

M/S. Silver Springs Vs. M/S. Canara Housing Development Company and Others

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Court : Karnataka

Decided On : Oct-01-2012

Judge : A.S. Bopanna

Appeal No. : Regular First Appeal No. 602 of 2010

Appellant : M/S. Silver Springs

Respondent : M/S. Canara Housing Development Company and Others

Judgement :

A.S. Bopanna, J.

1. The appellant herein is the first defendant in O.S. No.2612/2000. The second, third and fourth respondents herein were the plaintiffs in the said suit. The suit was filed seeking for the relief of mandatory injunction against the defendants to demolish the illegal structure constructed on the common areas and open spaces provided on Schedule-A property. The consequential relief of permanent injunction was also sought. The Court below by its judgment and decree dated 25.04.2009 has decreed the suit. The first defendant is therefore before this Court assailing the judgment.

2. The parties would be referred in the rank as assigned to them before the Court below for the purpose of convenience and clarity.

3. The first plaintiff claims to be a Society registered under the Karnataka Societies Registration Act, while the second and third plaintiffs are the members and are the absolute owners of Site Nos.A-1 and B-90 formed in the layout called "Silver Springs". The said sites and other sites are located in a Group Housing Project at Munnekolalu Village, Ramagondanahalli Village Panchayath, Varthur Hobli, Bangalore South Taluk. The first defendant is a registered partnership firm who are the developers of the said Project and are signatories to the agreement dated 26.07.1997. The names of the other partners of the firm is also referred to. The second defendant is also stated to be a registered partnership firm and are the Vendors of the land on which the Project was to be developed. The plaintiff-Society on behalf of its members had approached the first defendant-developer for development of the property shown 'B' Schedule to the plaint and the developer had guaranteed the plaintiff and its members that certain amenities and facilities available on the suit 'A' Schedule property will be for the benefit of the members of the plaintiff-Society. Assurances with regard to necessary permissions and constructions thereof were also made by the developer. Under the agreement dated 26.07.1997, the Society, the vendor of the land and the developer agreed that the vendor had permitted the developer to develop the land in 'A' Schedule property as per the development scheme. Insofar as the house sites, it was agreed that the members would purchase the sites directly from the vendor. Thus, though the vendor was to execute the sale deed in favour of the members in respect of the sites, the Society had to pay consolidated charges to the developer for developing the land. Accordingly, the amount required was stated to have been paid in installments to the developer. As per the said agreement dated 26.07.1997, the developer was required to get the requisite permissions for the various amenities and facilities and the members were to have access to all the said facilities as also the easementary rights in respect of the property indicated in 'A' Schedule. The members of the plaintiff-Society were therefore entitled to the use of the Club House, Swimming Pool and other recreation facilities to be constructed on Schedule-A property, subject to payment of a reasonable maintenance charge which was to be mutually agreed between the developer and the Society. The Society had accordingly paid the sum of Rs. 1,42,20,000/-. In that regard, while the houses were to be constructed on individual basis by the members, the

plaintiff-Society contended that the developer and vendor had agreed that all common areas of 'B' Schedule property would be conveyed to be Society for common use of the members of the Society who would purchase the sites. The sale deeds were executed in favour of the members of the plaintiff-Society in respect of the sites on 30.07.1997 which were registered on various dates. The developer however did not complete the development of the area wherein the sites are situated and on the other hand, despite the assurances the developer has started constructing a building in one of the common area in 'A' Schedule property. The said construction is in the open space which has been earmarked as common area included in 'A' Schedule in total violation of the plan annexed to the agreement. The said construction is at the open space which forms the western boundary of the sites bearing Nos.A-1 to A-7 belonging to the second plaintiff and the others.

4. The case of the plaintiff-Society is that the provision of various amenities and facilities including the Club House, Swimming Pool and open areas were important factors in purchasing the plots in the 'B' Schedule property. The members of the plaintiff-Society had chosen this layout due to the assurance of the availability of open spaces. Hence, by building structure on the open space, the defendants have committed a breach of the agreement. Such construction would adversely affect and limit the open spaces available to the Plot holders. The plaintiff-Society also contend that under the agreement, the defendants were not entitled to put up construction in the area marked as open space even in 'A' Schedule property. Despite the same, since the offending construction has been put up, the same would affect the easementary rights of the plaintiff-Society to enjoy light and fresh air. Thus, the plaintiff-Society claiming to be aggrieved by the construction being put up by the defendants have sought for the relief of mandatory injunction to demolish the construction.

