

(2013) 04 KAR CK 0042
In the Karnataka High Court
Case No : R.F.A. No. 1725/2005

Mrs. Premila Grubb

APPELLANT

Vs

Sri Air Marshall L.P. Pereira and Mr. Edward Rodricks

RESPONDENT

Date of Decision : 26-04-2013

Acts Referred:

Citation : (2013) 4 KarLJ 118

Hon'ble Judges : B.S. Patil, J

Bench : Single Bench

Judgement

B.S. Patil, J.—This Regular First Appeal is preferred by the 1st defendant aggrieved by the judgment and decree dated 25.10.2005 passed by the learned XIII Addl. City Civil Judge, Mayohall Unit, Bangalore, in O.S. No. 16565/2001. The Trial Court has decreed the suit filed by the plaintiff-respondent herein granting permanent injunction restraining the 1st defendant from interfering with the enjoyment of the undivided open space around "Dennison Apartments" and in the enjoyment of the usufructs of the trees standing therein. Plaintiff has purchased an apartment bearing No. 303 forming part of Dennison Apartments, No. 12, Hall Road, Richard Town, Bangalore - 560 005. The dispute in this case is with regard to the suit schedule undivided share in the land and the common area and other facilities in the Dennison Apartments. The description and measurement of the suit schedule property as furnished is as under:

All that piece and parcel of the undivided share of land, common areas and facilities in Dennison Apartments, No. 12, Hall Road, Richard Town, Bangalore-5, measuring North 70 feet 9 inches, South 70 feet 9 inches, East by 121 feet 10 inches and West by 121 feet 10 inches, total site area of 8619 sq. ft., built in area of 16230 sq. ft., consisting of 12 apartments, bounded by N-Hall Road, S-Conservancy Lane, E-Old No. 19 Hall Road and W-Old No. 21 Hall Road.

2. The 1st defendant-Premila Grubb along with her mother owned a vacant land measuring 8,619 sq. ft. She along with her mother entered into a contract with the 2nd defendant to develop the land and build 12 apartments (flats) in the

vacant place and named it as Dennison Apartments. According to the plaintiff, the undivided common areas around the main building including 5 coconut trees and some other trees and also a garage built unauthorizedly claimed by 1st defendant for her exclusive use was meant for the benefit of all the apartment owners. The 1st defendant, after the construction of 12 independent flats with car parking and other facilities took one flat bearing No. 3 in the, ground floor of the Dennison Apartments. Plaintiff purchased Flat No. 303.

3. According to the plaintiff, as per his sale deed and also as per the sale deeds of other apartment owners who purchased the apartments, each one was entitled for an undivided share of the total ground area of 8,619 sq. ft. and other common facilities used by the apartment owners. However, the 1st defendant excluded the other owners from the use of the common areas in and around the main building. She erected iron gates and started locking them thereby excluding the use of the open space by the other 11 apartment owners. Plaintiff further alleged that the garage built by the 1st defendant was unauthorized as it was not part of the approved plan. He urged that 1st defendant's claim of exclusive use over this garage has caused great obstacle for movement of fire tenders and firemen around the apartment building in case of fire, etc. It was also urged that the 1st defendant had unauthorizedly constructed a latrine in the vacant space claiming exclusive right over its use.

4. The plaintiff urged that the exclusive claim by the plaintiff over the coconut and other trees in and around the building and her attitude in not allowing the employees and officials of the KEB and KPTCL to dress the trees has proved dangerous and was a cause for fire accident in the plaintiffs flat causing loss to him and others. A legal notice was sent to the 1st defendant in this regard but the same was returned without service-on the defendant. Hence, the suit was filed.

5. Both defendants 1 & 2 filed separate written statements. Defendant No. 1 contended, at the outset, that the undivided open space around Dennison Apartments and the trees in respect whereof the relief of injunction was sought having not been specifically described and shown in the plaint., the suit was not maintainable. She emphatically denied that total extent of land measuring 8,619 sq. ft. was entrusted to the 2nd defendant for developing the same in order to construct 12 flats in the property bearing No. 12, Hall Road, Bangalore. The assertion of the plaintiff that the areas around the main building including the trees and garage in existence there formed part of the undivided common areas for the benefit of all the apartment owners, was denied as false.

