

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.02.2019

PRONOUNCED ON: 28.02.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1039 of 2005

1.A.Premraj Jain

2.A.Parasmal Jain

3.A.Kevalchand Jain

: Appellants/Defendants/
Plaintiff

Vs.

R.P.Krishnamoorthy Chettiyar : Respondent/Appellant
Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 30.01.2004 in A.S.No.6 of 2003 on the file of the Subordinate Court, Gudiyatham, reversing the judgment and decree dated 11.12.2002 in O.S.No.952 of 1983 on the file of the Principle District Munsif Court, Gudiyatham.

For Appellants : Mr.V.Manisekaran

For Respondent : Mr.K.M.Aazim Shehzad

J U D G M E N T

In this second appeal, challenge is made to the judgment and decree dated 30.01.2004 passed in A.S.No.6 of 2003 on the file of the Subordinate Court, Gudiyatham, reversing the judgment and decree dated 11.12.2002 passed in O.S.No.952 of 1983 on the file of the Principle District Munsif Court, Gudiyatham.

2.The second appeal has been admitted on the following substantial questions of law:

"(i).Whether the oral evidence of the plaintiff can be relied over the oral evidence of the defendant regarding the status of the building, having proved by document that the plaintiff is living there form 1961 onwards, whereas the defendant has admitted that he has come there only on 26.04.1978?

(ii).When the Gudiyatham Municipality has sanctioned the building plan on

24.02.1961 and which is valid for one year only, now having admitted that the building has been constructed as per the plain, whether it could be presumed that the building has been constructed within one year from 24.02.1961?"

3.Considering the scope of the issues involved in the second appeal between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4.The parties are referred to as per their rankings in the trial Court.

5.Suffice to state that the plaintiffs had laid the suit against the defendant seeking the reliefs of declaration and permanent injunction.

6.The plaintiffs have sought for the relief of declaration against the defendant that the first plaintiff is entitled to receive light and air to his house bearing door No.186 in Thalayatham Bazaar Road, Santhapet, Gudiyatham, described in the plaint 'B' Schedule through the suit Windows marked as W1 to W4 and the Ventilator marked as V1, in the plan marked as C and D and described in the plaint 'A' schedule and the relief of permanent injunction is sought for by the plaintiffs to restrain the defendant, his men and servants from obstructing or interfering in any manner the right of the plaintiffs to get and enjoy the light and air to the first plaintiff's house described in the plaint 'B' schedule through the suit Windows and Ventilator described in the plaint 'A' Schedule either by closing down or putting up any construction in the property bearing door Nos.184, 185, 185/A in Thalayatham Bazaar Road, Santhapet, Gudiyatham, described in the plaint 'C' schedule.

7.From the materials placed on record, it is seen that the plaintiffs claiming title to the property described in the plaint 'B' Schedule comprising door No.186 has come forward with the suit seeking their entitlement to obtain and enjoy the light and air to their abovesaid house located in the plaint 'B' Schedule property through the windows marked as W1 to W4 and the ventilator marked as V1 in the plan attached with the plaint and more fully described in the plaint 'A' Schedule. With reference to the abovesaid right claimed by the plaintiffs to receive the air and light, as could be seen from the averments contained in the plaint, the plaintiffs, particularly, the first plaintiff is seeking the abovesaid right on the basis of the easement by way of prescription. Thus, it is seen that according to the plaintiffs, they had been drawing the light and air through the

abovesaid windows and ventilator for their house described in the plaint 'B' Schedule and inasmuch as the defendant had started putting up a construction in his property described in the plaint 'C' Schedule and thereby, endeavored to prevent the passage of light and air to the plaintiffs' house described in the plaint 'B' Schedule through the windows and ventilator abovestated, according to the plaintiffs, they had been necessitated to lay the suit against the defendant for the aforesaid reliefs.

