

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.11.2017

PRONOUNCED ON: 13.12.2017

CORAM:

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A. No.1036 of 2001

K.E.Mohan ... Appellant/plaintiff

Vs.

1. J.K.Narasimha Bhagavathar (deceased)
2. Lakshmi Raman ... Respondents

(R2 brought on record as LR of the deceased R1 vide order of Court dated 13.10.2017 made in CMP.No.253 to 255/2013)

Prayer :- Second Appeal has been filed under Section 100 of CPC against the judgment and decree dated 30.11.2000 made in A.S.No.11 of 1996 on the file of the Subordinate Court, Arni, Thiruvannamalai District, confirming the judgment and decree dated 15.11.1995 made in O.S.No.897 of 1992 on the file of the District Munsif Court, Arni.

For Appellant : Mr.K.Bijai Sundar

For Respondent : Mr.Haja Naziruddeen
Senior Counsel
for M/s.R.Tholgappian

J U D G M E N T
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This second appeal is directed against the judgment and decree dated 30.11.2000 made in A.S.No.11 of 1996 on the file of the Subordinate Court, Arni, Thiruvannamalai District, confirming the judgment and decree dated 15.11.1995 made in O.S.No.897 of 1992 on the file of the District Munsif Court, Arni.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for Permanent Injunction.

4. The case of the plaintiff, in brief, is that the plaintiff is the owner of the building bearing door No.193, Sathiyamoorthy Road, Arni town and the defendant was owning an old house on the southern side of the plaintiff's building and he had demolished his old building and put up a new building therein and the defendant has permitted the plaintiff to have the windows and ventilator on the southern wall of the plaintiff and thereby, the plaintiff had put up sunshades and 12 windows on the southern side of the wall facing the defendant's property and when the plaintiff was putting up the construction, the defendant filed a suit for permanent injunction for a direction by way of mandatory injunction to close the 12 windows and remove the sunshades in O.S.No.514 of 1980 on the file of the District Munsif Court, Ranipet and the said suit was dismissed, after contest and no appeal has been preferred against the same by the defendant and the defendant has been keeping quite all these years, now, attempting to close the windows and sunshades by raising a wall adjacent to the southern wall of the plaintiff, wherein, windows are put up and the defendant having lost the suit in O.S.No.514 of 1980 as above adverted to, cannot be allowed to close the windows and sunshades in directly and thereby, obstruct the plaintiff's air and light and in O.S.No.514 of 1980, the Court has held that the defendant has no right to remove the sunshades and windows put up by the plaintiff on his side of the wall and the Court has held that the defendant was estopped from complaining the same and hence, the defendant is estopped by his own conduct and as per the judgment and decree rendered in O.S.No.514 of 1980 and on the other hand, inasmuch as the defendant attempted to close the windows and sunshades by raising a wall, the plaintiff has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts. It is false to state that the defendant had permitted the plaintiff to have his windows and ventilators on the southern wall of the plaintiff. On the other hand, the plaintiff had raised a skin wall along the wall of the defendant and put up the windows and ventilators and also put up projecting sunshades, violating the space of the defendant and hence, the defendant filed a suit in O.S.No.514 of 1980 for mandatory injunction as the plaintiff had high handedly encroached into the area of the defendant and put up the above structures and the plaintiff cannot claim as a matter of right the light and air on the basis of prescriptive easement and the plaintiff also cannot have any right to prevent the defendant from putting up the wall in his own property and no doubt, the wall put up by the defendant screens one of the windows of the plaintiff, but that wall has been put up over the ground wall of the defendant and if thereby, one of the windows gets closed, the defendant

cannot be blamed for the same as the defendant has no statutory bar from putting up such constructions and in and around areas of the locality walls are being put up by the residents in their own area, resulting in, closure of the windows of the neighbours and by the same, the plaintiff cannot have any cause of action to institute the suit against the defendant and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PW1 has been examined and Exs.A1 & 2 were marked. On the side of the defendant, DW1 was examined and no document has been marked. Exs.C1 and C2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties, the Courts below were placed to dismiss the suit laid by the plaintiff. Aggrieved over the same, the present second appeal has come to be laid.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

" (i) The earlier suit O.S.No.514 of 1980 having been dismissed on merits, is the respondent entitled in law to close the ventilators and windows?