5. The first defendant on appearing has filed the written statement denying the contentions put for the by the plaintiff. It is contended that the relief sought is imaginary since the agreement dated 26.07.1997 does not subsist any more in respect of 'A' Schedule property. It is contended that 'A' Schedule property measures 18 acres 22 guntas which is distinct from the 'B' Schedule property

measuring 10 acres 2 guntas and the plots are indicated in 'C' Schedule. The first plaintiff was only a mediator for arranging sale of plots to its alleged members and as such, when the agreement is not in force and the members are not before the Court, the relief sought cannot be granted. It is averred that the second defendant is the owner of the entire plaint 'A' Schedule property which includes suit 'B' Schedule and that the first defendant is only a developer of plaint 'A' Schedule property for making a layout of sites. The first defendant-developer had agreed that in case of development of 'B' Schedule property with facilities such as Community Centre, Prayer Hall etc., the same would be conveyed to the first plaintiff and it was agreed by the defendants No. 1 and 2 that the right to use the roads, open areas etc., within the 'B' Schedule property would vest with the plaintiff-Society. It was for the respective purchasers to form an association and enter into such arrangements as they desire with the plaintiff-Society. The defendants have referred to clause Nos. X (1) and X (2) of the agreement with regard to the formation of plots in 'B' Schedule and also to Clause X (4.2) of the agreement to contend that the sites to be formed and conveyed to the members of the plaintiff-Society would be segregated from the remaining property lying in 'A' Schedule by a boundary wall and as such the Schedule 'A' and 'B' properties are separate from one another. Clause X (6.6) has been referred to indicate that the access would be to the roads to be formed in the remaining property of 'A' Schedule from the roads to be formed in 'B' Schedule property, but they are not the conditions indicated in the absolute sale deeds. Clause X (7) is referred to indicate with regard to the right of the members of the plaintiff-Society to use the Club House, Swimming Pool to be constructed and situate outside the boundaries of the 'B' Schedule property to be constructed in the remaining portion of 'A' Schedule property on payment of such maintenance charges. The defendants have therefore indicated that even now the defendants have no objection for such usage. The other Clauses in the agreement have also been referred to contend to the same effect and from Clauses X and XII, it is pointed out that in the event of breach, first plaintiff was entitled to enforce specific performance. Consequent upon execution of the sale deeds in respect of 'B' Schedule property, no other obligation exists to seek for specific performance. The sum and substance of the further defence is in the same line to contend that the agreement dated

26.07.1997 does not provide any right to the plaintiff-Society and its members over the suit 'A' Schedule property and the only right is to use the Club House and Swimming Pool on payment of necessary charges. In the same line, the averments made in the plaint in the respective paragraphs have been adverted to. Hence, it is contended that any structure that is put up in the remaining portion of the 'A' Schedule property and which lies outside the boundaries of the 'B' Schedule cannot be questioned by the plaintiffs and at best, they can only safeguard their interests over the plots lying in the 'B' Schedule property. Hence, it is contended that the suit as brought out is not maintainable and the same is liable to be dismissed.

6. In the light of the rival contentions, the Court below has framed three issues for its consideration, which read as hereunder.

“1. Whether plaintiffs are entitled for relief of mandatory injunction directing defendants to demolish structure build in Schedule A property contrary to agreement dated 26.7.97?

2. Whether plaintiffs are entitled for injunction restraining defendants from putting up any construction in common area in violation of agreement dated 26.7.1997?

3. What order? What decree?”

7. The Present of the plaintiff-Society was examined as PW1 and the documents at Exhs. P1 to P19 were marked. The defendants did not choose to tender any evidence. In that regard, it is however to be noticed that one Sri Narendra Singh and filed his affidavit evidence, but the same did not arise for consideration as he did not appear to state with regard to his evidence and to tender himself for cross-examination. The Court below on noticing the available materials on record has decreed the suit by its judgment dated 25.04.2009. The first defendant accordingly has filed the instant appeal and an application in Misc. Cvl.5558/2011 is also filed under Order 41 Rule 27 of CPC to bring on record the additional document, being the sanctioned plan for the subject construction.

