



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 26.10.2018

Delivered on:
20.03.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.Nos.1297 and 1298 of 2001

A.Babjan

... Appellant in both S.As.

Vs.

1.Muthu

...Respondent in S.A.No.1297/2001

2.Thangammal

...Respondent in both S.As.

3.The District Collector,
Salem District, Salem.

4.The Revenue Divisional Officer,
Mettur Dam, Salem District.

5.The Tahsildar
Mettur Dam,
Salem District.

...Respondents 3 to 5 in
S.A.No.1297/2001

PRAYER in S.A.No.1297 of 2001: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 22.12.2000 made in A.S.No.80 of 1999 on the file of the Sub Court, Mettur (transferred A.S.No.75 of 1997 on the file of the Sub Court, Sangakiri) confirming the judgment and decree dated 19.01.1996 made in O.S.No.825 of 1985 on the file of the District Munsif Court, Mettur.

PRAYER in S.A.No.1298 of 2001: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 22.12.2000 made in A.S.No.86 of 1999 on the file of the Sub Court, Mettur (transferred A.S.No.93 of 1997 on the file of the Sub Court, Sangakiri) confirming the judgment and decree dated 19.01.1996 made in O.S.No.828 of 1985 on the file of the District Munsif Court, Mettur.



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For Appellants in
both SAs. : Mr.N.Manokaran

For R1 and R2 in SA 1297 of 2001
: Mr.R.Siddharth

and for Sole Respondent in S.A 1298 of 2001

For R3 to R5 : S.Jeganathan,
in S.A.No.1297/2001 Government Advocate (CS)

COMMON JUDGMENT

(a) S.A.No.1297 of 2001 has been filed by the plaintiff namely, A.Babjan against the judgment and decree passed by the Sub-Judge, Mettur, in A.S.No.80 of 1999 dated 22.12.2000 confirming the judgment and decree passed by the District Munsif Court, Mettur in O.S.No.825 of 1985 dated 19.01.1996.

(b) S.A.No.1298 of 2001 has been filed by the defendant namely, A.Babjan against the judgment and decree passed by the Sub-Judge, Mettur, in A.S.No.86 of 1999 dated 22.12.2000 confirming the judgment and decree passed by the District Munsif Court, Mettur, in O.S.No.828 of 1985 dated 19.01.1996.

2. The appellant in both the appeals namely, A.Babjan had filed a suit in O.S.No.825 of 1985 on the file of the District Munsif, Mettur, to declare that he is entitled to free light and air and access without any obstruction to the full extent on the back side of his building as mentioned in the rough plan; to restrain the defendants therein by means of a permanent injunction from in any manner interfering with his free light, air and access on the back side of his building by putting up the thatched sheds and any construction, etc., and to grant mandatory injunction directing the defendants therein to remove unlawful constructions put up by them within a time to be fixed by this Court.

3. The second respondent in S.A.No.1297 of 2001 and the respondent in S.A.No.1298 of 2001 namely, Thangammal had filed a suit in O.S.No.828 of 1985 against the said A.Babjan, on the file of the District Munsif, Mettur, to restrain him and his men from in any manner interfering with her peaceful possession and enjoyment of the suit property.



4. The learned District Munsif, Mettur, had tried both the suits jointly and by the common judgment dated 19.01.1996 had dismissed the suit in O.S.No.825 of 1985 and decreed the suit in O.S.No.828 of 1985 as prayed for. Aggrieved by the same, the said A.Babjan had filed the appeals in A.S.Nos.75 and 93 of 1997 on the file of the Sub-Judge, Sangakiri. After Constitution of the Sub-Court at Mettur, the aforesaid appeals were transferred to the said Court and renumbered as A.S.Nos. 80 and 86 of 1999 respectively. The Sub-Judge, Mettur by the common judgment dated 22.12.2000 had dismissed both the appeals confirming the judgments and decrees passed by the trial Court. Feeling aggrieved, the said A.Babjan had filed the present Second Appeals. For the sake of convenience, the parties are referred to as described in O.S.No.825 of 1985.