8.The defendant resisted the plaintiffs' action in all aspects contending that the plaintiffs are not entitled to the passage of air and light to their building described in the plaint 'B' Schedule through the windows and ventilator described in the plaint 'A' Schedule by way of prescriptive easementary right and according to the defendant, the plaintiffs had not established that they had been enjoying the passage of light and air through the abovesaid windows and ventilator for more than the statutory period as contemplated under law and accordingly, disputed the case of the plaintiffs that they are entitled to the abovesaid reliefs prayed for and according to the defendant, the construction of the superstructure in his property would not in any manner hinder the passage of light and air to the plaintiffs' building and accordingly, sought for the dismissal of the plaintiffs' suit.

9.In the light of the abovesaid defence projected by the defendant, at the foremost, the plaintiffs have to establish that they had been enjoying the air and light through the windows W1 to W4 and the ventilator V1 to his property described in the plaint 'B' schedule for more than the statutory period as contemplated under law and accordingly, he has acquired the abovesaid right by way of prescription and the same is not entitled to be hindered or obstructed by the defendant as put forth by them. In this connection, on a reading of the plaint, it is seen that though the plaintiffs would claim that the first plaintiff's father Ambalal had purchased the plaint 'B' Schedule property by way of the registered sale deed dated 14.06.1948, which document has come to be marked as Ex.A1 and though the plaintiffs would put forth the case that at the time of the abovesaid purchase, the house had been existing in the property and also having windows facing on the western side, however, as rightly found by the first appellate Court, considering the description of the property comprised in Ex.A1 sale deed, at the most, we could only gather that there is a superstructure in the said property but as regards the case projected by the plaintiffs that the said superstructure had windows facing on the western side, when there is no indication with reference to the same in Ex.A1 sale deed, in such view of the matter, as

rightly held by the first appellate Court, without any basis or foundation and in the light of the description of the property contained in Ex.A1 sale deed, it could not be construed or gathered that the superstructure described in the abovesaid sale deed Ex-A1 would also be having windows on the western side as projected by the plaintiffs. Be that as it may, the plaintiffs had proceeded with the case on the footing that the existing building in the plaint 'B' Schedule property had been demolished and thereafter, the new building had been put up in the plaint 'B' Schedule property with ground and first floor and according to the plaintiffs, the abovesaid construction of the ground and the first floor had been completed before June, 1961 and since then, according to them, they claimed to be receiving air and light through the windows and ventilator as abovestated to their house property described in the plaint 'B' Schedule and thereby, they had prescribed their easementary right of the enjoyment of the light and air through the abovesaid windows and ventilator and thus, they are entitled to seek and obtain the reliefs prayed for.

10. In particular, the defendant has resisted the plaintiffs' case as regards the position that the plaintiffs had put up and completed their house construction in the plaint 'B' Schedule before June, 1961. In this connection, it has to be noted that the suit had come to be laid by the plaintiffs on 10.08.1983. Therefore, for claiming the easementary right by way of prescription of the usage of light and air, the plaintiffs have to establish that they had been enjoying the abovesaid right as put forth in the plaint without interruption for not less than 22 years prior to the institution of the suit as provided under Section 15 of the Indian Easements Act, 1882. Now, according to the plaintiffs, they had put up the construction of the ground and first floor in the plaint 'B' Schedule property before June, 1961 and the same had been repudiated by the defendant. In such view of the matter, it is for the plaintiffs to establish that they had put up the construction as projected by them, particularly, they had constructed or erected the windows W1 to W4 and ventilator V1 in the first floor portion before June, 1961, so as to enable to claim the right of easement by prescription as prayed for by them. With reference to the abovesaid case of the plaintiffs, the only document, on which, they placed reliance is the sanctioned plain issued by the Gudiyatham Municipality, which document has come to be marked as Ex-A2. The defendant has challenged the truth and validity of Ex-A2 sanctioned plain and according to the defendant, the abovesaid plan had been secured by the plaintiffs for the purpose of their case and therefore, no reliance could be placed on the same. Be that as it may, on a scrutiny of the abovesaid document, on the reverse side, there

