was informed by letter that the provisional order had been confirmed. The confirmation was made by the responsible authority on 14th July 1947, exhibit D-4. This was done after notice to the Plaintiff and after considering his objection. The Plaintiff preferred an appeal to the Government against this order of confirmation, but the appeal was dismissed by the Government by their order, dated 20th November 1947. The Plaintiff failed to carry out the work specified in the original order, namely, the construction of a portion of the DD road and thereupon the Defendant authorized the Commissioner, Corporation of Madras, to construct that part of the road DD and to recover the expenses incurred thereby from the Plaintiff. The notice of the proposed action was given to the Plaintiff by a letter, dated 6th January 1949, from the Assistant Engineer, Town-Planning, Madras, exhibit D-5. The Plaintiff protested by his letter, dated 19th January 1949. He followed it up with the institution of the suit out of which this appeal arises on 31st March 1949. The Plaintiff, prayed for a declaration that the Nungambakkam North Town-Planning Scheme proceedings had become null and infructuous and that the scheme had ceased to exist so far as the Plaintiff was concerned and for an injunction restraining the Defendant from taking possession of the Plaintiff's land for the proposed road and from carrying out any of the works mentioned in their notice.

2. The main allegations of fact and law in the plaint are as follows: As soon as the Plaintiff became aware of the sanctioned scheme, he made representations to the Council of the Corporation of Madras and to the Provincial Government to abandon the scheme or to modify it by deleting the road DD from the scheme. His attempts were unsuccessful. He then applied to the concerned authority for compensation for injurious affection to his property. His claim was rejected by the arbitrator appointed under the Town-Planning Act as time-barred and an appeal was preferred against the order of the arbitrator rejecting the claim to the Chief Judge of the Court of Small Causes who dismissed it on the ground that No. appeal lay against the order of the arbitrator. Though the scheme was notified as early as September 1941, the Plaintiff's land was not acquired by the Defendant within the time prescribed by the statute, and consequently, the notification had ceased to have effect so far as the Plaintiff's property was concerned.

3. The Plaintiff was permitted to amend his plaint by the addition of two

paragraphs (8-a and II-a). In these paragraphs, he stated that the Defendant had failed to comply with the provisions of the Town-Planning Act, the rules made thereunder and the provisions of the scheme and that some of the provisions of the scheme were untenable in law and invalid and inoperative; that it was beyond the powers of the responsible authority to compel the Plaintiff to lay down the road DD or to surrender possession of the land required for the said road without an acquisition of the same, as the Defendant could not take possession of the land without paying just compensation. Any provisions of the scheme contrary to this principle were invalid and ultra vires.

4. The Defendant filed a written statement on 11th April 1949. They were permitted to file an additional written statement to traverse the allegations in the two new paragraphs in the plaint. In this, it was stated that the Defendant had duly complied with the rules framed under the Act and that the scheme was neither untenable nor invalid as alleged by the Plaintiff. It was incumbent on the Plaintiff to construct the portion of the DD road which runs across his land, and there was no necessity to acquire any land for the purpose.

5. On these pleadings, the following issues were framed:

1. Is the order made against the Plaintiff u/s 19 of the Madras Town-Planning Act binding and enforceable against the Plaintiff?

2. Is the Nungambakkam North Area Town-Planning Scheme binding on and enforceable against the Plaintiff?

3. Is the Defendant under an obligation to acquire any portion of the Plaintiff's property for the formation of DD road?

4. If the Defendant is under an obligation to acquire the Plaintiff's land, must the acquisition proceedings be commenced and completed within three years from the date of sanction of the scheme?

6. The learned Judge, Rajagopalan, J., tried the suit without recording any oral evidence and answered issue 1 in the negative, that is, against the Defendant. On issue 3, he held that there was no necessity to acquire any portion of the Plaintiff's property for the formation of the DD road, because DD was not intended to be a public street. In view of this finding on issue 3, issue 4 did not arise. The learned Judge refused to give a finding on issue 2. He said:

This leads to larger issues than are necessary for disposing of the main question at issue, the one underlying issue (1) whether the responsible authority was entitled to issue the directions in exhibit D-3 in its attempt to enforce the obligations the scheme laid on the Plaintiff under Clause 7(3) of the scheme.

I, therefore, do not propose to answer this issue.

The learned Judge in the end granted to the Plaintiff both the prayers in the plaint, namely, declaration and injunction.