8. Sri. R. Nataraj, learned Counsel for the first defendant while assailing the judgment of the Court below would at the outset contend that the judgment in effect is an ex-parte judgment inasmuch as the defendants apart from filing the written statement have not participated in the proceedings. It is contended that one Sri Narendra Singh who was working in the first defendant-Establishment had resigned from its services and as such, there was no effective representation in the suit. In that regard, an affidavit has also been filed before this Court enclosing a copy of the resignation letter. Hence, it is contended that the contentions put forth in the written statement are to be established by the defendants and in the absence of there being evidence, the Court below has accepted the version of the plaintiffs. Therefore, an opportunity is to be granted to the first defendant is his contention. The learned Counsel would further contend that even otherwise, a suit for mandatory injunction without seeking for the relief of declaration was not maintainable when easementary right was claimed. It is contended that the agreement dated 26.07.1997 had a Plan annexed to it, but the said Plain has not been produced. The learned Counsel thereafter referring to the agreement dated 26.07.1997 and pointing out the Clauses as indicated in the written statement would contend that the 'A' Schedule property and the 'B' Schedule Property are distinct as they are separated by a boundary wall. In that regard, the learned Counsel would refer to the Plan to point out that the spot wherein the construction is put up is situate in 'A' Schedule over which the plaintiffs have no right. The only right the members of the plaintiff-Society had was for using the Club House and the Swimming Pool which was to be located in 'A' Schedule by payment of necessary charges and other than the same, their right is only in respect of 'B' Schedule property. The learned Counsel would contend that insofar as the Club House, the same is existing and even otherwise, the present construction which was been put up consists of all activities including a restaurant and there would be no objection whatsoever for the members of the plaintiffs to use the same which in fact would comply the requirement of providing Club facilities. He further contends that the very framing of the issues is not appropriate and in that context, the evidence of P.W. 1 which had not been subjected to cross-examination has been relied by the Court below to arrive at its conclusion. The learned Counsel also makes a detailed reference to the Plan which has been marked as Ex.P13 to point

out the location of the building and to contend that it is situate within the 'A' Schedule property over which the plaintiffs have no manner of right. Hence, it is contended that the appeal is liable to be allowed and the judgment be set aside or in the alternative the matter be remanded for fresh consideration.

9. Sri T.V. Vijaya Raghavan, learned Counsel appearing for the respondents would not only seek to sustain the judgment of the Court below, but would contend that in a matter of the present nature the contentions could be considered by this Court in the first appeal itself as it relates only with regard to the manner of right indicated under the agreement. It is therefore contended that even otherwise, the first defendant who has not chosen to evince interest in the proceedings cannot be as a matter of course seek for reconsideration by the Court below. The position of law in that regard is referred to and it is contended that though the suit was pending from the year 2000 till 2009 and despite being aware of the injunction order granted against them, they have high-handedly proceeded with the construction and did not take part in the proceedings which in itself should disentitle them any indulgence of reconsideration. The additional document i.e., sanctioned plan produced is also not of any consequence inasmuch as the Plan is of the year 1993 whereas the agreement is in the year 1997 and there is absolutely no reference to such sanctioned plan. Even otherwise, the same is doubtful and cannot be relied upon since the owner in whose name the same is approved became owner only in the year 2004. The khatha number also does not tally is the contention. On the merits of the contention, it is pointed out that the agreement dated 26.07.1997 and the plan at Ex.P13 would clearly indicate that it is a composite development plan and though the members of the plaintiff-Society have ownership rights over the sites situate in suit 'B' Schedule property, the amenities and facilities including open areas located in the 'A' Schedule property should also enure to the benefit of the members of the plaintiff-Society. Hence, the question of the 'A' Schedule being segregated from 'B' Schedule property does not arise nor is it permitted as the agreement at Ex.P15 would clearly establish the same. The plaintiffs had approached the Court below immediately when the construction was attempted to be put up and thereafter this Court had granted the order of status-quo on 27.04.2001. Despite the same, they have proceeded with the construction and completed the same and such conduct needs to be viewed