is an endorsement mentioning that the plan has been approved subject to the conditions noted in the enclosed order and it appears to be signed by the Commissioner dated 22.04.1961. Based on the abovesaid plan, it is the claim of the plaintiffs that they had put up the construction before June, 1961 inclusive of the windows and ventilator in question and thereby, enjoying the passage of light and air through the said windows and ventilator to their house property and thereby, have prescribed their easementary right with reference to the same. As abovenoted, when the abovesaid claim of the plaintiffs that they had constructed the house inclusive of the windows and ventilator in question before June, 1961 has been challenged by the defendant, it is for the plaintiffs to establish the same that in particular, they had put up the house construction inclusive of the windows and ventilator in question before June, 1961. In this connection, other than the interested and the ipsi dixit testimony of the first plaintiff examined as PW1, there is no other witness examined on the part of the plaintiffs.

11. On a careful scrutiny of the evidence of the first plaintiff examined as PW1, it is seen that during the course of cross-examination, he has deposed that the plan marked as Ex-A2 has been obtained by his father and he has further admitted that Ex-A2 plan does not bear the signature of the Commissioner or the seal of the Municipality and no doubt denied the suggestion of the defendant that the abovesaid plan is not a sanctioned plan and the same had been concocted for the purpose of the case. Furthermore, PW1 has admitted that in the abovesaid plan, there is no indication that the Windows had been erected in the ground floor and also admitted that as per Ex-A2 plan, he had obtained the approval only for the erection of three Windows and on the otherhand, it is seen that the plaintiffs had come forward with the case as if they had put up four Windows and one ventilator as per Ex-A2 plan before June, 1961 and thereby, had prescribed their right of passage of air and light through the abovesaid four windows and one ventilator to their house property. When even as per the case of PW1, the sanctioned plan Ex-A2 approves the erection of only three windows, it does not stand to reason as to how PW1 could claim that he had put up the four windows and one ventilator in issue as per Ex-A2 plan before June, 1961. Furthermore, the photograph of the house of the plaintiffs marked as Ex-A4 would go to disclose that the plaintiffs' first floor portion consists of eight windows and with reference to the abovesaid erection of eight windows, there is no proper explanation on the part of the plaintiffs or PW1. When confronted with the same, PW1 would state that though he had obtained the approval for the erection of three windows, he had put up eight windows and at the foremost, admitted that six windows had been put up without approval. Now, according to the

defendant, as regards the erection of the windows on the western side, the plaintiffs have not obtained any approval as such and therefore, even as regards the erection of three windows by the plaintiffs on the western side, they do not have the requisite sanction and therefore, it is the case of the defendant that the plaintiffs having put up or erected the windows in question without the approval or authorization and they having infringed the law and hence, cannot be allowed to seek the entitlement of the prescriptive right for claiming the passage of light and air through the unauthorised construction and on that score alone, the plaintiffs' case should fail.

12. The above contention put forth by the defendant cannot be easily discarded. Furthermore, the first plaintiff, during the course of the further cross-examination, has admitted that he had put up the second floor construction also in the plaintiff 'B' Schedule property and according to him, in the second floor, he had erected ten windows and when confronted as to whether he had put the second floor construction after obtaining the necessary plan, though he would claim that the second floor construction had been erected as per the plan obtained by them, however, he has not endeavored to place the said plan for consideration. According to him, the second floor construction had been put up in the year 1968/1969. If really, the second floor construction had been put up by the plaintiffs during 1968/1969 as per the approved plan, as rightly contended by the defendant's counsel, if the abovesaid plan had been projected, the same would have disclosed as to whether the plaintiffs had the approval of erecting the windows W1 to W4 and ventilator V1, the subject matter of the present suit in the first floor and though the plaintiffs would claim to be in the possession of the approved plan for the second floor, for the reasons best known to them, not endeavored to place the same to sustain their case further. PW1, during the course of further cross-examination, would admit that he had erected the windows and ventilator on the eastern side in all the rooms and also admitted that there is no approval in Ex-A2 plan for the erection of the windows on the eastern side and further clearly admitted that he had put up the ground floor construction in the year 1961 and half of the first floor construction in the year 1961 and deposed that only seven or eight years thereafter, he had put up the remaining half of the first floor construction and also admitted that with reference to the same, he has not placed any proof. When as per the abovesaid clear admission of PW1, during the year 1961, he would state that he had put up the ground floor construction and half of the first floor construction and had put up the remaining half of the first floor construction only during the year 1969 or so and considering the abovesaid case projected during the course of