6. The 1st defendant admitted that plaintiff had purchased Flat No. 303, but his right was restricted to ingress and egress out of the specified common areas in the property and he had no right in the enclosed garage or in the open land in the rear and left side of apartment No. 003 situated in the ground floor of the Dennison Apartment and that none of the owners of the other flats including the plaintiff had any right in the vacant area measuring. 1706 sq. ft., which

exclusively belonged to the 1st defendant, Reliance was placed on the declaration given by the plaintiff himself in the Deed of Declaration in this regard. She further contended that she had given only 2700 sq. ft. of land out of her half share i.e., 4309.79 sq." ft. for development and for constructing the flats thereby retaining to herself exclusively the undivided land measuring about 1,706.50 sq. ft. with a further condition that she had to be handed over one apartment bearing No. 003 in the Ground Floor together with exclusive right to use and enjoy the entire land situated on the left and rear side of her flat and also exclusive right over the 5 coconut trees including the latrine built on the left hand side corner of her flat. She denied that the garage was an obstacle for fire tenders to move around. The alleged fire accident due to the omission or commission by the 1st defendant causing damage to the flat owners was also denied.

7. The 2nd defendant-Developer filed separate written statement supporting the assertion made by the 1st defendant and contending that plaintiff himself had admitted that the 1st defendant, was in sole and exclusive possession of the disputed portions of the property. It urged that the 1st defendant and her mother Mrs. M.P. Dennison had entrusted the property bearing No. 12, Hall Road, Richards Town, Bangalore, to them for the purpose of constructing a multistoried apartment building known as Dennison Apartments, excluding the old garage measuring 19.3 feet ? 13.3 feet. It further urged that an open space at the rear side of the building had to be retained for garden purpose with exclusive use of the coconuts and its fruits by the 1st defendant only to the exclusion of all the purchasers of the flats. It further urged that sanction plan was sought for demolition and development by reconstruction only in respect of the remaining portion of the property excluding the existing garage. The sale of the flats to other purchasers including the plaintiff was subject to those restrictions and hence the plaintiff had no right to make any claim in respect of the open space and the garage. The 2nd defendant further contended that the plaintiff being the owner of Flat No. 303 situated in the 3rd floor of the apartment, his rights were restricted for use of the stair case, lift, car parking in the basement and other common areas for the purpose of ingress and egress and nothing more. He also contended that there is no requirement to leave set back area of 15 feet around the apartment building as per law.

8. Additional written statement was filed by both the defendants jointly contending that the schedule mentioned in the suit was vague besides no injunction could be granted against the 1st defendant who was also one of the co-owners of the land and common areas in Dennison Apartments. The 2nd defendant also contended that she had been in exclusive use, occupation and enjoyment of the restricted areas and facilities including the garage and rear portion ever since the apartment was constructed.

9. Based on these pleadings, the Trial Court framed the following issues:

1. Whether the plaintiff proves that all apartment holders including the plaintiff

were in undivided and joint possession of the suit schedule property?

2. Whether the plaintiff proves that the 1st defendant illegally excluded plaintiff and other apartment holders from using common area in the schedule property?

3. Whether the plaintiff is entitled to the relief of injunction?

4. What order or decree?

10. In support of his case, plaintiff examined himself as PW-1, two witnesses were examined as PWs-2 & 3. Exs. P-1 to P-52 were produced and marked. The 1st defendant examined herself as DW-1. Exs. D-1 to D-5 were marked for the defendants. The 2nd defendant did not lead any evidence.

11. The Trial Court has held that there were two joint development agreements executed on the same day i.e., 30.04.1989, one as per Ex. P-19 and the second one as per Ex. P-22. Both these agreements are executed by and between defendants 1 & 2. In Ex. P-19, which is signed by the power of attorney holder of the 1st defendant, paragraphs 32(a), (b) & (c) are not present, whereas in the second agreement vide Ex. P-22 executed by the power of attorney holder of the 1st defendant in the presence of two witnesses, para 32(a), (b) & (c) are found.