7. Before dealing with the contentions of the Appellant, it is necessary to set out the main provisions of the Town-Planning Act and the rules framed thereunder. The Madras Town-Planning Act VII of 1920, was passed for the purpose of regulating the development of towns so as to secure to their present and future inhabitants sanitary conditions, amenity and convenience. A town-planning scheme may provide for all or any of the several matters enumerated in Section 4 of the Act. These include....

(b) the construction, diversion, extension, alteration, improvement or closure of streets, roads and communications; (c) the construction, alteration, removal, or demolition of buildings or bridges; (d) the acquisition by purchase, exchange or otherwise, of any land or other, immovable property within the area included in the scheme whether required immediately or not.... (k) the allotment or reservation of land for streets, roads, squares, houses, buildings for religious and charitable purposes, open spaces, gardens, recreation grounds, schools, markets, shops, factories, hospitals, dispensaries, Government and municipal building, and public purposes of all kinds.

8. A scheme may contain proposals which may even provide for the transfer of ownership of a plot from one person to another (Section 5(2)(d)). A scheme may be initiated either suo motu by a municipal council, or at the direction of the Provincial Government. In either case, the municipal council has to prepare, publish and submit a draft scheme. Every draft scheme should contain certain particulars (Section 13). The following provisions of Section 14 are very material:

14.(1) If within sixty days from the date of publication of a draft scheme any person affected by such scheme communicates in writing any objection or suggestion relating thereto, the council shall consider such objection or suggestion and may modify the scheme as it thinks fit.

(2) The scheme as passed or adopted by the Council together with all written objections and suggestions shall thereupon be submitted to the Provincial Government for sanction and the fact of such submission shall be published in the prescribed manner.

(3) The Provincial Government may, after considering the objections and suggestions, if any, and making such inquiry as they think fit, sanction the scheme with or without modification, or may refuse to sanction the scheme, or may return the scheme to the council for reconsideration.

(5) The sanction of the Provincial Government to a scheme under Sub-section (3) shall be published by notification in the Official Gazette and such notification shall state at what place and time the scheme will be open to inspection of the public.

Section 19 is the other important section. It is as follows:

19.(1) On and after the day on which the scheme comes into force, the responsible authority may make a provisional order requiring an owner--

(a) to remove, pull down, or alter any building or other work in the area included in the scheme which is such as to contravene the scheme, or in the erection or carrying out of which any provision of the scheme has not been complied with; or

(b) to execute within a specified period of any work which it is the owner's duty to execute under the scheme, where the responsible authority is of opinion that delay in the execution of the work would prejudice the efficient operation of the scheme.

(2) The responsible authority shall serve a copy of the provisional order made under Sub-section (1) on the owner, together with a notice requiring him to show cause, within a reasonable time to be specified in such notice, why the order should not be confirmed.

(3) If the owner fails to show cause to the satisfaction of the responsible authority, the responsible authority may confirm the order granting such further period as it may deem fit, to execute the work and such order shall be communicated to and be binding on the owner and may be enforced. The expenses of enforcement may be recovered in the prescribed manner. An appeal shall lie to the Provincial Government against the order of the responsible authority and their decision shall be final.

Section 20 provides for a claim to compensation by any person whose property is injuriously affected by the making of a town-planning scheme. Section 23 confers on the municipal council power to levy betterment contribution or from owners of property, the value of which had increased or is likely to increase by the making of any town-planning scheme. This appeal does not relate to betterment contribution which is the subject-matter of Sections 24 to 26. Chapter VII of the Act related to the acquisition of immovable property required for the purposes of a town-planning scheme. Such property shall be deemed to be land needed for a public purpose, within the meaning of the Land Acquisition Act, and may be acquired under the Land Acquisition Act, or under it as modified in the manner specially provided in that chapter. Section 34 to which reference was made in the course of the arguments runs thus:

In cases falling under Clause (b) of Section 33, a notification u/s 14 shall, notwithstanding anything contained in the Land Acquisition Act, 1894, operate in respect of any land for the purposes of the scheme as a declaration u/s 6 of the said Act, and no further declaration shall be necessary, but it shall not be incumbent on the Provincial Government, or officer authorized in that behalf, to take immediate steps for the acquisition of such land. Provided that if the land is not acquired within three years from the date of the notification, it shall cease to have effect as declaration u/s 6 of the Land Acquisition Act, 1894.