(ii) Are the Courts below right in concluding that there was no agreement between the parties, permitting the appellant to have the windows and ventilators, in the light of the specific finding given to the contrary under issue No.6 in O.S.No.514 of 1980?

(iii) Whether the respondent, what he could not achieve directly by way of filing a suit, could seek to achieve indirectly by raising a wall?

9. The plaintiff, who has been non-suited by the Courts below, has come forward with the second appeal contending that the Courts below have not properly understood the issues involved in the suit between the plaintiff and the defendant and also contended that the Courts below have not properly approached the issues in the right perceptive, particularly, in the light of the judgment dated 05.07.1984 passed in O.S.No.514 of 1980 on the file of the District Munsif Court, Ranipet. It is seen that the plaintiff has laid the present suit against the defendant for the relief of permanent injunction and in particular the relief sought for by the plaintiff in the present case against the defendant is to restrain the defendant, his men

and agent from closing the windows and sunshades put up on the southern side of the wall of the plaintiff by permanent injunction by raising a wall in his northern side. For the above said relief claimed in the said suit, according to the plaintiff, the cause of action arose on 05.07.1984, the date of the judgment in O.S.No.514 of 1980 above referred to and on 08.11.1992 since, when the defendant is threatening to close the windows and sunshades situated on the southern side wall of the plaintiff. Even for sustaining the suit, it is found that the plaintiff has relied only upon the copies of the judgment and decree made in O.S.No.514 of 1980 and other than the above said two documents, no other document has been pressed into service by the plaintiff for establishing his suit claim.

10. As per the Code of Civil Procedure, Order 7 Rule 1, inter alia, the plaint shall contain particulars of facts constituting the cause of action and when it arises and also the facts on the basis of which the plaintiff claims the relief sought for. Further, as per Order 7, Rule 7 of the Civil Procedure Code, the relief claimed in the plaint should be specifically stated and Order 7 Rule 7 CPC reads as under:

" Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

In addition to that, when the plaintiff bases his suit and claims the relief founded on separate grounds, it is incumbent upon him to specify the distinct claims or causes of action founded upon separate and distinct grounds and in this connection, Order 7 Rule 8 states as follows:

" Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly."

11. Now, coming to the determination of the plaintiff's suit, it is found that as above mentioned, the plaintiff has laid the suit only for the relief of permanent injunction. For claiming the relief, the plaintiff relies upon only two documents above referred to and nothing more i.e., the judgment and decree rendered in O.S.No.514 of 1980. Even according to the plaintiff, the basis on which, he has laid the present suit, it

is found that the defendant's house admittedly is situated on the southern side of the plaintiff's house and it is further seen that according to the plaintiff and also not in dispute that the defendant has put up a new building in his property and by way of the same, as per the case of the plaintiff, inasmuch as the defendant has put up a wall on the northern side of his property, close to the plaintiff's southern wall, it is the grievance of the plaintiff that by way of the same, the defendant is attempting to close the sunshades and 12 windows put up by the plaintiff on the southern side of his wall facing the defendant's property and further, according to the plaintiff, inasmuch as the defendant had filed a suit in O.S.No.514 of 1980 above referred to for the relief of mandatory injunction and for removing the sunshades and windows put up by the plaintiff on the southern side of his wall and the relief of permanent injunction sought for restraining the plaintiff and his men from entering into the property of the defendant and inasmuch as the above suit had come to be dismissed by the Court and thereafter, no appeal has been preferred by the defendant, the said judgment and decree having become final, it is the case of the plaintiff that by way of raising a wall on the northern side of his property, the defendant, thereby, is attempting to close the sunshades and windows put up by the plaintiff in the southern wall of his property and it is further contended that the defendant, by raising the wall on the northern side of his property, is trying to achieve his illegal objects, which, he could not secure by way of filing the suit in O.S.No.514 of 1980 and therefore, it is stated that the defendant by way putting up the wall on the northern side of his property obstructs the plaintiff's air and light and that apart, it is also the plea of the plaintiff in the plaint that inasmuch as, as per the issue No.6 framed in O.S.No.514 of 1980 above referred to and the said issue between the parties had been dealt with elaborately, the defendant has no right to close the windows of the plaintiff and thereby, it is stated that the defendant is estopped by his own conduct and also in view of the judgment passed in O.S.No.514 of 1980 against him. There are what the plaint averments speak about. That apart, the plaint averments do not state, on what basis or under what mode or on the basis of what provision of law, the plaintiff claims to be entitled to air and light through the windows put up by him on the southern wall of his property. It has not been clearly made out as to whether the plaintiff claims the right to air and light through the said windows as a matter of right or claims the same as matter of easementary right, if so, under what mode of easement he is claiming the right to air and light through the said windows etc., The only prayer sought for by the plaintiff is to prevent the defendant from putting up a wall in the northern side of his property and thereby, restraining him from closing the windows and sunshades put up by