5. The averments made in the plaint in O.S.No.825 of 1985 are in brief as follows:-

The plaintiff is having his building known as 'AB building' at 1A, workshop corner West Main Road, Mettur Dam-1. On the back side of the said building, the plaintiff is having two doors opening on the west into the open space. The inmates of the building used to remove the rubbish like used plantain leaves, papers etc., through these doors and underneath the door the ditch water coming out on the west and joined the ditch running in the open space. Through the other door which is situated on the southern side, inmates come out and enter into north-south pathway and also enter into the aforesaid open spaces. The defendants are husband and wife and they are trying to put up a thatched shed on the backside of the 'AB building' just completely blocking the two backside doors. The defendants are also attempted to block the ditch proceeding from the plaintiff's building. If the action of the defendants fructifies, it would prevent the plaintiff from having light, air etc., and obstructed the movements of the inmates from backside. Hence, the plaintiff was constrained to file a suit from in any manner interfering with his free light and air on the back side of his building by putting up the thatched sheds etc. During pendency of the suit, the defendants put up constructions in the suit property and hence, he amended the plaint and impleaded the defendants 2 to 5 and also amended the prayer for the relief of declaration and mandatory injunction.



6. It is seen from the judgment of the trial Court that the first defendant had filed a written statement in O.S.No.825 of 1985 but the said statement has not been sent by the trial Court along with the records. Hence, by referring to the trial Court's judgment, the defence set up by the first defendant in O.S.No.825 of 19865 is narrated as follows: According to the first defendant, the open space which is situated on the west of the plaintiff's property belongs to his wife and she is making construction. Further his wife had filed a suit in O.S.No.828 of 1985 seeking permanent injunction against the plaintiff in O.S.No.825 of 1985. The construction which is being made by the first defendant/wife would not affect the right of the plaintiff in getting light and air to his building. Further, there is a 2 feet space between the plaintiff's compound wall and the building constructed by the second defendant. He further stated that for the purpose of enjoying the property by the plaintiff, the first defendant's wife need not keep the property as vacant site and therefore, he prayed to dismiss the suit.

7. The averments made in the additional written statement filed by the first defendant and adopted by the second defendant are in brief as follows:-

The second defendant has put up construction in the Poromboke land belonging to the Government and the plaintiff has no right to question the same. The plaintiff has got lot of space in front of his building and through the said space he is getting enough light and air. On both sides of the plaintiff's house there are sufficient access. However, there is a 2 to 3 feet lane on the western side of the plaintiff's house and therefore, the defendants 1 and 2 prayed to dismiss the suit.

8. The averments made in the written statement filed by the fifth defendant and adopted by the defendants 3 and 4 are in brief as follows:-

The defendants 1 and 2 had constructed a terraced building in the suit property. The said land is a Village Natham. The Government is taking steps to grant patta for the said land in favour of the defendants 1 and 2. The plaintiff has not sent notice under Section 80 of CPC and hence, they prayed to dismiss the suit against them.

9. The plaintiff had filed a reply statement denying the allegations made in the written statements. He further asserted that he is having every right to get free passage of air and light through the suit property and hence, he prayed to decree the suit as prayed for.



10. The Averments made in the plaint filed in O.S.No.828 of 1985 are in brief as follows:

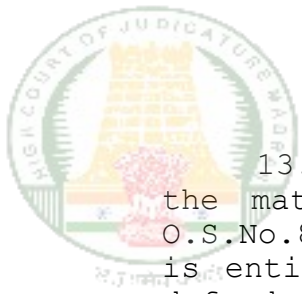
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The defendant, who is the owner of the adjoining building is giving all sorts of troubles in order to grab the suit property. He has no right what-so ever in the suit property. The suit property is going to be allotted to the plaintiff by the Revenue Authorities. The assessment for the same is in process. Out of some misunderstanding, for the past few days, between the plaintiff and the defendant, the defendant is trying to disturb the plaintiff's peaceful possession and enjoyment of the suit property. Hence, the plaintiff had filed the above suit for the relief of permanent injunction.

11. The averments made in the written statement filed by the defendant in O.S.No.828 of 1985 are in brief as follows:

The plaintiff has neither title nor in possession of the suit property. Now, the plaintiff is trying to put up a building especially after the defendant obtained an injunction against her husband in O.S.No.825 of 1985. This suit is subsequent to the suit in O.S.No.825 of 1985. The plaintiff is trying to block the sewage water from going out of the defendants' building. The plaintiff is also blocking free air and light on the back side of the defendants' building. The defendant is the owner of the building on the east of the suit property and in order to disturb the easementary right of the defendant, the plaintiff is doing all the mischief and filed the above suit with an ulterior motive. The plaintiff has no right to put up a shed in the suit property which is only a vacant land and therefore, he prayed to dismiss the suit.

