

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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S.A.No. 381 OF 1999

JUDGMENT:

The respondents in A.S.No. 159 of 1991 on the file of the Court of IV Additional District Judge, East Godavari at Kakinada (for the short, 'the Appellate Court'), preferred the present appeal challenging the decree and judgment dated 10-03-1999, whereby and whereunder the Appellate Court allowed the appeal setting aside the decree and judgment dated 16-09-1991 passed in O.S.No. 177 of 1984 on the file of the Court of Principal District Munsif, Kakinada (for short, 'the trial Court').

2. For convenience of reference, the ranks given to the parties before the trial Court will be adopted through this judgment.

3. The plaintiff filed the suit, for mandatory injunction to direct the defendants to remove buddy and other poles erected in red marked portion of plaintiff plan and also claimed permanent injunction restraining the defendants from interfering with the plaintiff's accustomed supply of free flow of air and light by putting any obstructions, alleging that the plaintiff is owner of tiled house bearing D.No.48-15-10, Jagannaickpur, Kakinada, which is shown as ABCD in plaintiff plan. To the west of the plaintiff's tiled house, there are two windows marked as W1 and W2 for free flow of light and air. Between road and western wall of the plaintiff's house, there is vacant site shown as ABEF in plaintiff plan. The plaintiff is getting light and air through the said windows for the last more than 30 years. While the matter stood thus, the defendants encroached red marked portion and erected wooden buddy closing the windows and doors. Hence, the suit.

4. The defendants filed written statement denying right of the plaintiff *inter alia* contending that Kakinada Municipality is the owner of red marked portion of plaintiff plan and the 2nd defendant was granted license by Kakinada Municipality during the month of October, 1984, through order dated 31-10-11983 authorizing the 2nd defendant to erect buddy in red marked portion. The 2nd defendant, accordingly, erected 7 ½' x 8 ½' buddy and it would not cause any obstruction for free flow of light and air from western side road through open site; therefore, the plaintiff is not entitled to claim any relief either mandatory injunction or permanent injunction and prayed

for dismissal of the suit.

5. The defendants also filed additional written statement contending that there is sufficient space between red marked portion and the house on the side of buddy and the plaintiff is getting free light and air through the only window fixed to his house wall. Therefore, the plaintiff is not entitled to claim either mandatory injunction or permanent injunction.

6. Basing on the above pleadings, the trial Court framed the following issues and additional issues:

Issues:

1. Whether the plaintiff is entitled to the permanent injunction prayed for?
2. To what relief?

Additional issues:

1. Whether the plaintiff is entitled to mandatory injunction prayed for?
2. Whether the suit is not maintainable?

7. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and got marked Exs.A1 to A5 and Exs.C1 to C4. On behalf of the defendants, D.Ws.1 to 4 were examined and got marked Exs.B1 to B4.

8. Upon hearing argument of both counsel and considering oral and documentary evidence, the trial Court dismissed the suit negating both the reliefs.

9. The plaintiff, being aggrieved by the decree and judgment dated 16-09-1991 passed by the trial Court, preferred A.S.No. 159 of 1991 before the Appellate Court.

10. The Appellate Court allowed the appeal setting aside the decree and judgment passed by the trial Court and granted both mandatory injunction and permanent injunction.

11. Challenging the finding recorded by the Appellate Court, the defendants preferred the present appeal raising several contentions.

12. Considering rival contentions, perusing material available on record and in view of the orders passed by this Court in S.A.M.P.No. 1403 of 2011, the only substantial question of law framed by this Court in view of the changed circumstances is thus:

"Whether the original cause of action for the suit survives or not due to removal of old tiled house by the plaintiff and constructed new R.C.C. roofed building in its place without any windows on the western side?"

13. In Re. Point:

Undisputedly, the plaintiff is the owner of ABCD property. Originally, it was a tiled house with two openings fixed with windows shown as W1 and W2 to the western wall and there is sufficient space between western road and western wall of the plaintiff's house. Therefore, the plaintiff is getting free flow of air and light. However, it is the case of the defendants that during pendency of the appeal, dominant heritage *i.e.* the tiled house is converted into terraced building and it is evident from positive photographs. Even according to the positive photographs, there are no openings of windows and doorways towards western side open place which is in occupation of the defendants. Therefore, question of obstructing free flow of light and air does not arise as on today.

14. Section 43 of the Indian Easements Act, 1882 (for short, 'the Act of 1882'), deals with extinction of easement by permanent change in dominant heritage. According to it, where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished unless –

- (a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or
- (b) the injury caused to the servient owner by the change is so slight that no reasonable person would complaint of it; or
- (c) the easement is an easement of necessity.

In view of Section 43 of the Act of 1882, conversion of dominant heritage *i.e.* tiled house into terraced building without opening any windows or doorways so as to allow free flow of light and air from western side amounts to extinction of easement. By applying Section 43 of the Act of 1882, I find extinction of easement claimed by the plaintiff due to change of circumstances and, consequently, the plaintiff is not entitled to claim either mandatory injunction or permanent injunction. The point is accordingly answered.

15. In view of my foregoing discussion, the finding of the Appellate Court is, accordingly, set aside restoring the finding of the trial Court.

16. In the result, the appeal is allowed; setting aside the decree and judgment dated 10-03-1999 passed in A.S.No. 159 of 1991 on the file of the Court of IV Additional District Judge, East Godavari at Kakinada; confirming the decree and judgment dated 16-09-1991 passed in O.S.No. 177 of 1984 on the file of the Court of Principal District Munsif, Kakinada. Pending miscellaneous petitions in this appeal, if any, shall stand closed in consequence. No order as to costs.

M.SATYANARAYANA MURTHY, J.

Date: 08th July, 2015.

JSK