the plaintiff on the southern wall of his property. As seen above, when the plaintiff files the lis and seeks the relief on the basis of distinct claims or cause of action, the plaint shall contain facts, upon which, the plaintiff's seeks the separate distinct claims and in so far as the present case is concerned, it is found that the plaint averments are very very nebulous and vague and do not reveal any clear right, as to on what basis, the plaintiff claims the right to light and air through the windows put up on the southern wall of his property.

12. In this connection, as rightly argued by the defendant's counsel and also as seen in the light of the decision of the Apex Court in (2008) 17 Supreme Court Cases 491 (Bachhaj Nahar Vs. Nilima Mandal and another), it is found that when a party claims injunction on the basis of an easementary right, now according to the plaintiff, in the present suit, he seeks the relief of permanent injunction only on the basis of easementary right, however, not explaining under what mode the plaintiff claims the right, a Court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence because there are various kinds of easements. It is found that when the facts necessary to make out a particular claim or seek to a particular relief are not found in the plaint, the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Expatiating the above said positions of law, the Apex Court in the above said decision has elaborately discussed the law on the above point in paragraphs 12 and 13, as follows:

"12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points

required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief."

That apart, in the very decision, the Apex Court has also held that where the pleadings necessary to establish a easementary right claimed by a party, the pleadings and proof as to the kind of easements on the basis of which the party seeks the relief should be clearly spelt out and the above position of law has been detailed by the Supreme Court in the following manner.

"18. A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for

making out an easementary right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right, relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of restricting the natural rights of the owner/occupier of such property.

19. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a water course etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right.

20. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same

person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to water course. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence.

21. A right of easement can be declared only when the servient owner is a party to the suit.....

13. In the light of the above said principles of law and the essential averments that should be contained in the plaint for enabling the Court to grant necessary reliefs sought for by the party, it is found that the above said necessary facts should be incorporated in the plaint, particularly, where the party seeks the relief sought for on the basis of an easmentary right and in so far as the present case is concerned, applying the above said principles of law as outlined by the Apex Court, it is seen that the plaint averments do not at all project any cause of action as to on what basis or on what easmentary right, the plaintiff seeks the right to light and air through the windows fixed on the southern wall of his property.

14. Further, as per the decision of the Apex Court reported in AIR 2011 Supreme Court 3258 (Ram kanya Bai and anr Vs. Jagdish and Ors), it is found that when a person (dominant owner) has an easementary right, and the servient owner disturbs, obstructs or interferes with his easementary right, or denies his easementary right, the remedy of the dominant owner is to approach the civil court for the relief of declaration and/or injunction. In so far as the present case is concerned, the plaintiff has not made out clearly in the plaint as to on what kind of easement, he seeks the right to light and air through the windows fixed on the southern wall of his property and despite the plea put forth by the plaintiff that the defendant is attempting to prevent the passage of light and air through the windows by constructing a wall on the northern side of his property and when even to the knowledge of the plaintiff, the defendant had already moved a lis for appropriate reliefs for a direction to the plaintiff to close the windows and