12. Based on the aforesaid pleadings, the learned District Munsif, Mettur, had framed necessary issues and tried both the suits jointly. Evidence was recorded in O.S.No.825 of 1985 and the same has been treated as evidence in O.S.No.828 of 1985. The plaintiff in O.S.No.825 of 1985 examined himself as PW1 and also marked Exs.A1 to Ex.A5 as exhibits. The defendants 1 and 2 in O.S.No.825 of 1985 examined themselves as DW1 and DW2 respectively and they have marked Exs.B1 to Ex.B70 as exhibits. The report and the rough sketch filed by the Advocate Commissioner have been marked as Exs.C1 and Ex.C2 respectively.



13. The learned District Munsif, Mettur, after considering the materials placed before him found that the plaintiff in O.S.No.825 of 1985 namely, A.Babjan has not established that he is entitled to the easementary right of light and air from the defendants' property which is situated on the west of the plaintiff's building. Accordingly, he dismissed the suit filed by A.Babjan in O.S.No.825 of 1985 and decreed the suit filed by Thangammal in O.S.No.828 of 1985. Aggrieved by the same, the said A.Babjan had filed the appeals in A.S.No.75 and 93 of 1997 on the file of the Sub Court, Sangakiri and subsequently, the said appeals were transferred to the Sub Court Mettur and renumbered as A.S.Nos.80 and 86 of 1999. The learned Sub Judge, Mettur, by the common judgment dated 22.12.2000 had dismissed both the appeals confirming the judgments and decrees passed by the trial Court. Feeling aggrieved, the said A.Babjan had filed the present second appeals.

14. This Court, at the time of admitting the second appeals formulated the following the substantial questions of law:-

"1. Whether a person complaining infringement of his right to get light and air can maintain an action against a stranger even though he has not specifically acquired any easementary right in respect of the right claimed if the deprivation alleged or anticipated is substantial?

2. Whether the Courts below have properly appreciated and applied the principles to find out the actionable nuisance in the light of the Commissioner's report?"

15. Heard, Mr.N.Manokaran, learned counsel for the appellants in both the Second Appeals and Mr.R.Siddharth, the learned counsel for the respondents 1 and 2 in both the Second Appeals and Mr.S.Jaganathan, the learned Government Advocate (CS) for the respondents 3 to 5 in S.A.No.1297 of 2001.

16. Substantial questions of law 1 and 2 :

The learned counsel for the appellant in both the second appeals has submitted that the Courts below erred in holding that the appellant herein is not entitled to ask for injunction



against passage of free air and light to his property because of the absence of windows on the western wall. He further submitted that the Commissioner's report and plan would clearly show that the construction made by the respondents 1 and 2 / defendants 1 and 2 would definitely restricts and curtails the passage of light and air to the building of the appellant/plaintiff. He further submitted that the construction made by the defendants 1 and 2 would affect the free flow of air and light. He further submitted that the Courts below erred in holding that the plaintiff failed to quote the provision of law under which, a person can prevent a neighbour from constructing a house in a vacant site. He further submitted that the right of easement is a right in rem and it is enforceable against all who may violate them.

17. He further submitted that it seems that the second defendant was prosecuted before a criminal Court for raising unauthorised construction in the land belonging to the Government without getting prior sanction from the town ship and the learned Magistrate has also imposed a fine and that it shows that the second respondent is only a trespasser. He further submitted that the Government has not granted any patta in favour of the defendants 1 and 2 and hence, they are trespassers and they have no right to put up any construction affecting the easementary right of the plaintiff. He further submitted that the trial Court has failed to appreciate the evidence in proper prospective and dismissed the appellant's suit and decreed the respondents' suit and the first Appellate Court also mechanically dismissed the appeals and confirmed the judgments and decrees passed by the trial Court and hence, he prayed to allow the second appeals and set aside the judgments and decrees passed by the Courts below and decree the suit in O.S.No.825 of 1985 and dismiss the suit in O.S.No.828 of 1985.