the evidence of PW1, as regards the erection of windows and ventilator in question, when there has been no approval with reference to the same by the Municipality other than the erection of the three windows and the windows and ventilator in question are claimed to have been put up by the plaintiffs in first floor construction and when even as per the case of PW1, the first floor construction had not been fully completed in the year 1961, on the otherhand, the first half of the first floor construction only had been completed in the year 1961 and the remaining half of the first floor construction had been constructed seven / eight years thereafter i.e., during 1969 or so, in such view of the matter, as rightly determined by the first Appellate Court, in the light of the abovesaid evidence of PW1, we cannot assume or hold that the plaintiffs would have put up the windows W1 to W4 and ventilator V1 in question during the year 1961 itself, i.e. at the time of putting up the first half of the first floor construction during the year 1961 and in such view of the matter, as rightly contended by the defendant as well as determined by the first Appellate Court, when the first floor construction itself has not been established to have been completed in fully by the plaintiffs during the year 1961 itself and equally, when the windows and ventilator in question are also not shown to have been erected by the plaintiffs during 1961 itself and with reference to the windows and ventilator in question, the plaintiffs have not established to have obtained a proper approval from the Municipality, in such view of the matter, at the most, we can only infer that the first floor construction of house property of the plaintiffs had been fully constructed, assuming that the evidence of PW1 is true, in the year 1969 only and in such view of the matter, in particular, when the plaintiffs have failed to establish that the windows and ventilator in question had been put up prior to the year 1961, the claim of the plaintiffs that they had been drawing air and light through the abovesaid windows and ventilator right from 1961 onwards and thereby, had acquired the easementary right by way of prescription with reference to the same as such cannot be accepted and accordingly, it is seen that the first Appellate Court had rightly declined the same sans any acceptable and reliable proof placed on the part of the plaintiffs.

13.The plaintiffs' counsel contended that the defendant had purchased the property belonging to him described in the plaint 'C' schedule only in the year 1978 and therefore, he would not competent to state that as to when, the plaintiffs put up the windows and ventilator in question and according to him, when the plaintiffs had projected the sanctioned plan Ex-A2, which go to show that it had been sanctioned on 24.02.1961, the Court should have raised the presumption that following the same, the

plaintiffs would have put up the construction of the first floor with the windows and ventilator in question and on that basis, should have held that the plaintiffs had been enjoying the passage of the light and air through the windows and ventilator to his house property and prescribed the easementary right with reference to the same. However, the abovesaid contention does not merit acceptance. Considering the abovesaid factors, at the foremost, there is no proof placed on the part of the plaintiffs that they had put up the construction before June, 1961, merely because, the plaintiffs had marked the plan as Ex-A2 which had come to be issued in the year 1961, it cannot be presumed that the plaintiffs would have constructed in the said year itself, when particularly, PW1 himself has admitted that the first floor construction had not been completed in full in the year 1961 and admitted that the first floor construction in full had been completed in the year 1969. In such view of the matter, merely because, the Municipality rules prescribed that the building should be constructed within one year from the date of the sanctioned plan, one could not presume that on that basis, the plaintiffs would have also put up the construction within one year from the date of sanctioned plan. The abovesaid case of the plaintiffs has been belied by the evidence of PW1 as above pointed out and in particular, when the plaintiffs have not obtained the approval of erecting the windows W1 to W4 and ventilator in question as per the sanctioned plan and they had been sanctioned the erection of only three windows and when the plaintiffs had failed to establish that they had erected the three windows or for the matter, the four windows and ventilator in question during 1961 itself and on the otherhand, when the evidence of PW1 go to point out that the first floor construction had been completed only in the year 1969 or so, at the most, we can only hold that the first floor construction inclusive of the windows and ventilator in question would have been put up/constructed by the plaintiffs only in the year 1969 and in such view of the matter, the suit having been laid by the plaintiffs on 10.08.1983, as rightly determined by the first Appellate Court, the plaintiffs having come forward with the suit seeking for claiming easementary right by way of prescription, has miserably failed to establish that they had been enjoying the said right for more than 22 years prior to the institution of the suit and in such view of the matter, on that basis alone, it has to be held that the plaintiffs' suit has to fail.