12. As per these paragraphs, exclusive use of the garden space, the setback behind the proposed building and also a part of the right setback is meant for exclusive use only to the owner and not to her successors in title. The proposed garage to be constructed on the left hand corner of the building is also meant for the exclusive use of the owner and not to her successors in title. Similarly, the fruits of the fruit bearing trees situated in the schedule property shall be the exclusive property of the owner and not her successors in title. As found by the Trial Court, though the 2nd defendant was a signatory to Ex. P-22 which contained para 32(a), (b) & (c), he did not enter the witness box and make his stand clear substantiating the defence taken. In paragraphs 11 to 14, the Trial Court has observed as under:

11. Relief sought by the plaintiff initially was for a permanent injunction against defendant-1 restraining her in interfering with the undivided open space around the Dennison Apartment's and the trees therein, be used by all the apartments owners as per the existing law of the lands. Words "By removing iron gate, unauthorized garage" have been inserted admittedly by, the counsel for the plaintiff in between the word "Apartments" and the word "and". This insertion is called by the advocate for defendant-1 as "tampering". He proved it by showing amended plaint in which the above referred "tampered" portion is not appearing. I do not wish to go in depth concerning the alleged tampering. This is the third aspect of the case.

12. Plaint came to be presented on 05.11.2001 without the schedule. On 28.05.2003, schedule was got inserted in the plaint. There are no pleadings as to what is the common area, what are the common rights there under. This is the fourth aspect of the case.

13. If one were to read the plaint at paras-3, 7, 8, 9, 10 and 11, it could give a meaning that defendant-1 has been enjoying the three restrictions (rear portion, garage portion and usufruct from the coconut trees), as on the date of the suit. Suit is for bare injunction and not even for mandatory injunction. This is the fifth aspect of the case.

14. Plaintiff placed affidavit evidence of E.T. Ponnu Kuttan (Apartment No. 302) and affidavit evidence of Krishna Pal Yadav (Apartment No. 201), without there being verification of the respective deponents respectively. Where affidavits not properly verified, they cannot be admitted in evidence, is position of law laid down in A.K.K. Nambiar Vs. Union of India (UOI) and Another, (however, no damage has been done). This is the sixth aspect of the case.

13. There is a deed of declaration which the 1st defendant has produced and marked as Ex. D-1. This declaration is given on 26.11.1993 and duly signed by the plaintiff and his wife. The owners of other apartments have also given similar deeds of declaration. In Ex. D-1 declaration. They have admitted that on the left side of the building, there is a covered garage for the exclusive use of the owner of apartment No. 003. They have further admitted that in front of the building there is an open space for common area. No structures of any kind shall be constructed on the open area, in the rear of the building there is an open space for the exclusive use of owner of apartment. No. 003, no structure, etc., can be constructed thereon; there are 5 coconut trees in the compound of the building for the exclusive use of the owner of the apartment No. 003.

14. Exs. D-1 & D-4 - Deed of Declarations dated 26.11.1993 are registered documents. They are confronted to the plaintiff in the course of cross-examination and he has admitted its execution by himself and his wife. The Trial Court has found that Deed of declaration is not a title deed and it will not create right, title or interest. It has also held that by becoming the owner of an apartment, right over the common undivided land could be acquired, therefore, once a person becomes the owner of an apartment, he automatically acquires right over the common undivided land and he cannot transfer either the apartment or his rights in the common undivided land by de-linking each other. It has observed that when the owner and or developer sells the apartment, he also conveys his rights over the common undivided land. Therefore, the recitals in the deed of declaration cannot be relied as gospel and the sale deed would prevail over the deed of declaration. Thus, the trial court concluded that inspite of such declaration made in the deed of declaration, the same does not have the legal effect of extinguishing the right of an apartment holder over the common undivided land.

15. The Trial Court has further held that Exs. D-1 & D-4 were required to be read with EX.D-20 - letter written by the President, Dennison Apartment Owners Association to the 2nd defendant, wherein the circumstances under which the deed of declaration as per Exs. D-1 & D-4 were executed have been stated, which disclosed that the apartment owners were clear in their mind while

executing the deed of declaration that they had executed them without prejudice to their rights and that it was so executed to get khatas entered in their respective names.