Section 36, which occurs in the Miscellaneous Chapter VIII confers power on a municipal council to make any agreement with any person in respect of any matter which has to be provided for in a town-planning scheme. Section 44 confers power on the Provincial Government to make rules, either generally or

for any particular area, to carry out all the purposes of the Act. These rules may be incorporated in any scheme subject to modifications, if any. The rules are in respect of matters like (a) the manner of publication of the modifications u/s 10, and of the draft scheme u/s 11: (d) what streets or roads and improvements thereto provided in a town-planning scheme shall be made or carried out at the expense of the municipal council, the owners of the property or both; (k) the procedure to be observed by municipal council and responsible authority in cases where the owners commit default, or delay in the carrying out of works or improvements, for carrying out such works or improvements and for recovering the cost from the owners liable therefor.

9. It is not necessary to refer in any detail to the rules made under the Act. The following rules, however, were referred to by Counsel, namely, Rule 36, which says that a municipal council shall convene meetings of owners of lands and buildings in the area affected by the proposed scheme, at which the proposed scheme shall be described and explained and which provides for the taking of written agreements from the owners individually and collectively with respect to their co-operation with the council by the surrender of land for roads and public purposes, reconstitution of boundaries, betterment levy, compensation or other provisions of the scheme affecting them individually or collectively. Rules 70 and 71 are in respect of the recovery of the expenses of enforcement of orders made u/s 19(3) of the Act.

10. Clause 7(3) of the scheme refers to Sections 215 and 216 of the City Municipal Act. As one part of the argument of the learned Counsel for the Respondent, which found acceptance with the learned trial Judge, is based on the provisions of these sections, it is useful to extract them.

They run as follows:

215. If the owner of any land utilizes, sells, leases or otherwise disposes of such land or any portion or portions of the same as sites for the construction of buildings, he shall, save in such cases as the site or sites may abut on an existing public or private street, lay down and make a street or streets or road or roads giving access to the site or sites and connecting with an existing public or private street.

216. (1) Any person intending to lay out or make a new private street must send to the Commissioner a written application with plan and sections showing the following particulars, namely:

- (a) The intended level, direction and width of the street,
- (b) the street alignment and the building line, and
- (c) the arrangements to be made for levelling, paving, height of buildings abutting thereon shall apply also in the case of lighting the street.

(2) The provisions of this Act and of any rules or by-laws made under it as to the

level and width of public streets and the height of building abutting thereon shall apply also in the case of streets referred to in Sub-section (1); and all the particulars referred to in that sub-section shall be subject to approval by the standing committee.

(3) Within sixty days after the receipt of any application made under Sub-section (1) the standing committee shall either sanction the making of the street on such conditions as it may think fit or disallow it, or ask for further information with respect to it.

(4) Such sanction may be refused--

(i) if the proposed street would conflict with any arrangements which have been made or which are in the opinion of the standing committee likely to be made, for carrying out any general scheme of street improvement,

(ii) if the proposed street does not conform to the provisions of the Act, rules and by-laws referred to in Sub-section (2), or

(iii) if the proposed street is not designed so as to connect at one end with a street which is already open.

(5) No person shall lay out or make any new private street without or otherwise than in conformity with the orders of the standing committee. If further information is asked for, no steps shall be taken to lay out or make the street until orders have been passed upon receipt of such information:

Provided that the passing of such orders shall not in any case be delayed for more than sixty days after the standing committee has received all the information which it considers necessary to enable it to deal finally with the said application.

11. At the outset, we may mention that Mr. Narasimha Ayyar, learned Counsel for the Respondent, attacked the validity of the scheme itself. It is true that issue 2 does cover this contention. But the learned trial Judge expressly refrained from answering that issue. The entire judgment of the learned Judge proceeded on the assumption that the scheme as such was valid, binding and enforceable against the Plaintiff. We shall, therefore, deal only with those contentions which relate to issue 1 and on the same assumption. If we followed Mr. Narasimha Ayyar correctly, his contention was that if the street DD was a private street, the Respondent cannot be compelled to construct any portion of it at his own cost, unless he himself applied u/s 216 of the City Municipal Act. In the alternative, he contended that if it was treated as a public street, then it was incumbent on the responsible authority to first acquire the land on which the street was proposed to be laid before further steps could be taken to compel the Respondent to construct it. The reasoning of the learned trial Judge also proceeds on this alternative basis of considering DD as a public or a private street. There is no definition of a public street or a private street in the Town-Planning Act. But there are definitions in the City Municipal Act.