sunshades fitted on the southern wall of his property, it is seen that the plaintiff having known the definite stand of the defendant with reference to the issue between the parties, should have come forward with the necessary relief of declaration as to the basis on which, he claims the easementary right of passage of light and air through the Windows fitted on the southern wall of his property, particularly, on what nature of easements, he claims the said right and also the plaintiff should set out facts in the plaint, the basis on which, he claims the said easementary right as pointed out in the Apex Court decision earlier referred to. However, it is found that the above facts, which are necessary to be stated in the plaint, particularly, in the nature of the suit like the present case are completely absent. It is found that the plaintiff, without any basis or foundation, has come forward with the suit only claiming the relief of permanent injunction without disclosing, as to on what basis, he seeks to sustain his alleged right of passage of light and air through the windows and if really, the plaintiff has any easementary right with reference to the same, the plaintiff should have disclosed the necessary facts to enable the Court to understand his case correctly and also to enable the defendant to set out his defence properly as to whether the plaintiff is entitled to claim such an easementary right as regards the passage of light and air through the windows.

15. Admittedly, the defendant is putting up the wall only within the limits of his property. Even as per the case of the plaintiff, the defendant has raised the wall on the northern side of his property and it is not the case of the plaintiff in the plaint that the defendant, by way of raising a new building in his property, is constructing the wall on the northern side of his property violating the necessary approval and sanction from the concerned authorities. That apart, no material has also been placed by the plaintiff to hold that the construction of the wall by the defendant on the northern side of his property is against law or against the approval and sanction of the competent authorities. Thus, it is seen that the defendant is raising the wall on the northern side of his property as per the necessary sanction of law.

16. No doubt, the suit laid down by the defendant in O.S.No.514 of 1980 for the reliefs of mandatory injunction and permanent injunction to the plaintiff to close the windows and sunshades on the southern wall of his property had come to be dismissed. It is also seen that as against the judgment and decree passed in the said suit i.e. O.S.No.514 of 1980, the defendant has not preferred any appeal. In the above said suit, as per the documents marked as Exs.A1 and Ex.A2, it is found that the following issues were framed for determination:

" 1. As the defendants built 12 windows in his southern wall?

2. Do the aforesaid windows constitute infringement of plaintiff's right or privacy?

3. Is plaintiff justified in claiming a breach of the right of privacy?

4. As the defendant committed trespass on plaintiff's property?

5. Is plaintiff entitled to any of the injunction claimed?

6. In plaintiff estop from complaining against the defendant for the reason given in the statement and from filing the suit?

7. To what relief if any, is plaintiff entitled?"

17. On a perusal of the above issues framed for consideration in the said suit, it is seen that nowhere any issue had been framed in the said suit as to whether the plaintiff is entitled to any easementary right of passage of light and air through the windows fitted on the southern wall of his property. That apart, even in the said suit, the plaintiff has not made out any pleas that he is entitled to any particular kind of easementary right for free passage of light and air through the windows fitted on the southern wall of his property and the defendant is not entitled to seek the removal of the windows thereby. On the other hand, the plaintiff would claim in the said suit, as seen from the documents marked Exs.A1 and Ex.A2, it is seen that according to the plaintiff, the defendant had requested the plaintiff, informing that as his northern wall is weak and had no foundation, therefore, to raise a wall in his property all along its length and accordingly, it is the case of the plaintiff that he had complied with the request of the defendant and thereby, put up the wall on the southern side of his property and also fitted the windows and sunshades in the said wall and this is how the plaintiff claims the right of putting up the windows and sunshades on the southern wall of his property. However, as regards the above case projected by the plaintiff in the said suit, as seen from Exs.A1 and Ex.A2, the plaintiff has not pleaded any written agreement between the parties with reference to the same and it appears to be an oral understanding between the parties and we have to see whether the

Court in that case had rightly and properly accepted the plaintiff's case as regards the above said pleas. In this connection, the plaintiff strongly relied upon the issue No.6 framed in the said suit mentioned supra and thereby, contends in the present suit, that the defendant is estopped by his own conduct and in view of the judgment rendered against him in O.S.No.514 of 1980. The above said plea is based upon the pleas contained in the written statement of the plaintiff in O.S.No.514 of 1980 as above narrated i.e. the defendant informing the plaintiff about his northern wall being weak and without foundation and thereby, requesting the plaintiff to raise his wall on the southern side all along its length and accordingly, the plaintiff has put up the southern wall and fitted the windows and sunshades. With reference to the said, issue No.6 framed in O.S.No.514 of 1980, the Court had answered the said issue as below:

" Issue No.6: From the perusal of the written statement, it is seen that the plaintiff requested the defendant that his northern wall of the house is weak having no foundation the defendant might raise a wall all along its length so that the plaintiff's wall would get strengthened the defendant has complied with the request of the plaintiff when the defendant was completing his construction and intended to plaster its windows and sun shaded and to which putting of windows and sun shades which the plaintiff permitted when he and the defendant's were in amicable terms. The plaintiff has countered, the statement of the defendant which given to room to conclude that the plaintiff himself has permitted the defendant to have the windows and sun shades on the southern wall of the defendant's house, as such the plaintiff cannot now claim that the act of the defendant is illegal and is estopped from filing the suit. I find this issue accordingly."

18. On a perusal of the approach of the Court in O.S.No.514 of 1980 as regards the issue No.6, it is found that the Court has only found that the defendant has countered the above pleas projected by the plaintiff and in such view of the matter, when even according to the Court, the defendant has repudiated the above case of the plaintiff i.e. he having granted any permission to the plaintiff to raise the southern wall of his property, it does not stand to reason as to how, without any

further material, on what basis, the Court, while answering the issue No.6, had come to the conclusion that the defendant had permitted the plaintiff to have the windows and sunshades fixed on the southern wall of his property and with reference to the above said point, when there is no further material available on record, other than Exs.A1 and Ex.A2 and when as per Exs.A1 and Ex.A2, specifically, when it is noted that while answering issue No.6, it has come to the knowledge of the Court that the defendant has countered the pleas put forth by the plaintiff as regards the estoppel plea projected by the plaintiff, it is seen that exfacie, the findings of the Court in the above suit as regards the issue No.6 that the defendant is estopped from filing the suit for seeking a direction to the plaintiff to close the windows and sunshades, in my considered opinion, it is found to be erroneous and without any basis on materials and the said findings can only be perceived as perverse and unsustainable in the eyes of law. Therefore, while answering the issue No.6 in the said suit, when the Court is not possessed of any material, as to how, it has come to the conclusion that the defendant has acceded and given permission to the plaintiff to put up the southern wall of his property by fitting the windows and sunshades and with the materials placed in the said suit also do not point out anything with reference to the same and when the defendant has strongly countered the above pleas of estoppel claimed by the plaintiff, it is seen that without any rhyme or reason, the Court has come to the conclusion that the defendant is estopped from directing the plaintiff to close the windows and sunshades and filing the suit against him. When it is seen that the above answer to the issue No.6 by the Court in the said suit is not founded or based upon on any materials or on any point of law and the same being found to be perverse in toto, the answer to the issue No.6 rendered by the Court in the said suit cannot be made the basis for the plaintiff to seek the reliefs claimed in the present suit. The plaintiff, as earlier adverted to, in the plaint, only averred that the defendant is estopped by his own conduct and the judgment rendered against him in O.S.No.514 of 1980 to raise the wall on the northern side of his property, thereby, attempting to close the windows and sunshades put up by the plaintiff. However, when the basis for the above said plea of estoppel raised by the plaintiff is found to have no legs to support and also cannot be sustained sans materials and when in the present case also, the plaintiff has not come forward with any material, as such, to hold that the defendant by his conduct had permitted the plaintiff to put up the windows and sunshades in the southern wall and when the contention of the plaintiff that the said issue has been properly and rightly answered in his favour in O.S.No.514 of 1980 is found to be unacceptable, particularly, when it is seen that the above issue had been answered in favour of the plaintiff by the Court concerned without any basis or

material, particularly, when the above pleas had been strongly countered/repudiated by the defendant, it is seen that the plea of estoppel, now put forth by the plaintiff on the basis of the answer given by the Court to the issue No.6 in O.S.No.514 of 1980 cannot be countenanced either factually or legally and therefore, it is found that the plaintiff cannot sustain his lis against the defendant on the basis of the above plea of estoppel. It is thus found that the Courts below have rightly negatived the plea of estoppel projected by the plaintiff for sustaining his suit against the defendant.