14.As rightly determined by the first Appellate Court, the trial Court seems to have presumed that the plaintiffs would have put up the construction within one year from the date of the sanctioned plan and on that footing, proceeded to hold that the plaintiffs had been enjoying the passage of light and air through the windows and ventilator in question from 1961

onwards. On the otherhand, when there is no proof projected by the plaintiffs pointing to the same and on the otherhand, the evidence of PW1 alone, belies the abovesaid case of the plaintiffs as above pointed out, in all, it is seen that the first Appellate Court is fully justified in declining the reliefs sought for by them, particularly, in such view of the matter, when the plaintiffs had failed to establish that they had been deriving the enjoyment of the light of air through the windows and ventilator in question to their house property for more than the statutory period as contemplated under law and other than the abovesaid claim of right, the plaintiffs having not claimed the abovesaid easementary right by any other mode and when it is seen that the plaintiffs are having windows on the eastern side and other directions, in such view of the matter, it is found that the claim of easementary right by prescription prayed for by the plaintiffs cannot be granted as determined by the first Appellate Court.

15. In the light of the above discussions, no presumption could be made that the plaintiffs would have constructed the building as per the plan within one year from the date of obtaining the sanctioned plan, particularly, when the evidence adduced by the plaintiffs is found to be otherwise and merely because, the plaintiffs had been living in the 'B' Schedule property prior to 1961, when the materials placed on record as above discussed go to show that the plaintiffs had not put up the windows and ventilator in question during 1961 as claimed by them and the first floor construction, in which, the windows and ventilator in question had been completed by the plaintiffs only in the year 1969, in such view of the matter, the argument put forth by the plaintiffs' counsel that the first Appellate Court had not appreciated the materials placed on record in the proper perspective and thereby, erred in dislodging the findings and determination of the trial Court in favour of the plaintiffs and therefore, the judgment and decree of the first Appellate Court needs reversal as such cannot be countenanced. When as above pointed out, the plaintiffs have failed to establish their easementary right by way of prescription to the passage of light and air through the windows and ventilator in question for more than the statutory period, the substantial questions of law formulated in the second appeal are accordingly answered against the plaintiffs and in favour of the defendant.

16. The defendant's counsel contended that the contentions projected by the plaintiffs with reference to their case are based on the factual matrix and in such view of the matter, according to him, the plaintiffs cannot allow to canvas the factual aspects of the case in the second appeal and in the second appeal only the substantial questions of law could be canvassed and for that proposition, relied upon the decisions

reported in AIR 1999 SC 2213 (Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and ors.), AIR 2009 SC 1103 (Bachhaj Nahar Vs. Nilima Mandal and Ors.) and AIR 2006 Mad 139 (Ponnan and Ors. Vs. Chinna Gounder and Ors.). The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the case at hand.

In the light of the abovesaid discussions, the second appeal is found to be devoid of merits and accordingly, the same is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar

// True Copy//

Sub Assistant Registrar

nsd/sms

To

- 1.The Subordinate Court, Gudiyatham.
- 2.The Principle District Munsif Court, Gudiyatham.
- 3.The Section Officer, VR Section, High Court.

+1cc to Mr.V.Manisekaran, Advocate, SR.No.18655.
+1cc to Mr.K.M.Aazim Shehzad, Advocate, SR.No.18499.

Judgment made in
S.A.No.1039 of 2005

VSN II (CO)
CSR(16/12/2019)

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