

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 22.09.2017

Judgment Pronounced on : 11.09.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.1004 of 2014

in

M.P.No.3 of 2015

L.Subramaniam ... Appellant/Appellant/Defendant

Vs.

Sohandevi ... Respondent/Respondents/Plaintiff

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 13.06.2014 made in A.S.No.429 of 2013 passed by the learned Additional Judge, XIX Additional City Civil Court, Chennai, confirming the Judgment and decree dated 29.08.2013 made in O.S.No.2778 of 2010 passed by the XVI Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.S.Subbiah

For Respondent : Mr.T.M.Hariharan for
M/s.Sha and Sha

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 13.06.2014 made in A.S.No.429 of 2013 passed by the learned Additional Judge, XIX Additional City Civil Court, Chennai, confirming the Judgment and decree dated 29.08.2013 made in O.S.No.2778 of 2010 passed by the XVI Assistant Judge, City Civil Court, Chennai.

2.Brief facts of the case is as follows:-

The plaintiff filed a suit for declaration and easementary right of light and air with regard to the suit property and also sought for permanent injunction against the defendant. According to the plaintiff, he has purchased the suit property on 13.03.1985. On the northern side of the plaintiff's property, the property of the defendant is situated. The

plaintiff's property is bearing New Door No.5 and the defendant's property is bearing New Door No.3. From the date of purchase, on the northern wall of the plaintiff building there are three windows measuring to an extent of 3 x 5 feet, which is the only source of light and air for the bedroom. The defendant has recently demolished the then existed old building and started putting up new construction. The construction has reached the level of ground floor roofing and the defendant has not left any set back space on the northern side of the plaintiff's property adjoining the northern wall. The present construction put up by the defendant is likely to close the windows in the northern wall in the first floor of the plaintiff's property and obstruct the free flow of light and air. The plaintiff has also acquired easementary right of light and air being in existence over a statutory period of time. The construction by the defendant without leaving set back space is affecting the easementary right of the plaintiff and the same is unlawful. Hence, the plaintiff has come forward with the suit for declaration and injunction with regard to the easementary right.

3.The defendant denied the allegations of the plaintiff and stated that on the eastern side of the plaintiff's property there is open space and she is enjoying air and light uninterruptedly from all the sides of her property. On the southern side of the plaintiff's property there is a vast open play area of about 5 grounds. As such, the plaintiff is enjoying the privilege of easementary right from huge open terrace, open space on eastern side and western side of her property is facing road side with spacious balcony and on southern side of her property also huge open vacant play ground exist. She has also installed tin sheets on the terrace to avoid excess sun light and heat in summer. Thus, no right of easement of necessity will arise for the plaintiff with the ventilation available through other sources. Where there are other ways and means to have access for air and light from all the three sides of the plaintiff's property, the plaintiff cannot have any right merely on the ground that the construction by the defendant will cause inconvenience to the plaintiff. The defendant put up a construction as per the approved plan. Hence, the plaintiff has no right to seek easementary right against the defendant.

4.After contest, the trial Court decreed the suit as prayed for. Aggrieved upon that the defendant has preferred the first appeal before the lower appellate Court and after contest the lower appellate Court dismissed the appeal filed by the defendant and confirmed the decree and judgment of the trial Court. Aggrieved upon that the defendant preferred this second appeal.

5. At the time of admission, the following substantial question of laws were framed by this Court for consideration.

a) When a right of easement is to whether it is of necessity or grant or prescriptive, as provided under the Easements and License Act, under Section 28 of the above Act, and when, the plaint does not signify any one of such right, whether the Court is empowered to grant a right which have not been specifically claimed by the plaintiff in the plaint.

b) When the pleadings claiming a right of easement were lacking. In the suit filed by the plaintiff, whether the Court can permit to lead evidence on any case of those that were enumerated under Section 28 of the Easement and License Act?

6. The learned counsel appearing for the appellant/defendant would submit that as far as air and light are concerned, they were only fall within Section 28 of the Easement Act, but, the plaintiff neither pleaded nor let in any evidence to show whether such a right claimed by her fall within easement of necessity or acquired by grant or prescriptive right and in the absence of any such pleadings to show to that it comes under Section 28 of the Easement Act, the lower Appellate Court ought to have dismissed the suit, but, the lower appellate Court wrongly confirmed the findings of the trial Court. It is against law. In support of his argument, the learned counsel appearing for the appellant/defendant has relied on number of citations to strengthen his contention and sought for allowing the appeal.

7. Per contra, the learned counsel appearing for the respondent/plaintiff would submit that Para 6, 11 and 12 of the plaint contain definite pleadings with regard to easementary right. From the year 1962 onwards, the plaintiff was a tenant of the suit property and subsequently, she has purchased the same in the year, 1985. From the date she entered into the possession of the suit property, the plaintiff has been enjoying the right and she has prescriptive easementary right. Hence, the allegations of the appellant is not sustainable. After elaborate discussions of both oral and documentary evidence, the Courts below has come to the correct conclusion and there is no infirmity in the findings of the Courts below. Hence, the appeal has to be dismissed.