"Private street" means any street, road, square, court, alley, passage or riding path which is not a "public street" but does not include a pathway made by the owner of premises on his own land to secure access to or the convenient use of such premises (Section 3(19)).

12. The definition of "public street" in so far as it is material for this case is as follows:

3. (20) "Public street" means any street, road, square, court, alley, passage or riding path over which the public have right of way whether a thoroughfare or not.

The learned Judge, after an elaborate discussion, was unable to escape the conclusion that the scheme did not either expressly or by necessary implication classify DD either as a public or as a private street. We are unable to see how a determination of the nature of the street has any bearing on the question which falls for decision, namely, whether the responsible authority was entitled to make the order against the Plaintiff u/s 19 of the Town-Planning Act. Once the scheme as such is found or assumed to be valid, we think the question can be easily answered. Section 14(6) of the Town-Planning Act says that notification published under Sub-section (5) of that section shall be conclusive evidence that the scheme has been duly made and sanctioned. From the date of such notification all owners of lands and buildings in the area affected by the scheme will be under an obligation to comply with the provisions of the scheme. Under the scheme with which we are concerned in this appeal, it is the duty of the Respondent as owner of Survey No. 537 to execute work of constructing that part of the street DD which runs through his land. u/s 19(1) of the said Act, the responsible authority has got the power to make a provisional order requiring the Respondent as such owner to execute the work which it is his duty to execute under the scheme. u/s 19(3) if the owner fails to show cause to the satisfaction of the responsible authority, the authority may confirm the order. Rule 70 provides that where any owner commits default or delays the carrying out of any work ordered by the responsible authority under Sub-section 3 of Section 19, the responsible authority may authorize the Commissioner of the Corporation of Madras to cause such work to be executed and recover the expenses incurred thereby from the owner. All that has happened in this case appears *prima facie* to be strictly in accordance with the provisions of the scheme of the Act and the rules framed thereunder.

13. The question whether a street is public street or a private street may become material when rights are asserted by the general public over it, when the liability to maintain it arises, and in other circumstances, none of which is involved at this stage. A "street" in its ordinary popular sense means a roadway, not necessarily a highway which has on one side or both sides a more or less continuous and regular row of houses. (Vide Halsbury's Laws of England, second edition, Vol. XV., p. 192.) Though popularly a road without any houses on either side would not be a street, yet in a vast city like Madras, there are bound to be

several such roads within municipal limits, and they too should be regarded as streets for purposes of municipal administration. Vide: *Provident Investment Co. v. Emperor* AIR 1943 Bom. (F.B.) 435, 436. Jessel, M.R., in *Taylor v. Corporation of Oldham* (1876) 46 L.J. Ch. 105, 109 observed as follows:

The definition of a street is thus laid down in the Imperial Dictionary "The street itself is no doubt properly the paved or prepared road; that is the street". It sometimes includes houses along each side of it. But that is not its proper meaning. It is called a street even without houses. There are some streets with no houses.

There may be streets over which the public at large have no unobstructed right of passage. But at the same time, certain members of the public, namely, residents of the houses abutting that street, may have a right of passage over it to have access to a public street. Likewise, persons who desire to have access to such building abutting the street may also have a right to use it. Even in respect of what are deemed to be private streets, the municipal authorities have considerable powers. u/s 218, if any private street or part thereof is not, for instance, levelled, paved, metalled, drained, or conserved to the satisfaction of the Commissioner, he may by notice require the owners of such street or path, and the owners of buildings and lands fronting or abutting on such street or path, to carry out any work which in his opinion may be necessary and if such work is not carried out within a specified time the Commissioner may execute it himself. The scheme only mentions streets, some of which have to be constructed by the responsible authority and some to be constructed by the owners. In addition to these streets, which are an integral and essential part of the scheme, there is also provision in the scheme for other private streets (Clauses 7(4) and (5)).