from apposition that despite such constructions being put up they did not choose to take the Court proceedings seriously and therefore, there could be no equities in their favour even for the purpose of reconsideration of the matter. In fact, in the instant appeal, there is no other material produced to controvert the material which is already available on record in the suit and as such, no purpose would be served. In that light, if the available documents are perused, the area where the construction has been put up is an open space and even the Plan which is sought to be relied on to justify the construction is a concocted one. Hence, it is contended that the appeal is liable to be dismissed.

10. In the light of the rival contentions, the following points arise for consideration:

I) Whether in the facts and circumstances of the case remand of the matter for reconsideration by the Court below is necessary?

II) Whether the first defendant is justified in contending that the plaintiffs cannot claim any right in respect of 'A' Schedule property with reference to the open space in question?

III) Does the impugned judgment and decree passed by the Court below call for interference?

11. The learned Counsel for the defendant while seeking for remand would contend that one Sri Narendra Singh who was working as Law Officer and was dealing with the case, had resigned without furnishing details and as such no evidence was tendered which has prejudiced the case of the defendant. Though the affidavit of Sri Narendra Singh was filed, since he had not appeared, the same has not been considered. Further, a plan has been produced before this Court as additional document which is to be marked and explained. To substantiate that he had resigned, an affidavit is filed and the resignation letter is produced. The learned Counsel for the plaintiff has disputed the letter of resignation produced since the same is addressed to some other company and not to the first defendant. It is also contended that it has not been accepted. He would thereafter refer to the decisions of this Court in the case of Jaishri Vs. Maruthi, (ILR 1995 Kar 3100); in the case of The Karnataka Wakf Board Vs. State of Karnataka and

Others, AIR 1996 Kar 55 (DB) in the case of Undivided Family Manager, Ganapathi Subraya Bhat Vs. Land Tribunal, Honnavar III by its Chairman and Others, 2002 (4) KCCR 2328 (DB); in the case of Kumar and Another Vs. Papanna and Others, ILR 2010 Kar 3864 and the decision of the Honorable Supreme Court in the case of P. Purushottam Reddy and Another Vs. M/s. Pratap Steels Limited, 2002 AIR SCW 417 to contend with regard to the limited scope available for remand as provided under Order 41 Rules 23, 23-A and 25 of CPC and that it cannot be a matter of course. The learned Counsel for the defendant on the other hand relied on the decision of the Honorable Supreme Court in the case of Prakash Chander Manchanda and Another Vs. Smt. Janki Manchanda, AIR 1987 SC 42 to contend that in view of the decision, the instant impugned judgment is in effect an ex parte judgment and in that regard, he seeks to set aside the same and restore the suit.

12. About the position of law enunciated in the above cited decisions, there can be no quarrel whatsoever. However, even if it is construed as an ex-parte judgment whether in the instant facts a retrial is necessary or whether this being a first appeal, the reappraisal of the material on record is sufficient is the question. In this regard, a perusal of the papers will disclose that except for there being no oral evidence, it is the same set of documents which is relied upon by the parties which have all been marked and it is the consideration of the said documents alone that will arise to determine the right of the parties. Apart from the said documents which were available before the Court below, the appellants have not relied upon any other documents in this appeal so as to point out that the said documents would have to be produced before the Court below and that would form the basis for the judgment to be rendered by the Court below and that such document read contrary to what has been relied upon. Though the Court below has also been influenced by the fact that the defendant has not tendered any evidence, in my view, that is not material since in the present facts, the oral evidence cannot alter or take away the purport of the documents.