8. I have heard the rival submissions and also perused the materials available on record.

9. On perusal, it is clear that the plaintiff is the owner of New Door No.5 and Old Door No.3 on the southern side of the

defendant's property. The defendant's property is situated on the northern side of the plaintiff property bearing New Door No.3 and Old Door No.2. According to the plaintiff, there are three windows fixed on the northern wall of the plaintiff's property. The defendant who is the northern side property owner demolished his building and constructing a new building. While constructing the new building, he attempted to close the windows by raising wall on the southern side of the defendant's property without letting any space on the northern side of the plaintiff's property. It affects the free flow of air and light to the plaintiff's property. From the year 1962 onwards, the plaintiff is enjoying the light and air from the defendant's property open space. Hence, the plaintiff is claiming easementary right.

10. According to the defendant, the plaintiff is having ways and means to get free flow of air and light from all other three sides of her property. So, there is no necessity to sent flow of air from the northern side of the plaintiff's property. The plaintiff has also not claimed which kind of easementary right, namely, easementary right by grant, easementary right by prescription on easementary right by necessity. It is contended that with regard to his right, there is no specific pleadings in the plaint. In support of his contention, the learned counsel for the defendant relied upon the Apex Court verdict which is reported in 2009 (2) LAW WEEKLY 485 in BACHHAJ NAHAR Vs. NILIMA MANDAL & ANOTHER, wherein it is held as follows:-

".....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 person by virtue of his ownership of 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.

14.....Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc."

As per the Apex Court verdict, pleadings with regard to which kind of easementary right is sought for is mandatory and if not pleaded specified and proved by letting in evidence, the plaintiff is not entitled for decree. Now, let us see the

relevant pleadings of the plaint. In the plaint para No.6 which runs as follows:-

"The plaintiff states that the defendant is not entitled to close or obstruct the windows on the northern wall in the first floor of the plaintiff's property which had acquired easementary right of light and air being in existence over a statutory period of time. The construction by the defendant without leaving set back space by affecting the easementary right of the plaintiff is unlawful."

11.In the evidence para No.7 of the proof affidavit, P.W.1 says as follows:-

I further submit that the defendant is not entitled to close or obstruct the windows on the northern wall in the first floor of plaintiff property which has acquired easementary right of light and air being in existence over a statutory period of time even prior to 1962. The construction by the defendant without leaving side set back space is affecting the easementary right of me and this act of defendant is not only unlawful but clearly in violation of the rules and regulations stipulated by the concerned authority."

12.On the side of the plaintiff, P.W.1 has stated during cross examination as follows:-

"1962-ல் நான் தாவா சொத்திற்கு வாடகைக்கு வந்தேன். பிறகு 1985-ல் கிரயம் வாங்கிவிட்டேன். என்னுடைய கட்டிடத்தின் மேற் கூரையை காட்டும் புகைப்படம் பிசா.ஆ.1 முதல் 5 ஆகும். அதில் பள்ளிகூடத்தின் புகைப்படமும் உள்ளது. பள்ளிகூடத்திற்கு முன்பு விளையாட்டு மைதானம் இருந்தது. தற்பொழுது கட்டிடம் கட்டிவிட்டார்கள். என்னுடைய சொத்தில் வடக்கு பக்கம் என்னுடைய இடத்தில் காலியிடம் இல்லை நான் கட்டிய வீட்டைதான் வாங்கினேன். நான் மற்றவர்களின் சொத்தில் இடைவெளி கேட்க உரிமையில்கலை என்றால் சரியல்ல."

So the plaintiff has pleaded about the easemntary right as "acquired easementry right of light and air over the statutory period of time".

13.Section 28 of the Easement Act runs as follows:-

28.Extent of easements__with respect to the extent of easements and the mode of their

enjoyment, the following provisions shall take effect.

Easement of necessity—An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

Other Easements—The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired.

(c) Prescriptive right to light or air—The extent of a prescriptive right to the passage of light or air to a certain window, door or other openings is the quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used."

13. As per the provision of Section 28, the extent of a prescriptive right to the passage of light or air to a certain window, door or other openings is the quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used and it has to be proved. The plaintiff has specifically pleaded in Para 6 of the plaint that the first floor of the building on the northern wall consist of three windows measuring to an extent of 3 x 5 feet which is the only source of light and air for the bed room. To substantiate the pleadings, P.W.1 has stated that during his evidence as from 1962 onwards as a tenant and from the year 1995 onwards as a owner of the property, he was enjoying the light and air through the above said windows. On the side of the defendant, it is not denied with any acceptable evidence. Thus, the necessary pleadings and evidences let in by the plaintiff to prove their case. In plaint para - 6, the plaintiff has stated that he had acquired easementary right and that he is enjoying easementary right for more than the statutory period. So, the pleadings as well as the evidence let in by the plaintiff is sufficient as per Section 28 of the Easementary Act. If not specifically pleaded, the plaintiff is not entitled for that right. When it was specifically pleaded in the plaint, the contention of the defendants relying upon the Apex Court verdict stated above cannot be entertained.