14. We fail to see how any question of acquisition of the land on which the street DD is to run arises in this case. If the land is acquired, then the street vests in the municipal council. Otherwise, the ownership of the street, vests in the respective owners of the land over which the street runs. The Appellant does not claim ownership in that part of the street DD which runs through the Plaintiff's property. The fact that the municipal authorities can compel an owner to do something on his own land in the interests of public health or safety does not mean that there is any transfer of ownership of the concerned land to the municipality. Take, for instance, the compulsory construction of a private drain u/s 179 for a group or block of premises. The Commissioner can himself construct a drain and collect the expenses of the construction from the owners of the several premises. The drain, however, remains the joint property of the several owners: In the same manner, a private owner may be compelled to lay a street on a portion of his land, and nevertheless continue to remain the owner of the site of such street.

15. The reference to Sections 215 and 216 of the City Municipal Act in Clause 7(3) of the scheme is sought to be made use of by the Appellant's Counsel to

found an argument that unless the private owner, that is, the Respondent himself, applies u/s 216, he is not obliged to construct any portion of the street DD. As the Respondent has not made any such application, it is contended that he is under no obligation to construct it. In our opinion, the entire argument is fallacious. The reference to Sections 215 and 216 is obviously confined to the procedural part of the sections. Otherwise, the provisions in the scheme become meaningless. Section 215 cannot literally apply to the carrying out of the Town-Planning Scheme sanctioned by the Government. When the scheme, as set out in the plan comprises the laying of new streets, there can be no question of any person "intending to lay out or make" a new street, within the meaning of Section 216 of the City Municipal Act. The scheme lays down that certain streets shall be constructed either by the responsible authority or the owners on the lines shown in the maps attached to the scheme. Once the scheme has been published and it is otherwise valid, the provisions of the scheme are enforceable against the owners of lands and buildings within the area covered by the scheme. It is not then open to any of the private owners to say that a particular road is not necessary or that it should run in any way different from the way shown in the plan. The reference to Sections 215 and 216 of the Municipal Act in Clause 7(3) of the scheme must be read with reference to the context and it should not be overlooked that the reference itself is "subject to the provisions of the scheme".

16. With respect to the learned trial Judge, we are unable to agree with him that the obligations to form that portion of DD as lay in the Plaintiff's Survey No. 537 could arise only if there was an application from the Plaintiff u/s 216 of the City Municipal Act. We are also unable to agree with him that on the assumption that DD was intended to be a public street, the Plaintiff-Respondent would have a right to resist the enforcement of the order u/s 19(3) of the Act till the title to the land on which the road DD has to be constructed vests in the responsible authority. We hold that the answer to the first issue should be in the affirmative.

17. This of course is on the assumption that the scheme itself is valid and enforceable against the Plaintiff. Mr. Narasimha Ayyar, learned Counsel for the Respondent, however, contends that the scheme itself is invalid and not enforceable against the Plaintiff. This is covered by issue 2. But the learned trial Judge expressly refrained from dealing with it because of his finding on issue 1 the Plaintiff was bound to succeed. As we have differed from the learned Judge on issue 1, a determination of issue 2 becomes necessary. In the interests of a speedy disposal of the case, we think the best course would be to remit the case to the trial Judge for a finding on issue 2. The parties will be at liberty to adduce such additional oral and documentary evidence as they chose to.

(The appeal again came up after the return of the finding.)

18. On 9th October 1953, we remitted the case to the learned trial Judge for a finding on issue 2. That issue runs as follows:

Is the Nungambakkam North Area Town-Planning Scheme binding on and enforceable against the Plaintiff?

19. The parties were given the opportunity to adduce such additional oral and documentary evidence as they chose to. Panchapakesa Ayyar, J., accordingly dealt with this issue and has returned the following finding, namely, that the scheme is binding and enforceable against the Plaintiff, on condition of his being paid reasonable compensation for the deprivation of his exclusive right and enjoyment of the land up to a length of 940 feet and the Corporation bearing the entire cost of constructing the road on the land. This finding of the learned Judge was based on Articles 13, 19 and 31(2) of the Constitution. Dr. John, Counsel for the Appellant, namely, the responsible authority under the scheme, attacked the finding on the ground that the Constitution would not apply to the case, as the scheme was framed under an Act passed long before the Constitution came into force. He further relied on the fact that the scheme was also framed long before the Constitution, and rights and liabilities had accrued before the Constitution came into force. Mr. Narasimha Ayyar, learned Counsel for the Respondent, sought to support the finding of the learned Judge not only on the provisions of the Constitution but also the provisions of Section 299 of the Government of India Act, 1935. He also contended that even apart from the provisions of the Constitution and the provisions of the Government of India Act of 1935, the scheme contravened the principle of common law that no person could be deprived of property without just compensation. In addition to these constitutional objections, Mr. Narasimha Ayyar also put forward the plea that the scheme in any, event in so far as it affected him did not fulfil the requirements of Rule 36 of the rules framed under the Act.

