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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.04.2019

PRONOUNCED ON : 23.05.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM
S.A.Nos.152 and 179 of 2013
and
MP.Nos.1 of 2013 and 1 of 2013

Subaidha Ammal
(rep by power agent Mohiden pichai)

... Appellant/Plaintiff in SA.NO.152/13
Appellant /Defendant in SA.NO.179/13
Vs.

Jainambu

... Respondent/ Defendant
(in SA.No.152 of 2013)

Abdul Rahman

... Respondent/Plaintiff
(in SA.No.179 of 2013)

PRAYER IN S.A.No.152 of 2013: Second Appeal filed under Section 100 of C.P.C., against the Judgement and decree passed by the learned Sub-Judge, Mannargudi in A.S.No.11 of 2011 dated 27.03.2012 reversing the judgment and decree passed by the learned District Munsif Court, Thiruthuraipoondi in O.S.No.107 of 2004 dated 30.04.2010.

PRAYER IN S.A.No.179 of 2013: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree passed by the learned Sub Judge, Mannargudi in A.S.No.17 of 2011 dated 27.03.2012 reversing the judgment and decree passed by the learned District Munsif Court, Thiruthuraipoondi in O.S.No.8 of 2005 dated 30.04.2010.

For Appellant : Mr.S.Sadasivan
(in both the appeals) for M/s.S.Sathiamurthi

For Respondents : Mr.P.Satheesh Kumar
(in both the appeals)



COMMON JUDGMENT

S.A.No.152 of 2013 has been filed by the plaintiff in O.S.No.107 of 2004 on the file of the District Munsif, Thiruthuraipoondi against the judgment and decree passed by the Sub Judge, Mannargudi in A.S.No.11 of 2011 dated 27.03.2012 reversing the judgment and decree passed by the District Munsif, Thiruthuraipoondi in O.S.No.107 of 2004 dated 30.04.2010.

S.A.No.179 of 2013 has been filed by the defendant in O.S.No.8 of 2005 on the file of the District Munsif, Thiruthuraipoondi against the judgment and decree passed by the Sub-Judge Mannargudi in A.S.No.17 of 2011 dated 27.03.2012 reversing the judgment and decree passed by the District Munsif, Thiruthuraipoondi in A.S.No.8 of 2005 dated 30.04.2010.

2. The appellant in S.A.No.152 of 2013 namely Subaidha Ammal had filed a suit in O.S.No.107 of 2004 on the file of the District Munsif, Thiruthuraipoondi for the relief of permanent injunction restraining the defendant therein from interfering with her peaceful possession and enjoyment of the suit "B" schedule lane. The respondent in S.A.No.179 of 2013 namely Abdul Rahman had filed a suit in O.S.No.8 of 2005 on the file of the District Munsif, Thiruthuraipoondi for the relief of mandatory injunction to direct the defendant therein to remove the sun shades, portigo and drainage pipes from the suit property and for permanent injunction to restrain the defendant, her men, agent, etc., from interfering with his right of enjoyment in the suit property and also making any construction in the suit property.

3. The learned District Munsif, Thiruthuraipoondi tried both the suits separately and disposed of the same by separate judgments dated 30.04.2010. The learned District Munsif had decreed the suit in O.S.No.107 of 2004 as prayed for without costs. However, he dismissed the suit in O.S.No.8 of 2005.

4. Aggrieved by the judgment and decree passed in O.S.No.107 of 2004, the defendant therein namely Jainambu had filed an appeal in A.S.No.11 of 2011 on the file of the Sub-Judge, Mannargudi. Likewise, the plaintiff in O.S.No.8 of 2005 namely Abdul Rahman had filed an appeal in A.S.No.17 of 2011 on the file of the Sub Judge, Mannargudi against the dismissal of his suit in O.S.No.8 of 2005. The learned Sub-Judge, Mannargudi, by the separate judgments dated 27.03.2012 had allowed both the appeals and dismissed



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the suit in O.S.No.107 of 2004. However, she decreed the suit in O.S.No.8 of 2005 and directed the defendant to remove the sunshades, portigo, drainage pipe which have been constructed by the defendant in the suit lane within three months by way of mandatory injunction. Feeling aggrieved, the plaintiff in O.S.No.107 of 2004 and the defendant in O.S.No.8 of 2005 namely Subaidha Ammal has filed the present second appeals.