14. On the side of the defendant, the learned counsel relied on the ruling reported in (1) 1971 (2) SCC 205 in CHAPSIBHAI DHANJIBHAI DANAD VS. PURUSHOTTAM, (2) 2001 (3) MLJ 13(SC) in SARASWATI AND ANOTHER Vs. S.GANAPATHY AND ANOTHER and (3) 1975 (1) MLJ 401 in V.N.CHANDRAVADIVELU Vs. V.VARADAPPA CHETTY AND

AIR 1927 ALLAHABAD 191 in DWARKA PRASAD AND ANOTHER Vs. BISHAMBHAR DAYAL. However, as the facts involved in the present case is different, the above said ruling will not be any use to the defendants.

15. Out of the citations relied on by the defendant, only 2009 (2) LAW WEEKLY 485(SC), is relevant to the facts of this case. As per the said Apex Court verdict, easement has to be pleaded and proved. In this case, the plaintiff has sufficiently pleaded and proved the right of easement enjoyed by her. Hence, both the Courts below accepted the claim of the plaintiff. The defendant has now come forward the second appeal with the substantial question of law containing as if the plaintiff failed to plead and prove easementary right as per Section 28 of the said Act. As stated supra, the plaintiff has sufficiently pleaded and proved easementary right as per Section 28 of the Easementary Act. Hence, the substantial question of law raised by the appellant/defendant is answered against him and in favour of the plaintiff/respondent. Both the Courts below came to the correct conclusion on factual aspect with regard to proof of easementary right for the statutory period. Moreover, the defendant has not questioned the period of enjoyment. The only ground put forth in the appeal is lack of pleadings and evidence on the side of the plaintiff. For the reasons stated above, the contention of the appellant is not tenable. In view of the above said discussion, there is no need for interference in the findings of the Courts below. Therefore, this Court comes to the conclusion that the second appeal is devoid of merits and the same has to fail.

16. In the result, the second appeal is dismissed. No Costs. The decree and judgment dated 13.06.2014 made in A.S.No.429 of 2013 passed by the learned Additional Judge, XIX Additional City Civil Court, Chennai confirming the Judgment and decree dated 29.08.2013 made in O.S.No.2778 of 2010 passed by the XVI Assistant Judge, City Civil Court, Chennai is hereby confirmed. Consequently, connected M.P. is closed.

Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

1. The Additional Judge,
XIX Additional City Civil Court,
Chennai.

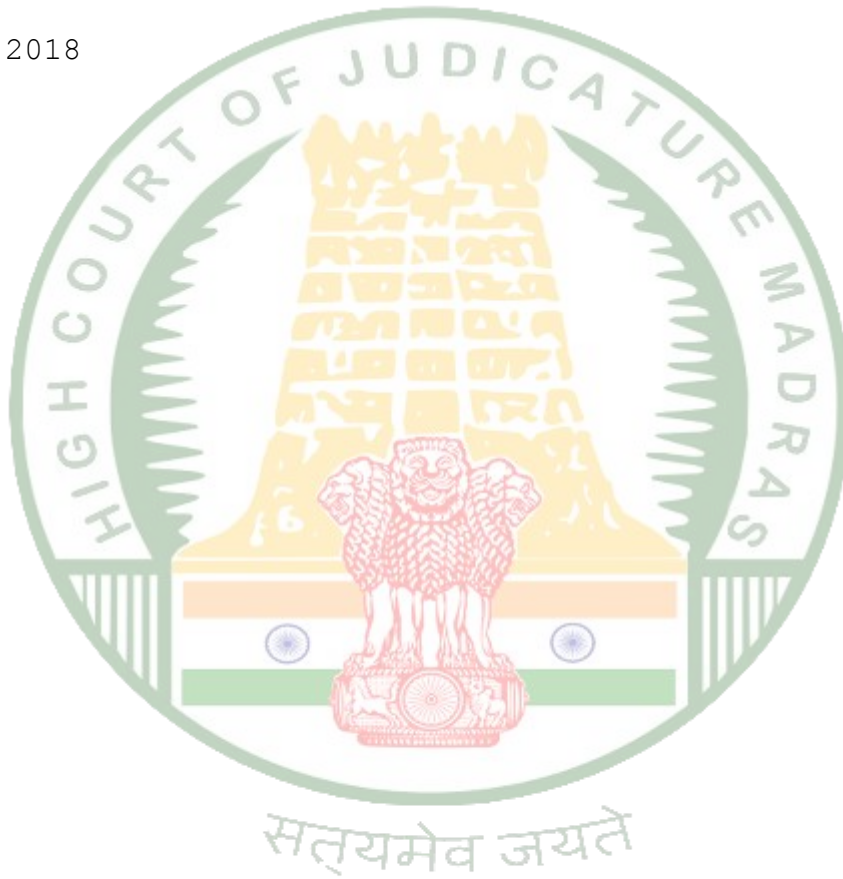
2.The XVI Assistant Judge,
City Civil Court, Chennai.

+1 cc to M/s.Sha and Sha, Advocate Sr.No.63194

+1 cc to Mr.P.Raja, Advocate Sr.No.63112

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