13. No doubt, subsequently during the pendency of the appeal, an application in Misc.Cvl.5558/2011 is filed under Order 41 Rule 27 of CPC producing a sanctioned building plan along with the same. Though objection is filed to the said

application, even if the said document is taken on record, the same would relate to the construction which is now put up so as to claim that approval had been granted for construction. The same could be looked into in this appeal itself but, it does not relate to permissibility, of construction in open space or in the nature of alteration of the layout plan. The application is however allowed and the document is taken on record. Yet, I do not find reason to agree that the said plan in itself needs to be considered by the trial Court but, it could be looked into as a part of the records in this appeal itself. Hence, in the present facts and circumstances, I see no reason to remand the matter. I am of the said opinion because both the parties are relying on the same set of documents which are already on record and since the defendants has filed their written statement and had taken a definite stand and arguments were addressed before me based on the available documents being the only documents and as such, the same needs to be noticed and the documents are to be reappreciated in that background and a conclusion could be reached herein. Hence, point No.1 is answered in negative.

14. The case of the plaintiffs as noticed is that the second defendant are the vendors of the land which is more fully described in 'A' Schedule and that land was to be developed by the first defendant. Within the said 'A' Schedule property, the 'B' Schedule property is also situated. The first plaintiff, for the benefit of its members including the plaintiffs No.2 and 3 had sought for sites and as such the 'B' Schedule property was earmarked for the benefit of purchase by the members of the first plaintiff-society. The understanding was that though the plaintiff society would be entitled to the exclusive possession of the common areas created in the 'B' Schedule property where its members would purchase the sites, the plaintiffs and the members would also enjoy the facilities on 'A' Scheduled property including the easement through approach road. In that regard, memorandum of understanding dated 10.09.1992 (Ex.P14) was entered into between the first defendant and the plaintiff society. An agreement dated 26.07.1997 (Ex.P15) was also entered into between the first and second defendants with plaintiff society. The terms relating to the project was agreed therein.

15. The immediate grievance for the plaintiffs to approach the Court below was that the first defendant had started putting up certain construction in the area

which was shown as on open space and was behind the plot Nos.A1 to A7 which had been proposed and thereafter sold to the members of the plaintiff society. It is in that context, the plaintiffs had contended that they were entitled to the benefit of the open areas and the club and games facilities though it was located outside the 'B' Schedule property and therefore the construction sought to be put up is contrary to the understanding and the same cannot be put up the first defendant. Since at that stage, the construction had just commenced as pointed out from the photographs at Exhs.P7 to P12, the plaintiffs had sought for grant of mandatory injunction to direct the defendants to demolish the illegal construction constructed on the 'A' Schedule property. Consequential permanent injunction was also sought.

16. The case of the first defendant as noticed is that even though the memorandum of understanding and the agreement at Ex.P15 were entered into between the parties, the agreement would indicate that the right of the plaintiff society and its members was only in respect of the 'B' Schedule property and the limited right was only for enjoyment of the facilities in the Club House, Swimming Pool etc., located in Schedule 'A' property on payment of the requisite charges and therefore, the plaintiffs cannot claim any right to the Schedule 'A' property nor have any grievance with regard to the constructions being put up therein. The relevant clauses in the agreement are referred and it is contended that as per the same, the 'B' Schedule property was also to be segregated by a compound wall from the larger layout and in respect of the amenities and facilities in the segregated Schedule 'B' property, the same is as contained in Annexure-II to the said agreement. The learned Counsel for the first defendant would therefore refer to the different clauses in the agreement and would also content that though a plan was attached to the said agreement, the same has not been produced by the plaintiff. In that regard, it is to be noticed that the defendant has also not produced any other plan of the layout except relying on the one which is marked as Ex.P13. Hence, by referring to Ex.P13, the learned Counsel for the first defendant would point out the entire layout and the segregated 'B' Schedule property which according to him is enclosed by a compound wall and would also refer to the benefits of the club house, swimming pool and Tennis Court in 'A' Schedule property which would still be available to the members of the plaintiff-society on

payment basis. He would thus seek to justify that the portion where the construction has been put up was not a part of the amenities assured to the plaintiff-society and its members.