16. Learned Counsel Mr. Shekhar Shetty appearing for the appellant submits that the plaintiff has filed the suit as a representative suit as the relief sought and the grounds urged in the plaint make it clear that they are not confined to the plaintiff alone but are intended to secure the interest of all of the apartment owners by getting a decree of injunction in their favour. He has further urged that the description of the suit schedule property in the plaint schedule is vague and is not capable of identification. It is also urged by him that defendant No. 2 has admitted the claim and the right of defendant No. 1. Referring to Ex. P22, he has pointed out that it was the real development agreement. He has placed considerable reliance on Ex. D1- Declaration dated 16.11.1993 given by the plaintiff particularly inviting the attention of the court to clauses (h), (j) & (k), wherein no right is given to the purchaser of the apartment in the open space. He also refers to Ex. D3-Owner's Declaration dated 28.5.1994 and points out that an extent of 1706 Sft. area in the rear portion is meant for the exclusive use of the owner of apartment No. 003 i.e., defendant No. 1. He has relied on the judgment in the case of The Assistant Commissioner, Hindu Religious and Charitable Endowment, Salem and Others Vs. Nattainai K.S. Ellappa Mudaliar and Others, , to persuade the court that though the defence of form of suit being bad as it was filed as if it was a representative suit was not taken in the written statement, such a plea could be raised, at any stage, because it is the duty of the court to consider the same. He also points out that since it is a pure question of law, it can be raised at any stage. Reliance is placed on the judgment in the case of State of Punjab and Others Vs. Dr. R.N. Bhatnagar and Another, in this regard. It is also contended by him that, as it is a jurisdictional point, if a judgment is rendered without jurisdiction it will be a nullity, even if the parties consented for such judgment. Reliance is placed on the judgment in the case of Devasahayam (D) by LRs. Vs. P. Savithramma and Others, in this regard. He also points out that in the absence of pleadings asserting easementary right and seeking necessary relief with regard to the suit schedule property for common use of the apartment owners evidence could not have been permitted to be adduced on these aspects. In this connection, reliance is placed on the judgment in the case of Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, ; Bondar Singh and Others Vs. Nihal Singh and Others, ; and in the case of D. Ramanatha Gupta Vs. S. Razaack, . He further points out that Ex. P19 though marked in evidence is subject to proof and the absence of any evidence to prove the same, mere marking will not dispense with its proof. He has referred to the judgment in the case of Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Sateyya and Others, in this connection. It is also submitted by him that the declaration made by the plaintiff wherein he has conceded the rights of defendant No. 1 over the vacant area estops him from asserting to the contrary. He has also placed reliance on the judgment in the case of B.L. Sreedhar and Others Vs. K.M.

Munireddy (Dead) and Others, . It is his further contention that as the plaintiff has himself admitted that the defendant No. 1 has been in possession of the property for the last 13 years, he could not have maintained a suit for injunction as no such suit for mere injunction could lie in the absence of proof of possession. In this regard, he has placed reliance on the judgments in the case of Jemma Vs. Raghu, ; N. Umapathy Vs. B.V. Muniyappa, and in the case of Abdul Latif and Another Vs. Mahadeo Lal and Others, .

17. Mr. Rego, learned Counsel appearing for the respondents has urged that Ex. P22 is a concocted document. He contends that there could not have been any provision in the said agreement for garden space, etc., before the plan was sanctioned. As the sanctioned plan is dated 17.8.1999 and even before the sanction of the plan, such arrangement could not have been postulated. The approved plan, according to him, refers to the entire area measuring 8619.755 and nothing is mentioned about the proposed latrine or garage in the ground floor area. He also points out that Ex. P21 - Occupation Certificate does not refer to the garage and latrine. Taking the Court through the provisions of Karnataka Apartment Ownership Act, 1972, he submits that as per Section 7, each apartment owner is required to strictly comply with the byelaws with administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the convenience, conditions and restrictions set forth in the declaration or in the deed to his apartment. Failure to comply with any of the same shall be a ground for action to recover sums due for damages or injunctive relief or both maintainable by the Manager or Member on behalf of the Association of Apartment Owners or in a proper case by an aggrieved apartment owner.