20. In dealing with the several questions raised before us, it is necessary to make a distinction between an attack on the Act itself under which the scheme was framed and an attack on the scheme as such. Though the issue in terms refers to the scheme, it would certainly be open to the Respondent to contend that the Act itself is invalid and, therefore, any scheme framed under the provisions of that Act would be consequently invalid. So far as we were able to gather, Mr. Narasimha Ayyar did not seriously contend that the Act itself was ultra vires the Legislature or that it was void because it contravened any express legislative provision. Indeed, he could not. The Act was passed in 1920, and Sub-section 4 of Section 299, the only provision of the Government of India Act on which reliance was placed expressly declares:

Nothing in this section shall affect the provisions of any law in force on the date of the passing of this Act.

Likewise, Article 31(5)(a) declares that nothing in Clause (2) shall affect the provisions of any existing law other than a law to which the provisions of Clause 6 applies, and obviously Clause 6 has no application to the Act in question. It became clear during the course of Mr. Narasimha Ayyar's arguments that his objection was really to the provision in the scheme which made it obligatory on

him to construct the road DD at his own expense. Mr. Narasimha Ayyar did not seriously contend that this provision could in any way be affected by Section 299(2) of the Government of India Act, 1935, which prohibits a Federal or Provincial Legislature to make any law, that is, in future, authorizing the compulsory acquisition for public purposes, of any land, unless the law provided for the payment of compensation for the property acquired. The scheme as such cannot be deemed to be a law made by the Provincial Legislature.

21. Mr. Narasimha Ayyar relied very strongly on Article 13(1) of the Constitution. It runs thus:

All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency be void.

Law is defined as including any ordinance, order, by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. The only way in which Mr. Narasimha Ayyar can seek the aid of Article 13(1) is to treat the notification of the Government sanctioning the scheme as a law within the meaning of Article 13(1) and to contend that it is inconsistent with Article 31(2) which prohibits property being taken possession of or acquired for public purposes unless the law provides compensation for the property taken possession of or acquired. If this be so, then he is met with what happens to us to be an insuperable difficulty in his way on account of the express provision contained in Article 31(5)(a), because the scheme would be an existing law.

22. There is also another aspect of the matter, which conclusively prevents Mr. Narasimha Ayyar from taking advantage of the Constitution. Not only was the scheme framed long before the date of coming into force of the Constitution; the liability under the scheme also accrued long before that date and the responsible authority had taken steps to enforce that liability by the issue of a notice u/s 19(1) of the Act long before that date. In fact, the suit itself was instituted in 1949, that is, before the Constitution. In such circumstances, the Constitution will not avail the Respondent. The principle is thus enunciated by Das, J., in *Keshavan Madhava Menon Vs. The State of Bombay*, .

As already explained, Article 13(1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution. It has no retrospective effect and if, therefore, an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for to say that it is, will be to give the law retrospective effect.... So far as the past acts are concerned the law exists notwithstanding that it does not exist with respect to the future exercise of fundamental rights.

Mukerjee, J., as he then was, in *Syed Qasim Razvi Vs. The State of Hyderabad and Others*, affirmed this principle thus:

...as has been held by this Court in *Keshavan Madhava Menon Vs. The State of Bombay*, the effect of Article 13(1) of the Constitution is not to obliterate the entire operation of the inconsistent laws or to wipe them out altogether from the statute book; for to do so will be to give them retrospective effect which they do not possess. Such laws must be held to be valid for all past transactions and for enforcing rights and liabilities accrued before the advent of the Constitution.

23. Mr. Narasimha Ayyar's argument that apart from the Constitution and the Government of India Act of 1935 there is a common law rule that no one could be deprived of property without just compensation does not call for serious consideration. Learned Counsel confessed that he was unable to cite any authority in support of his argument. It is well known that before the present Constitution there was no rule, either statutory or at common law, to that effect.

24. The conception of private property is itself dependent upon and bound up with law. Cooley in his *Constitutional Law* says:

That is property which is recognised as such by the law and nothing else is or can be.

and quotes from Bentham's *Theory of Legislation* the following passage in support:

Property and law are born and must die together. Before the laws there was no property; take away the laws and property ceases.