17. From the above contentions, it cannot be in doubt that the agreement dated 26.07.1997 (Ex.P15) would bind the parties with regard to the terms agreed therein. In that regard while considering the same, the layout plan which includes both 'A' and 'B' Schedule property would be relevant for consideration since both the parties have relied on the said plan (Ex.P13) as well as the terms of the agreement but, each of them have interpreted the same as per their understanding and as such the same needs to be considered in its correct perspective. The preamble in clause (V) to the agreement would indicate that the third party and the first party therein i.e., first defendant and the plaintiff respectively have arrived at an understanding that the third party i.e., the plaintiff could purchase sites in a portion of the layout formed in Schedule 'A' property consisting of sites of varied dimensions and sub-clause (a) therein would refer to the number and the measurement for carving it out of Schedule 'A' property. This would show that the plan containing all the details including open spaces therein was available when the plaintiffs chose the sites to be enclosed in 'B' Schedule property from the larger 'A' Schedule property. The learned Counsel for the defendant by placing reliance on Clause X (1)(3)(4.2)(5.2)(6.5))6.7) and (7) would however stress on the fact that 'B' Schedule is independent of Schedule 'A' property and the right guaranteed regarding amenities in only in respect of 'B' Schedule property and there is no restriction on the use of the 'A' Schedule property by the first defendant. Learned Counsel for the plaintiff has also relied on the same clauses to contend that the entire layout was planned as in 'A' Schedule and the 'B' Schedule was separately carved out from that by keeping in view the privacy that was sought for by the members of the first plaintiff-Society who belong to a particular community and as such required their layout to be exclusive. But, such carving out was with the benefits and the amenities in 'A' Schedule property which includes the open spaces therein.

18. In that context, if the said clauses in the agreement are referred, it is clear that the 'B' Schedule property is agreed to be segregated from the large layout by a

boundary wall as indicated in Clause X (4.2). But, the question is as to whether such segregation by boundary wall would entitle the first defendant to alter the pre-indicated open spaces even if it is in Schedule 'A' property if it becomes detrimental to the proper enjoyment of the portions in 'B' Schedule property. In Clause X (6.5) and (6.7) it is provided that the first defendant would be responsible for payment of the statutory dues and providing all the amenities and facilities in Schedule- 'B' as per Annexure-II and it is further agreed that the access to the Schedule property from the main road is through the Schedule 'A' property and the easementary right in that regard has been agreed upon. In Clause X(7) the use of club house and swimming pool located in Schedule 'A' property outside the boundaries of Schedule 'B' property is agreed subject to payment of reasonable maintenance charges which shall be mutually agreed upon. The point therefore is as to whether the first defendant can put up construction in an area shown as open space in Schedule 'A' property merely because it is outside the boundary wall of the Schedule 'B' when it effects the right for the enjoyment of the 'B' Schedule property.

19. In order to understand this aspect of the matter keeping in perspective the fact that the 'B' Schedule property has been carved out of the larger layout, the amenities and open spaces which existed in the larger layout and its location will have to be kept in view and thereafter the conclusion would have to be arrived at since in any event, the plaintiffs had the express benefit of certain facilities which was available in Schedule 'A' property. Hence, it is necessary to refer to the plan which is available at Ex.P13. As already noticed, there is no other contrary layout plan produced. In that context, a perusal of the plan would indicate that the open space wherein the construction is presently put up by the first defendant is located at a place abutting the sites marked at A1 to A7 in Schedule 'B' property. Even if Schedule 'B' is accepted to be bounded by a compound wall, the located of the open space in the larger layout, is exactly behind Site Nos.A1 to A7. Though the said open space is shown to be located in Schedule 'A' property when the Schedule 'B' property was carved out of the same and further when the amenities such as Club House, Swimming Pool and Tennis Court was agreed as the common benefit for both Schedule 'A' and Schedule 'B' property and when the Club House, Swimming Pool and Tennis Court is shown to be located on the rear

side i.e., the western boundary of Site Nos.A8 to A14, it is seen that the open space would similarly form the western boundary of Site Nos.A1 to A7.