5. For the sake of convenience, the parties are referred to as described in O.S.No.107 of 2004.

6. The averments made in the plaint filed in O.S.No.107 of 2004 are in brief as follows:

The plaintiff Subaidha Ammal is the absolute owner of the suit "A" schedule property by virtue of the registered Settlement deed dated 13.05.1965 executed by her father Pakri Mohaideen Ravoothar. On the north of the suit "A" schedule property, the suit "B" schedule property lane is situated, the said lane is admeasuring 3 feet north south and 26 feet east west. On the north of the said lane, the defendants house is situated. The house site belongs to the defendant's husband. Since her husband is in abroad, the defendant has been constructing a house in the suit property and construction is almost over. The plaintiff's father had purchased the suit "A" schedule property under the registered Sale deed dated 09.03.1936 and he had been enjoying and using the suit "B" schedule lane for white washing and maintenance of the wall. The plaintiff's father had settled the suit 'A' schedule property in favour of the plaintiff under a registered settlement deed dated 13.05.1965 and from the date of aforesaid settlement, the plaintiff has been using the said land for the aforesaid purpose. Neither the defendant nor her agents had raised any objection, all these years, but, now, with a view to use the said lane exclusively by her, the defendant is raising objection of using the said lane by the plaintiff. Since the plaintiff and her husband are frequently going to Singapore for business purpose, the defendant is trying to take away the right to use the said lane from the plaintiff. If the defendant obstructed the plaintiff from using the said lane, the plaintiff cannot maintain her wall, whitewash the wall and let the rain water from her house. Since the plaintiff and her predecessor in title have jointly and continuously use the said lane for long period and the same cannot be denied by the defendant. Hence, the plaintiff was constrained to file the above suit for the relief of permanent injunction to restrain the defendant, her men, agent etc from preventing the plaintiff from using the said "B" schedule lane.



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7. The averments made in the written statement filed in O.S.No.107 of 2004 are in brief as follows:

The plaintiff has to prove that she is the absolute owner of the suit "A" schedule property by virtue of Settlement deed executed by her father dated 13.05.1965. It is false to state that the plaintiff's father had been using the said land from the date of purchase of the suit "A" schedule property i.e., from 09.03.1936 and from the date of settlement, the plaintiff had been using the said lane for whitewashing and maintaining her wall. It is also false to state that the defendant has not raised any objection for using the said lane by the plaintiff for the aforesaid purpose. On the western side, the aforesaid lane has been closed, even during the life time of the defendant's father-in-law. The suit "B" schedule lane is situated in Survey No.262/36. The said survey number originally belonged to the defendant's father-in-law and he constructed a house in the said survey number and he had been residing there. In the partition which took place on 11.02.1999 between the defendant's husband and his brother Hussian, the property including the suit "B" schedule lane was allotted to the share of the defendant's husband. The defendant had demolished the old house and in its place constructed a new house and at that time, she left a lane on the southern side for the purpose of going to her backyard. The defendant has put up a gate in the said lane and she is using the same exclusively. So, the allegation that the plaintiff has been using the said lane for the purpose of maintaining her wall and whitewashing the same are all false. Recently, the plaintiff constructed sunshades and laid pipe lines extending into the said lane. Hence, the aforesaid constructions have to be removed by the plaintiff. The plaintiff cannot claim ownership as well as easementary right over the suit "B" schedule lane. Therefore, the defendant prayed to dismiss the suit.

8. The averments made in the plaint filed in O.S.No.8 of 2005 are in brief as follows:

The suit property admeasuring 36.50 feet east west and 24 feet north south and the total extent of 876 sq.ft absolutely belongs to the plaintiff by virtue of the partition dated 11.02.1999 which took place between the plaintiff and his brother Hussain. On the northern side, the plaintiff's brother had constructed a terraced building and on the souther side, the plaintiff had constructed a terraced building for his residence leaving the vacant space on the southern side for his personal use. The said vacant space is the suit property. The said vacant space is shown as A, B, C, D, E and F and marked in yellow colour in the plaint plan. The width of the aforesaid vacant space/lane on the western side is about two and half feet,



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on the southern side is about three and quarter feet. On the eastern side, the plaintiff has put a gate and the said lane is in exclusive possession of the plaintiff. On the southern side of the said lane, the defendant's house is situated. The defendant is not having any right over the aforesaid lane. The fact remains so, the defendant had filed a suit against the plaintiff's wife Jainambu in O.S.No.107 of 2004 for the relief of permanent injunction. The allegations made in the plaint in the said suit are false. Since the plaintiff is staying at abroad for business purpose, his wife is a cosha lady and taking advantage of the same, on 10.01.2004, the defendant had constructed a portigo and sunshades and also laid pipes with a view to pour roof water into the suit suit lane from her house. The aforesaid constructions are illegal constructions and they have to be removed by way of mandatory injunction and the defendants should be restrained by means of permanent injunction from interfering with the plaintiff's peaceful possession and enjoyment of the aforesaid lane by making any constructions.