19. In addition to that, a perusal of Exs.A1 and Ex.A2 i.e. the judgment and decree passed in O.S.No.514 of 1980, it is found that the defendant has sought the reliefs of mandatory injunction and permanent injunction against the plaintiff in the said suit only complaining that putting up of the windows and sunshades by the plaintiff on the southern side of his wall had infringed his privacy as the existence of the above said windows exposed the open latrine and bathroom in the backyard of his house and accordingly, sought for the appropriate reliefs in the said suit. Accordingly, it is found that necessary issues were only framed by the Court in the said suit as to whether the windows fitted by the plaintiff in the southern wall of his property constituted infringement of the defendant's right of privacy and accordingly, on holding that putting up of the windows by the plaintiff did not infringe the right of privacy of the defendant as put forth by him and further, accordingly, also holding that the windows put up by the plaintiff did not constitute any trespass on the defendant's property, non suited the defendant and resultantly, dismissed the suit laid by him in O.S.No.514 of 1980. It is thus found that the main issue that had crept in the said suit was whether the existence of windows put up by the plaintiff on the southern side of his wall amounted to any breach of privacy of the defendant's property, particularly, his bathroom and lavatory and the Court answering the same in the negative, resultantly, dismissed the defendant's suit and in such view of the matter, it is found that nowhere in O.S.No.514 of 1980, any issue was raised, agitated/contested between the parties as regards the entitlement of the right of passage of light and air to the plaintiff either as a matter of absolute right or by any kind of easementary right through the southern windows and in such view of the matter, the contentions put forth by the plaintiff's counsel that in the earlier suit in O.S.No.514 of 1980, the Court had accorded or approved the plaintiff's right to easement of receiving light and air through the windows fitted on the southern wall of his property as such cannot be countenanced and accepted in any manner. When such issues were not at all germane or necessary for the determination of the reliefs claimed in the said suit as above discussed and when the pleas put forth by the respective parties

in the said suit are also not in any manner related to the alleged easementary right of the plaintiff to receive the light and air through the southern windows as such and when no specific issue of any such right has also been determined by the Court in the said case, in it is seen that the judgment and decree passed in O.S.No.514 of 1980 would not in any manner be the cause of action for the plaint or the foundation for the plaintiff to institute the present suit against the defendant for claiming any right to receive the light and air through the southern windows. Accordingly, it is found that the plaintiff has also not spelt out clearly in the plaint, as to under what kind of easement, he is claiming the right to light and air through the southern windows. If really, the plaintiff's right of easement to receive the light and air through the southern windows had been upheld in the earlier suit one way or other and the plaintiff had also continued to enjoy the said right, even thereafter, in the manner known to law, the facts constituting the same or necessary pleas with reference to the same would have been incorporated in the present plaint and accordingly, the plaintiff would have also come forward with the relief of declaration that he is entitled to a particular kind of easementary right to receive the light and air through the southern windows and on the other hand, inasmuch as the plaintiff knew very well that he cannot claim any right of easement of passage of light and air through the southern wall windows, as he did not possess any such right on the date of the present suit or even during the period when the earlier suit in O.S.No.514 of 1980 was pending and the plaintiff is also fully aware that the defendant has also not granted any such right to him either expressly or impliedly, it is found that the facts pertaining to the same are completely and conspicuously absent in the present plaint and likewise, it is also seen that the plaintiff unable to place any material to sustain his claim of easementary right to receive the light and air through the windows other than marking the copies of the judgment and decree in O.S.No.514 of 1980, however, when it is noted that the judgment and decree passed in O.S.No.514 of 1980 do not form the basis for the plaintiff to institute the present suit, it is seen that the plaintiff has no cause of action at all to institute the present lis against the defendant.