18. He points out that right to institute a suit is granted u/s 7 by the statute which is a special legislation. He points out that defendant No. 1 has admitted the signature of her mother on Ex. P19 and as the property is owned jointly by defendant No. 1 and her mother, defendant No. 1, cannot claim that the said property exclusively belonged to her. He also points out that the three items of property mentioned in paragraphs 32(a), (b) & (c) of Ex. P22 are immovable properties as per the definition contained in Section 3(26) of the General Clauses Act. Therefore, registration of the document is mandatory in the light of Section 17(1) of the Indian Registration Act, read with Section 49-A. Ex. P22, in paragraphs 7 & 8, refers to the undivided share of 4309 Sft. in the entire land, out of which a portion of 2603.35 Sft. would be sold to the developers and the remaining 1706.05 Sft. would be held by the owner and that the said 1706.50 Sft., in such circumstances cannot be equated to the vacant area earmarked as setbacks after the construction of the apartment. He refers to Section 22 of the Limitation Act, to contend that when there is a continuing breach of contract or continuing fresh cause of action, a fresh period of limitation begins to run at every moment of the time during which the breach or the cause of action, as the case may be, continues. Reliance is placed on the judgment in the case of Hari Ram Vs. Jyoti Prasad and Another, in this regard. He also urges that as it is a

special statute, the effect of the same has to exclude the general laws. Since the statute gives the plaintiff the right to seek injunctive relief, the plea of non-maintainability of the suit for not seeking declaration does not hold good. He points out that trees are immovable properties as is so held in the decisions in the case of Ajit K. Saha Vs. Nagendra N. Saha and Another, and in the case of Joseph Vs. Joseph Annamma, .

19. In so far as the declaration submitted by the plaintiff, he refers to the letter Ex. P20 written by the plaintiff to defendant No. 2 on 3.11.1993 wherein it is stated that the three conditions were not present in the copy of the agreement given to them and that without prejudice they have signed the declaration so as to apply for the katha. Counsel points out that such clauses do not confer title as is held in the case of Kamakshi Builders Vs. Ambedkar Educational Society and Others, . He also points out that the plaintiff is not precluded to take the correct stand by changing his stand which was taken by mistake as per the declaration. He has placed reliance on the judgment in the case of Groupe Chimique Tunisien SA Vs. Southern Petrochemicals Industries Corpn. Ltd., in this connection.

20. In reply, Mr. Shekhar Shetty submits that there is no allegation regarding violation of any byelaw. He also states that there is an admission made in the evidence of DW1 admitting that he was bound by the declaration in the absence of any case made out stating that the declaration was obtained by fraud or misrepresentation. The plaintiff cannot avoid the said declaration which is referable to Section 11 of the Act. He further points out that no right is given for the setback area and the garage area in Ex. P1. He also points out that the declaration is registered and has been admitted. Hence, admitted documents need not be proved. He invites the attention of the Court Section 58 of the Evidence Act in this connection. He also points out that the decree of injunction is sought against the holder of the property without even making the mother as a party. He is critical of the observations made by the Court below in stating that BBMP could take action against the garage when the High Court in the previous round of proceedings in Writ Petition has already held that it was not an illegal construction. Taking the Court through the judgment in the case of Madhukar and Others Vs. Sangram and Others, , he submits that the manner in which the Appellate Court has to deal with the matter having been lucidly stated in the said judgment, this Court has to exercise the appellate jurisdiction and interfere with the findings recorded by the Trial Court, which according to him, are perverse, illegal and unsustainable.

21. In the light of the various contentions urged, the points that arise for consideration in this case are,

(i) Whether the findings recorded by the Trial Court are perverse and illegal warranting interference by this Court in exercise of the appellate jurisdiction?

(ii) Whether the Trial Court was justified in law in granting the decree of permanent injunction in favour of the plaintiff?