18. The learned counsel for the appellant, in support of the aforesaid contentions, relied upon the following decisions:-

1. Esa Abbas Sait Vs. Jacob Haroon Sait and another, (1910) ILR 33 Mad 327.

2. Mohidin Kunhi Beavy and another Vs. K.Gopalakrishna Mallya, minor and another, AIR 1953 Mad 849.

3. Chapsibhai Dhanjibhai Danad Vs. Purushottam, (1971) 2 SCC 205.



19. Per contra, the learned counsel for the respondents 1 and 2 in S.A.No.1297 of 2001 and the respondent in S.A.No.1298 of 2001, submitted that in the plaint, the plaintiff has not pleaded that he received free air and light on the western side from the vacant space situated in the western side. He further submitted that the plaintiff has not pleaded and also not adduced any evidence to show that from which date he enjoyed the said easementary right and whether he acquired the said easementary right by prescription. He further submitted that in Ex.A3 notice, the plaintiff has not specifically stated that the proposed construction in the vacant site situated west of his property would affect his easementary rights of free flow of air and light.

20. He further submitted that there is no evidence that would show the amount of the light and air received by the plaintiff before the construction made by the defendants and how much of the said air and light diminished after construction made by the defendants. He further submitted that the report and plan filed by the Advocate Commissioner would show that on the western side, the plaintiff has not put up any windows and on the contrary, he has put up only two doors and under the said circumstances, it cannot be said that after construction made by the defendants in their property, the light and air which were received by the plaintiff substantially diminished. He further submitted that as per the explanation II and III to Section 33 of the Easements Act, to constitute an actionable obstruction of free passage of light or air to the openings in a house it is not enough that the light or air is less than before. He further submitted that there must be a substantial privation of light, enough to render the occupation of the house uncomfortable, according to the ordinary notions of mankind.

21. He further submitted that the Commissioner's report and plan would show that in the plaintiff's building on the western side two rooms are there and the said rooms also not having any roof and as such the said rooms would receive light and air directly from the top. He further submitted that the defendants 3 and 5 have admitted in their written statement that the property which has been occupied by the defendants 1 and 2 is a village natham and steps have been taken to grant patta to the defendants 1 and 2. He further submitted that even assuming that the defendants 1 and 2 constructed their house without getting necessary permission from the municipality, it is for the municipality to take appropriate action and it is open to the plaintiff to question the same.



22. He further submitted that the Courts below, taking into consideration of all the aforesaid facts, had categorically held that the plaintiff failed to prove that he acquired the easementary right by prescription and the said right has been substantially affected due to the construction made by the defendants 1 and 2 in their property and in the said concurrent findings, this Court cannot interfere and therefore, he prayed to dismiss the second appeals. In support of the aforesaid contentions, he also relied upon the decision in Chapsibhai Dhanjibhai Danad Vs. Purushottam, (1971) 2 SCC 205.

23. It is not in dispute that the plaintiff is the owner of the building namely, 'AB building' which is situated on the east of the suit property. According to the plaintiff, he had purchased his property under a registered sale deed dated 10.04.1974 (Ex.A2) and from that date onwards he has been enjoying the free passage of light and air from the suit property which is situated on the west of his building. But he has not pleaded in his plaint and also adduced evidence that he has acquired the aforesaid easementary right by prescription. As per Section 12 of the Easements Act, the person who claims the easementary right should have enjoyed the said easementary right without interruption for a period of 20 years. In this case, admittedly there is no pleading or evidence as to whether the plaintiff has acquired the easementary right by prescription.

24. The Advocate Commissioner's report and plan (Ex.C1 and Ex.C2) would clearly show that the plaintiff has not put up any windows on the western wall of his building, but only two doors were put up in the said wall. So it cannot be said that he has enjoyed the passage of light and air through the said doors. Further, Ex.C1 and Ex.C2 would show that on the western side there are two rooms and the said rooms are not having any roof. One room is having roof but that room is bathroom. The aforesaid physical features also would show that the plaintiff would not have enjoyed the passage of light and air from the property situated on the west of his property. It is also to be pointed out that in the Commissioner's report and plan it is stated that in between the walls of the plaintiff's house and the defendants' house there is a passage having 2 feet width. So the plaintiff can get light and air through the said passage. Further, the Commissioner's report and plan also shows that on the south side of the plaintiff's building there is a road and also on the east side there is a road. Further, the plaintiff's building is facing east that is towards the main road. So from the sides of east and west, the plaintiff would have received enough light and air. Further, there is no evidence as to what



amount of light and air received by the plaintiff before the defendants constructed their house and after construction how much amount of light and air diminished.