20. It is, however, vehemently argued by the plaintiff's counsel that the plaintiff, by way of implied grant of easementary right by the defendant, is entitled to sustain his case and the said point of law has not been properly appreciated by the Courts below. In this connection, the plaintiff's counsel relied upon the decision reported in AIR 1964 MADRAS 209 (M.Ratanchand Chordia and others Vs. Kasim Khaleeli) by contending that even in the absence of an express grant, an easement may arise by implication, if an intention to grant can

properly be inferred, either from the terms of the grant or from the circumstances and the intention of the grantor has to be presumed that he intended to convey to the grantee a right of easement for the reasonable and convenient enjoyment of the property which has to be ascertained in all the circumstances of the case to find out whether a grant can be implied and pointing to the above said position of law, the plaintiff's counsel argued that inasmuch as the defendant had granted permission to the plaintiff to raise the southern wall as found by the Court in issue No.6 in O.S.No.514 of 1980 by way of the above said position or as a corollary of the above said determination, the plaintiff should be held to be entitled to the easementary right to receive the light and air through the southern windows by implication. In this connection, the decision of this Court dated 15.02.2017 passed in S.A.No.733 of 2011 and the decision reported in AIR 1972 MADRAS 307 (K.Govindarajulu Chettiar Appellants Vs. V.N.Srinivasalu Naidu Respondent) are also relied upon by the plaintiff's counsel. No doubt, if there are material facts, by which, a party is entitled to easementary right by way of implication, the Court would be entitled to draw and infer such right from the relevant circumstances projected and accordingly, grant appropriate reliefs to the party concerned. In so far as this case is concerned, the easementary right by implication is not sought for by plaintiff by any document and only the circumstances set out in issue No.6 in O.S.No.514 of 1980 are projected. However, when under the same issue, the said pleas put forth by the plaintiff had been repudiated by the defendant, as found by the Court concerned and despite the said resistance, when there is no material to the Court concerned to hold that the defendant had acceded to any such right to the plaintiff to put up the Windows and sunshades etc., in southern wall, it is found that the Court concerned had committed a serious flaw in the said suit that the defendant is estopped from questioning the putting up of the Windows and Sunshades in the plaintiff's southern wall while answering the issue No.6 in the said suit. In such view of the matter, it is seen that the contention of the plaintiff's counsel that the plaintiff had acquired the easementary right of the passage of light and air through the southern windows by implication from the attending circumstances of the case cannot be accepted sans any proof or any material pointing to the same. If that be so, the plaintiff would have clearly averred about the necessary facts constituting the same in the present suit and also placed acceptable and reliable materials to sustain the said pleas, however other than marking the copies of the judgment and decree in O.S.No. 514 of 1980, the plaintiff has not placed any material to sustain his case and also the plaint is also completely lacking in necessary particulars as regards the basis, on which, the plaintiff claims the easementary right.

21. As rightly determined by the Courts below, the suit in O.S.No.514 of 1980 would not in any manner constitute res judicata to the defence projected by the defendant in the present suit. When it is found that the issues pertaining in O.S.No.514 of 1980 are materially distinct and separate from the issues involved in the present suit as in O.S.No.514 of 1980, the issues are whether the defendant is entitled to seek the closure of the windows and sunshades put up by the plaintiff's on his southern wall as the same amounts to breach of right or privacy, whereas in the present suit, the issue is whether the defendant is entitled to put up the wall on the northern side of his property, thereby affecting the passage of light and air to the plaintiff's windows fitted on the southern wall. As above referred to, when the plaintiff has not come forward and also not established as to under what mode of legal right, he claims the right of passage of air and light through the windows on the southern wall, it is seen that the plaintiff cannot be allowed to maintain the suit as such and accordingly, it is found that the Courts below have rightly non suited the plaintiff as without any foundation. As regards the plea of res-judicata, the counsel for the respondent placed reliance upon the decision reported in 2004 (1) CTC 238 (K.Sivaramaiah Vs. Rukmani ammal). The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

