

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1246 of 2017

JUDGMENT:

This appeal is filed by the defendant under Section 100 of Civil Procedure Code challenging the judgment and decree dated 31.07.2017 in A.S.No.30 of 2015 on the file of the Court of XXVII Additional Chief Judge, City Civil Court, Secunderabad, wherein and whereby the decree and judgment dated 30.06.2011 in O.S.No.7 of 2007 on the file of the Court of 1st Junior Civil Judge, City Civil Court, Secunderabad, granting the relief of mandatory injunction in favour of the plaintiff, was confirmed.

2. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

3. The facts leading to filing of the second appeal are briefly as follows:

The plaintiff became the absolute owner of the house bearing No.7-1-165 consisting of ground floor and upstairs portion situated at Bandimet, Secunderabad by virtue of a registered gift deed dated 25.02.2004. The defendant is operating all vibrating machines in the above said premises continuously for 24 hours, thereby causing pollution and nuisance to the plaintiff. Recently the defendant installed carpentry machines and causing much inconvenience to the

plaintiff. The defendant unlawfully and illegally erected window, ventilator and exhaust fan in the ground and first floor of her house facing towards the plaintiff's premises. The defendant also constructed toilets in Indian style and bathrooms in her premises within three feet on the rear side of the plaintiff's premises adjacent to kitchen and bed room of the plaintiff's house. The toilets are emitting foul smell. Unable to bear the inconvenience being caused by the defendant, the plaintiff filed the suit for mandatory injunction.

4. The defendant filed written statement denying all the averments made in the plaint *inter alia* contending that her son has been carrying on furniture business under the name and style of M/s. Ashok Furniture Works in her house. The defendant's son has taken every care in order to avoid inconvenience to the plaintiff. The defendant's son is carrying on carpentry work with two workers only. It is absolutely false to state that the defendant has been carrying on furniture work by installing machinery, hence the suit is liable to be dismissed.

5. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the plaintiff is entitled for Mandatory injunction as prayed?
2. Whether the defendant can be directed to close permanently the windows, ventilators and exhaustive fans opening in the ground, first and second floors of the defendant's house?
3. Whether the defendant can be directed to remove the toilets and bath rooms constructed in the suit premises which are located on the rear side of the plaintiff's house as prayed?
4. To what relief?

6. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A1 to A11 were marked. On behalf of the defendant, D.Ws.1 and 2 were examined and Exs.B1 to B6 were marked. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff is entitled for the relief of mandatory injunction and decreed the suit. Feeling aggrieved by the judgment and decree of the trial Court dated 30.06.2011, the defendant preferred A.S.No.30 of 2015 on the file of the Court of XXVII Additional Chief Judge, City Civil Court, Secunderabad. The first appellate Court after reappraising the oral and documentary evidence afresh, dismissed the appeal while concurring with the findings recorded by the trial Court. Hence, the present second appeal.

7. Heard the learned counsel for the appellants-defendants and the learned counsel for the respondent-plaintiff. The questions of law urged by the learned counsel for the appellants are as follows:

1. Whether the Courts below misconstrued the scope of Section 4 of the Indian Easements Act? and
2. Whether the findings recorded by the Courts below are not based on any evidence?

8. The following admitted facts can be culled out from the pleadings.

9. The plaintiff is the owner of the premises bearing No.17.1.165 situated at Bandimet, Secunderabad. The defendant is the neighbouring owner of the plaintiff. The son of the defendant has been carrying on carpentry work in her

house. The defendant opened ventilators, window and exhaust fans pointing towards the house of the plaintiff.

10. It is the case of the plaintiff that the son of the defendant has been using the machines in order to carry on carpentry work. A perusal of Exs.A4 to A9 clearly reveals that the defendant opened window, ventilator and exhaust fan just adjacent to the kitchen room of the plaintiff. The defendant constructed house after obtaining Ex.B4 sanctioned plan from the concerned authority. Even as per the sanctioned plan, the defendant is not entitled to open the window, ventilator and exhaust fan, which are the subject matter of the suit. The material placed before the court clinchingly establishes that the defendant opened the window, ventilator and exhaust fan without any right whatsoever and without obtaining necessary permission from the concerned authority.

11. A perusal of the record reveals that pending appeal, the respondent-plaintiff filed E.P.No.11 of 2014 in O.S.No.7 of 2007 on the file of the Court of I Junior Civil Judge, City Civil Court, Secunderabad. A perusal of the same reveals that the Executing Court granted fifteen days time to the appellant herein to close down the window and ventilator.

12. At the time of arguments, learned counsel for the respondent submitted that the appellants herein filed an undertaking memo in E.P.No.11 of 2014 that they will close down the window and ventilator.

13. A perusal of the documents clearly reveals that the defendant causing much inconvenience to the plaintiff more particularly by opening window and ventilator.

14. Learned counsel for the appellants strenuously submitted that the courts below misconstrued Section 4 of the Indian Easements Act. He further submitted that this Court, while exercising jurisdiction under Section 100 of CPC, can grant relief even without pleading. There is no pleading in the written statement that the defendant opened window, ventilator and exhaust fan long back, thereby perfected her easementary right by prescription. There is no pleading in the written statement that the defendant cannot enjoy her property without window and ventilator. It is a settled principle of law that edifies of the civil suit based on its pleadings. To put in a different way, the pleadings form bedrock in civil suit. Any amount of oral and documentary evidence without pleading is of no avail, more particularly claim of easementary right. Absolutely there is no material on record to establish that the defendant cannot use or enjoy her house without window and ventilator in dispute. On the other hand opening of such window and ventilator by the defendant causes much inconvenience to the plaintiff. The Court cannot grant relief without any pleading. Therefore, I am unable to accede to the contention of the learned counsel for the appellants that the Court can grant relief without pleadings.

15. Whether the window and ventilator of the defendant causes any inconvenience to the plaintiff or not is purely a question of fact. The trial Court after considering the oral and documentary evidence, arrived at a conclusion that the plaintiff is entitled for the relief of mandatory injunction. The first appellate Court reappraised the oral and documentary evidence, without being influenced by the findings recorded by the trial court, came to a conclusion that the plaintiff is entitled for the relief of mandatory injunction. The Courts below have assigned reasons much less cogent and valid reasons to its findings. If the findings recorded by the Courts below are based on no evidence, or based on evidence which is not legally admissible, then such findings can be termed as perverse. As observed earlier, the findings recorded by the Courts below are based on evidence much less legally admissible evidence. Therefore, I am unable to accede to the contention of the learned counsel for the appellants that the findings recorded by the Courts below are perverse and liable to be set aside. Viewed from any angle, the provisions of Section 4 of Indian Easements Act have no application to the facts of the case on hand.

16. This Court while exercising the jurisdiction under Section 100 CPC shall not lightly to interfere with the concurrent finding of fact recorded by the Courts below.

17. In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, while dealing with the scope of Section 100 of CPC, the Hon'ble apex Court held at paragraph No.16 as follows:

16. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC.

18. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that there is no question of law much less substantial question of law involved in this appeal and the appeal is liable to be dismissed.

19. In the result, the Second Appeal is dismissed at the admission stage with costs through out. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

3rd January 2018

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¹ (2010) 13 SCC 216