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25. In Esa Abbas Sait Vs. Jacob Haroon Sait, (cited supra) the plaintiff claimed an easement of light and air through a window in the eastern wall into the lane in question. The defendants disputed the presence of the window, but the plaintiff had proved the existence of the said window for more than 20 years by adducing satisfactory evidence. Based on the same, the trial Court came to the conclusion that the plaintiff had acquired easementary right of light and air by prescription and the same has been upheld by this Court. In this case as already pointed out that on the western side, the plaintiff has not at all put up any window. Further there is no evidence that the plaintiff had acquired the easementary right of light and air by prescription. Therefore, the aforesaid decision will not help the plaintiff.

26. In Mohidin Kunhi Beavy Vs. K.Gopalakrishna Mallya, (cited supra) this Court has held that if the owner of a property who is entitled to ancient lights the lateral passage of adequate light and unpolluted free air, finds himself obstructed to an appreciable and sensible extent by an adjoining trespasser then he can come forward and seek abatement of the private nuisance. Further it was held that if the person who is obstructing the light and air happens to be the owner of the property, then there can be no cause of action, the simple distinction being that owner would also be entitled to build right up to the edge of his own property and exercise the same right as the complaining owner. In this case as already pointed out that the plaintiff has not pleaded and proved that he acquired the easementary right of free flow of air and light by prescription. Further, the defendants 1 and 2 have not encroached the land of the plaintiff. They have occupied the village natham and that the Government also had decided to grant patta to the defendants 1 and 2. Under the said circumstances, it cannot be said that the defendants 1 and 2 are trespassers. They are the owners of the property which was occupied by them. Therefore, they are entitled to construct the building within their property and the same cannot be questioned by the plaintiff. So the aforesaid decision also will not help the plaintiff.

27. In Chapsibhai Dhanjibha Danad Vs. Purushottam (cited supra), the Hon'ble Supreme Court in para No.22 has observed as follows:-



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"22. As to the light and air through the windows on the western side, it is clear from explanation II and III to Section 33 that to constitute an actionable obstruction of free passage of light or air to the openings in a house it is not enough that the light or air is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable, according to the ordinary notions of mankind (See Cells V. Home and Colonial Stores)."

28. From the aforesaid decision it is clear that to constitute an actionable obstruction of free passage of light or air to the openings in a house it is not enough that the light or air is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable, according to the ordinary notions of mankind. In this case, as already pointed out that the plaintiff has not pleaded in his plaint and also adduced any evidence that after the construction being made by the defendants 1 and 2 in their property, the plaintiff could not get the same amount of light and air as before. The plaintiff failed to establish that the obstruction caused by the construction made by the defendants 1 and 2 had been such as to amount to a substantial privation, so as to render occupation of the building by him uncomfortable.

29. Insofar as the contention of the appellant that the defendants 1 and 2 have violated the building rules, it is for the authorities concerned to take appropriate action in accordance with the law. The appellant cannot take the role of the authorities. He has to establish, in what way he is affected on account of the construction made by the defendants 1 and 2. As already pointed out that the appellant failed to prove that the obstruction caused by the construction made by the defendants 1 and 2 has been such as to amount to a substantial privation, so as to render occupation of the building by him uncomfortable. Therefore, the Courts below taking into consideration of all the aforesaid facts, concurrently found that the plaintiff is not entitled to get any relief. In the said concurrent factual findings, this Court cannot interfere. Accordingly, the substantial questions of law are answered against the appellant.



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30. In the result, both the second appeals are dismissed.
No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1. The Subordinate Court,
Mettur.

2.The District Munsif Court,
Mettur.

Copy to

The Section Officer,
VR Section, High Court, Madras.

+2cc to Mr.N.Manokaran, Advocate Sr.26597 & 26598

S.A.Nos.1297 and 1298 of 2001

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srg 17/10/2019