20. In fact the second plaintiff is the purchaser of site No.A1 under the sale deed dated 30.07.1997 which is marked as Ex.P17. A perusal of the boundaries indicated to the said site in the Schedule to the said sale deed would indicate that the western boundary has been shown as open space and the northern boundary is shown as private property which would relate to Site Nos.C37 and C38 carved out in Schedule 'A' property i.e., the larger layout. If in fact, the western boundary was a property which was available to be utilised either by the vendors or the first defendant who was the developer, the western boundary to Site Nos.A1 to A7 also should have been shown as private property instead of open space. This would clearly establish that when the Site Nos.A1 to A7 were purchased and though it was located in the segregated 'B' Schedule, the western boundary was represented to be an open space though it was physically located in Schedule 'A' property but it was abutting the sites in Schedule 'B' property. Hence, if construction is sought to be put up in the said open space it would affect the free flow of light and air to the site owners in Schedule 'B' property as against what was represented by the plan of the large layout when they bought the sites. The plaintiffs would therefore be entitled to seek for the relief as sought in the plaint. The first defendant would certainly not be entitled to put up any construction in the open space as represented therein. Hence, Point No.(II) raised above is answered against the defendants.

21. The contention raised by the learned Counsel for the defendants is also that the present suit seeking the relief of mandatory injunction is not maintainable in the absence of seeking for declaration of easementary right. The learned Counsel sought to rely on the judgment of this' Court in the case of D. Ramanatha Gupta Vs. S. Razaak, AIR 1982 Kar 314. The learned Counsel for the plaintiff while repelling the said contention sought to rely on the subsequent judgment dated 17.08.2012 passed in RFA No.506/2010 (M/s. Spring Borewells Company Limited. Vs. Union of India) wherein this Court considered the said decision and another decision of this Court and though while accepting the view in Ramanatha Gupta had clarified that the need for seeking declaration would arise in cases where

there is no pre-existing right.

22. In the instant case, as already noticed above in detail, the 'B' Schedule property has been carved out of the 'A' Schedule property which is a larger layout wherein all facilities and amenities were indicated and the open space in question was also located abutting the sites on its western side and it was shown as the western boundary to the site Nos.A1 to A7 located in 'B' Schedule property. Hence there was already a preexisting right that the western boundary of the property belonging to the plaintiffs more particularly that to Site Nos.A.1 to A7 was to remain as open space though it was located in 'A' Schedule property. It is only such existing right which was sought to be protected when the construction was attempted therein. That apart, the photographs at Exhs.P7 to P12 indicate that the construction was at the initial stage even at the point and the plaintiff had approached the Court below immediately when the construction had commenced. Thereafter, as on 27.04.2001 this Court had granted an interim order not to proceed further with the construction as passed in MFA No.2138/2001 connected with MFA No.2139/2001. Despite the same, the first defendant has proceeded with the construction and put up a big building which is indicated as per the memo filed before this Court on 18.08.2011. This would only indicate the high-handed manner in which the first defendant has proceeded unmindful of the proceedings pending before the Court below and the interim order granted by this Court. The first defendant did not even care to see that they were properly represented in the suit in a circumstance where they were aware that there was an interim order. Such conduct to over reach the judicial proceedings cannot be countenanced even if equities were to be considered.

23. That apart, the first defendant in order to justify the validity of construction has produced the alleged approved plan along with the application for additional documents as noticed above. A perusal of the same as pointed out by the learned Counsel for the plaintiff would indicate that it has been produced as if the approval is granted on 10.11.1993 by the Ramagondanahalli Grama Panchayat. Even if the variance with regard to the Khatha number etc. is not taken into consideration, what is evident is that the agreement entered into between the plaintiff and the first defendant is of the year 1997. If in fact there was an approved plan for

construction as on that date, the space behind Site Nos.A-1 to A-7 should have been earmarked as the area for the proposed building and it could not have been shown as open space on the western boundary in the sale deed to Site No.A1. That would have enabled the plaintiffs to decide on the purchase at that stage. If in fact the plan had been approved in the year 1993 and if four years had gone by, certainly there would have been an indication of the proposed building even in the large layout plan of Schedule 'A' property when negotiations were entered into for marking of the 'B' Schedule property. Notwithstanding the same, it is difficult to countenance that the construction would have been taken up only in the year 2000 i.e., at the point when the suit was filed by claiming right under a plan said to have been approved in the year 1993 when there was absolutely no indication of the same earlier to that. Hence, for all these reasons and the reasons stated by the Court below, the impugned judgment does not call for interference. Therefore, Point No.(III) is also answered in the negative.

In the result, the appeal is dismissed. Parties to bear their own costs.

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