22. The suit was for bare injunction. The same pertains to the so-called open space around the apartment complex which is known as Dennison Apartments, though in the schedule to the plaint the same is not specifically and properly described. Plaintiff is the purchaser of one of the apartments. There are two agreements produced at Exs. P-19 & P-22, both of whom are styled as development agreements entered into by the owners with the developers. Both the agreements are executed on the same day i.e., 30.04.1989. As per Ex. P-19, the developers have undertaken to allot 3,253.54 sq. ft. of constructed area in favour of the owner and an extent of 12,976.53 sq. ft. of the constructed area has been agreed to be retained by the developers and/or to be sold to their nominees. The constructed area to be allotted to the owner was agreed to be in the ground floor and first floor of the apartment complex. Both parties agreed that they shall be entitled to common rights and facilities in the common areas of the building equally. In Ex. P-19, it is stipulated that the developer shall be entitled to be absolute owner of 12,976.53 sq. ft. of constructed area and 2,603.35 sq. ft. of the land area and the owner is entitled to 3,253.54 sq. ft. of the constructed area to be allotted to her and also to retain, enjoy, sell, allot or transfer the same. The owner also undertook to execute a deed of conveyance or sale deed in respect of 2,603.35 sq. ft. of the area of land.

23. In Ex. P-22 at Clause 32(a), (b) & (c), the owner is held entitled to the exclusive use of garden space and set back behind the proposed building, the proposed garage to be constructed and also in respect of all the fruit bearing trees situated in the schedule property. The said clause 32 reads as under:

32. The Owner shall be entitled to retain or sell her share of the constructed area. If she decides to sell, she shall consult the Developers before the sale in order to safeguard the interest of the Developers in respect of the prices offered and the Owner shall be entitled to the following:

- a) The exclusive use as garden space, the set back behind the proposed building as also a part of the right set back which exclusive use is restricted only to the Owner and not to her successors in title.
- b) The proposed garage to be constructed on the left hand corner of the building is allotted to the exclusive use of the Owner and her successors in title.
- c) All the fruits of the fruit bearing trees situated in the schedule property shall be the exclusive property of the owner and not her successors in title.

24. The aforesaid Clause 32 is not found in Ex. P-19. The plaintiff contends that Ex. P-19 is the real agreement and Ex. P-22 is a concocted one. On the basis of this allegation, the plaintiff asserts right over the entire set back area, around the building. The Trial Court has held that Exx.P-22 appears to be concocted as it has come into existence in a suspicious circumstance. On re-appreciation of the evidence on record, I find that the Trial Court has erred in coming to the conclusion that Ex. P-22 is a created document. As can be seen from the deed of declarations dated 26.11.1993 produced at Exs. D-1 & D-4 which are executed

by the plaintiff and his wife who have purchased one of the apartments in Dennison-Apartments, it is clearly stated that in the rear side of the building, there is open space measuring 1,706 sq. ft. meant for the exclusive use of the owner of the apartment No. 003. The right of the owner over the coconut trees in the compound of the building is also conceded therein. It is specifically stated therein that the open space in front of the building was meant for common use. It is also specifically stated in Clause 4(h) of the declaration at Ex. D-1, that the covered garage on the left side of the building was meant for the exclusive use of the owner of Apartment No. 003.

25. This declaration is signed by the plaintiff and his wife. It is duly registered. This document is confronted to the plaintiff in the course of cross-examination. He has admitted the execution of this declaration and his signature on the document. Thus, the defendant has proved that the plaintiff had at an undisputed point of time on 26.11.1993 acknowledged the exclusive right of defendant No. 1 in respect of certain vacant portions of land in the rear, left and right sides of the apartment. The rights of the owner over the said vacant space and the garage as admitted and acknowledged in the declaration is consistent with the rights reserved by the owner in her favour in Ex. P-22 agreement entered into between defendant No. 1-Owner and defendant No. 2-Developer.