No doubt, the common law of England would seem to recognize the right of private property as one of the three absolute rights inherent in every Englishman. This right of property, according to Blackstone, consists in "the free use, enjoyment and disposal of all his acquisitions, without any control or diminution save only by the laws of the land". So it follows as a logical corollary that the laws of the land can control or diminish such right of property. In England, Parliament is supreme. The validity of an Act of Parliament cannot be questioned by the Court, therefore, on the ground that it diminished or destroys private property. The unlimited scope of the legal power of Parliament is described by Dicey as the power to make or unmake any law whatever within the limits of physical possibility. (Vide: Halsbury (Hailsham's Edition), Vol. VI, p. 383 and p. 390). That is why the subject cannot possess guaranteed rights in England, such as are guaranteed to the citizen by many foreign Constitutions. So far as British India was concerned, its Legislatures, though not sovereign, in the sense that Parliament is sovereign, were within the limits of their powers and jurisdiction, omnipotent. The Legislatures had plenary powers of legislation acting within the limits, as large and of the same nature, as those of Parliament itself. *The Queen v. Burah* (1878) 3 App. Cas. 889, 904. Dealing with Colonial Legislatures, which were analogous to the Indian Legislatures under the

Government of India Act, Clement in his book on Canadian Constitution (third edition) at page 358, says that an Act passed by any Canadian Legislature within the power conferred by the British North America Act would not be invalid, even if it imposed taxation without regard to uniformity or equality, or even if one man's property was taken from him and given to another without compensation. Before the Government of India Act, 1935, there was no provision similar to Section 299 of that Act in the earlier Government of India Acts. It is only the present Constitution that in terms confers fundamental rights on citizens including the right to acquire, hold and dispose of property. It is, therefore, clear that the Town-Planning Act, passed in 1920, cannot be impugned on the ground that it deprives a citizen of his property without payment of compensation.

25. We also see no substance in the contention based on Rule 36. That rule relates to the procedure to be followed before the scheme is even placed before the Council of the Corporation. Under that rule, the Municipal Council has to convene meetings of owners of lands and buildings in the area affected by the proposed scheme. It is now found that the Respondent did attend one such meeting. At such meetings, the proposed scheme has to be generally described and explained. Rule 36(6) provides:

At the meetings or at such other times as may be convenient, written agreements shall be taken from the owners individually and collectively with respect to their co-operation with the council by the surrender of land for roads and public purposes, reconstitution of boundaries, betterment levy, compensation or other provisions of the scheme affecting them individually or collectively. The necessary stamp fee on such agreements shall be borne by the municipal council.

The contention of Mr. Narasimha Ayyar is that no written agreement was taken from the Respondent, such as is contemplated by Rule 36(6) and, therefore, the scheme does not bind the Respondent, in so far as it affects him. The fact that written agreements are contemplated to be taken from the owners "with respect to their co-operation" with the council does not lead to the conclusion that in the absence of such agreements the scheme is invalid. Section 14(5) and (6) are in the following terms:

(5) The sanction of the Provincial Government to a scheme under Sub-section (3) shall be published by notification in the Official Gazette and such notification shall state at what place and time the scheme will be open to the inspection of the public.

(6) A notification published under Sub-section 5 shall be conclusive evidence that the scheme has been duly made and sanctioned. The scheme shall have effect from the date of publication of such notification and the execution of the scheme shall be commenced forthwith:

Provided that, where the scheme so provides, the execution of the scheme or any part thereof may be deferred until such time as may be fixed in the scheme.

It is not disputed that a notification was published under Sub-section 5. After such a notification it will not be open to anyone to say that the scheme has not been duly made. Section 19 provides that on and after the day on which the scheme comes into force, the responsible authority may make an order requiring an owner to execute within a specified period any work which it is the owner's duty to execute under the scheme, where the responsible authority is of opinion that delay in the execution of the work would prejudice the efficient operation of the scheme. We see, therefore, nothing in this objection of the Respondent.

26. It follows from what we have held above that the finding of the learned trial Judge cannot be accepted. Our finding on issue 2 is that the scheme is binding and enforceable against the Plaintiff.

27. On this finding and the findings arrived at by us before remand, the suit must, and is hereby, dismissed. No costs in the trial Court. The Appellant will get the costs of the appeal from the Respondent.