22. It is argued by the defendant's counsel that the relief of permanent injunction sought for by the plaintiff against the defendant is personal and on the death of the defendant pending the second appeal, it is contended that the cause of action for the plaintiff, even assuming the said cause of action is true, it is argued that the same does not survive and therefore, it is contended that the suit laid by the plaintiff for permanent injunction has become infructuous on the death of the defendant and in this connection, the decisions reported in 1998 (5) KarLJ 171 (Venkubai (Deceased) By L.Rs Vs. The Assistant Commissioner), the decision of our High Court dated 04.01.2016 passed in CRP(PD)Nos.1245 and 1246 of 2012 and dated 17.03.2016 passed in CRP(PD)No.565 of 2016 are relied upon. A perusal of the above said decisions would go to show that when the suit for permanent injunction is filed against the particular person based on the personal cause of action, such cause of action does not survive the death of the person and accordingly, it is seen that on the death of the defendant, even assuming that the plaintiff's cause of action for laying the suit is true, it is seen that the same does not survive and on that basis also, it is seen that the suit laid by the plaintiff has become infructuous. However, it is argued by the plaintiff's counsel that inasmuch as the plaintiff had claimed easementary right in the present suit for his entitlement to receive light and air

through the southern windows and therefore, according to him, such right flowing along with the servient tenement and even in the case of change of ownership of the servient tenement, the plaintiff need not be directed to file separate suit, whenever there is a change in the ownership of the servient tenement, as it is argued that the easementary right runs with the land and in this connection, the decision of our High Court dated 03.11.2011 passed in S.A (MD) No.782 of 2010 is relied upon. However, as rightly argued by the defendant's counsel, when the plaintiff has not based his action claiming any easementary right to receive light and air through the southern windows and also not placed any material with reference to the same to sustain his case and on the other hand, only sought for the relief of permanent injunction personally against the defendant on the foundation of the judgment and decree passed in O.S.No.514 of 1980, it is found that the above said decision is not applicable to the facts at hand as the plaintiff has failed to establish that he is entitled to any such kind of easementary right for receiving light and air through the southern wall of the windows.

23. The counsel for the defendant placed reliance upon the decision reported in 1964 (1) MLJ 293 (M.Ratanchand Chordia and others Vs. Kasim Khaleeli) and the principles of law outlined in the above said decision are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

24. In the light of the above discussions, it is found that the defendant has raised the wall only within the northern limits of his property and in such view of this matter, it is seen that the construction of the said wall by the defendant would not amount to the closure of the windows put up by the plaintiff on the southern side of the wall, when it is found that as per the materials, the said construction at the most would result in the closure of only one window and the raising of the said wall would not in any manner affect the existence of the other windows and ventilators put up by the plaintiff and therefore, it is seen that accordingly, the Courts below have rightly held that on the above said issue also that the plaintiff is not entitled to obtain the relief of permanent injunction and the determination of the Courts below is found to be reasonable and acceptable and nothing has been pointed out to hold that the above said finding or determination is against the evidence on record. In the absence of any material, it is found that the Courts below have correctly held that there is no agreement between the parties, particularly, no permission had been granted by the defendant to the plaintiff to put up the windows and ventilators in the southern wall and it is also found that the finding given with reference to the same under

issue No.6 in O.S.No.514 of 1980 is, as above determined, perverse and unacceptable in the eyes of law. The plaintiff having failed to establish any kind of right under which he is entitled to maintain the windows and ventilators on the southern side of his wall and when it is seen that the defendant has not granted any permission to the plaintiff to put up the said windows and ventilators and when it is further noted that the defendant has raised the wall only within the limits of his property and the construction of the said wall has not shown to be against law or the contrary to the approval / sanction of the competent authority concerned, it is found that as rightly determined by the Courts below, the defendant is not attempting to achieve indirectly what he could not obtain by raising the wall in his property. The issues formulated in the second appeal are accordingly answered.

25. In conclusion, the second appeal fails and accordingly, is dismissed with costs and consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar (CS-iv)

//True Copy//

Sub Assistant Registrar

mfa/sms

To

1. the sub judge,
The Subordinate Court,
Arni, Thiruvannamalai District.
2. the district munsif,
The District Munsif Court, Arni.
3. The Section Officer,
V.R. Section, High Court, Madras. (2 copies)

+1cc to Mr.R.THOLGAPPIAN, Advocate, S.R.No.88595
+1cc to Mr.K.BILAISUNDAR, Advocate, S.R.No. 88635

judgment made in
S.A. No.1036 of 2001

VG I (CO)
TR(16/02/2018)