26. In the written statement filed, defendant No. 2-Developer has admitted such reservation of rights exclusively in favour of defendant No. 1-Owner. Therefore, there was no material before the Trial Court to come to the conclusion that Ex. P-22 had come into existence in suspicious circumstances. As the rights reserved in favour of the owner in Ex. P-22 is consistent with the registered document Ex. D-1 - deed of declaration made by the very plaintiff, wherein also the rights of the owner have been recognized and acknowledged in respect of certain vacant portions of the land, the Trial Court has committed a serious error in recording its findings against defendant No. 1.

27. It is relevant to notice here that it is not only the plaintiff herein who has executed such declaration but the other apartment owners who have purchased the apartments have also executed such declarations. The Trial Court has held that this deed of declaration is not a title deed and will not create right, title and interest in favour of the owner. It has further referred to a letter - Ex. P-20 dated 03.11.1993 sent by the plaintiff to defendant No. 2, wherein the plaintiff has come up with an explanation that in order to avoid delay in issue of khatha certificate and without prejudice, they were making such declaration conceding the rights of the owner. It has to be stated that Ex. P-20 cannot prevail over the registered document by way of declaration executed by the plaintiff vide Exs. D-1 & D-4. The deed of declaration is not a title deed but in so far as the declarant is concerned, it spells out the factual position as it acknowledges the right of the owner over certain areas which is consistent with Ex. P-22 Agreement entered into between the owner and the developer. This declaration which is an admitted document belies the allegation made by the plaintiff that Ex. P-22 is a concocted

document.

28. It is evident from the evidence of the plaintiff, in the cross-examination, he has admitted that the defendant has put two wicket gates on the TWO sides and had put locks to the said gates and was not allowing any apartment owner from using the common areas on the rear portion. It is also specifically admitted by the plaintiff that defendant No. 1 had been using the rear portion for the past 13 years and was in exclusive use of the same. Similarly, admission is made with regard to the exclusive possession of the garage by defendant No. 1. It is also elicited in the cross-examination that the plaintiff and other apartment owners have free passage for movement of vehicles from the basement of the apartment to the main road. It is also elicited in the cross-examination that there is a free passage on the western side of the apartment near the stair case for the movement of the apartment holders. It is further admitted in the cross-examination by the plaintiff that defendant No. 1 does not have car parking space in the basement and that except the garage portion there was no other car parking for her. It is also clear that in the cross-examination, the plaintiff himself admits that he was bound by the terms and conditions of the deed of declaration executed by him, until it was changed and that the terms of the deed of declaration had not been changed. He has admitted that on 26.11.1993 defendant No. 1 was in exclusive possession of the garage portion, rear portion the apartment and the usufructs of five coconut trees. Thus, it is clear that on his own showing the plaintiff was not in possession of the disputed area and it was defendant No. 1 who was in possession of the same as on the date of the suit.

29. Therefore, the plaintiff cannot maintain a bare suit for injunction in respect of these areas which are admittedly in possession and enjoyment of the first defendant. As the plaintiff has admitted the execution of deed of declaration and has failed to establish his possession over the vacant area and the garage in question, the Trial Court was not justified in granting the decree of permanent injunction. No doubt, the defendants have to leave the required set back as per the building bye-laws. It is also necessary for the safety of the apartments in times of any emergency. These are matters that have to be kept open to be agitated by the plaintiff by approaching the competent authorities. Injunction sought in this suit is for the entire open area. Plaintiff has not specified the set back area while seeking permanent injunction.

30. The developer and the owner cannot violate the building bye-laws by encroaching the set back, which is necessary for safety measure and for maintenance of the apartments. Hence, the dismissal of the suit will not affect "" the right of the plaintiff to move the appropriate authority or ?initiate fresh proceeding only with regard to the said set back area.

31. In view of the nature of the suit, the available documents and the admission made by the plaintiff regarding the due execution of declaration as per Exs. D-1 & D-4, it is totally unnecessary to refer to any of the judgments relied upon by the learned Counsel for the parties, as the proposition of law laid down in those

cases have no application to the specific controversy raised in this appeal, which is answered based on the pleadings and the evidence on record. Hence, this appeal is allowed. The impugned judgment and decree are set aside. The suit of the plaintiff is dismissed. Parties to bear their respective costs.