9. The averments made in written statement filed in O.S.No.8 of 2005 are in brief as follows:

The plaintiff has to prove that the suit property belongs to him. The defendant does not know whether the plaintiff has got the property under the partition deed dated 11.02.1999. The defendant's property originally belonged to the defendant's father Pakri Mohideen Ravoothar by virtue of a registered Sale deed dated 09.03.1936 and from the date of said purchase, the defendant's father had been using the suit lane for the purpose of whitewashing and maintaining the northern side wall. Further, he let in roof water also in the said lane. Neither the plaintiff nor his agent have raised any objection. The defendant's father gifted the suit property to the defendant under the registered settlement deed dated 13.05.1965 and from that date onwards, she has been in possession and enjoyment of her property and she also using the suit lane for whitewashing and maintaining the northern side wall. In the year 1981, the defendant's father after obtaining necessary permission from the Town Panchayat, Muthupet had constructed a terraced house and residing there. If the plaintiff obstructed the defendant for using the aforesaid lane, she cannot maintain her northern side wall and whitewashing the same. She acquired easementary right by long use and the same cannot be denied by the plaintiff. On 13.06.2004, the plaintiff's wife had caused obstruction for using the said lane and hence, the defendant had filed a suit in O.S.No.107 of 2004 for the relief of permanent injunction and the same is also pending. The said portigo



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and the sun shades were constructed even in the year 1981 itself. After 24 years, the plaintiff has filed a suit for mandatory injunction to remove the said construction and hence the said suit is not maintainable. Therefore, the defendant prayed to dismiss the suit.

10. Based on the aforesaid pleadings, the learned District Munsif, Thiruthuraipoondi had framed necessary issues, but instead of trying both the suits jointly, he had conducted separate trials and disposed of both the suits by separate judgments. During Trial in O.S.No.107 of 2004, on the side of the plaintiff, the plaintiff's power agent namely Mohaideen Pichai was examined as P.W.1 and one more witness was examined as P.W.2 and Exs.A.1 to A.4 were marked as exhibits on the side of the plaintiff. On the side of the defendant, the defendant namely Jainambu examined herself as D.W.1 and she has marked Exs.B.1 and B.2 as exhibits. The Advocate Commissioner's Report and plan were marked as Exs.C.1 and C.2 respectively. Exs.X.1 to X.3 were marked as third party exhibits. In O.S.No.8 of 2005, the power agent-cum-wife of the plaintiff namely Jainambu was examined as P.W.1 and Exs.A.1 to A.3 were marked as exhibits on the plaintiff's side. On the side of the defendant, the defendant examined herself as D.W.1 and also examined one more witness as D.W.2. She had marked Exs.B.1 to B.5 as exhibits. The Advocate Commissioner's report and plan were marked as Exs.C.1 and C.2 respectively. The Surveyor's report and plan were marked as Ex.C3. Exs.X.1 to X.3 were marked as third party exhibits.

11. The learned District Munsif after considering the materials placed before him, disposed of both the suits by separate judgments dated 30.04.2010. He decreed the suit in O.S.No.107 of 2004 as prayed for and dismissed the suit in O.S.No.8 of 2005. Aggrieved by the same, the defendant in O.S.No.107 of 2004 namely Jainambu had filed an appeal in A.S.No.11 of 2011 on the file of the Sub Judge, Mannargudi. The plaintiff in O.S.No.8 of 2005 namely Abdul Rahuman had filed an appeal in A.S.No.17 of 2011 on the file of the Sub Judge, Mannargudi. The learned Sub-Judge also disposed of both the appeals by the separate judgments dated 27.03.2012. She had allowed both the appeals and thereby set aside the judgments and decrees passed by the Trial Court in both the suits and dismissed the suit in O.S.No.107 of 2004. However, she decreed the suit in O.S.No.8 of 2005 and directed the defendant therein by way of mandatory injunction to remove the constructions made in the suit lane within three months. Feeling aggrieved, the plaintiff in O.S.No.107 of 2004 has filed the second appeal in S.A.No.152 of 2013 and the defendant in O.S.No.8 of 2005



has filed the second appeal in S.A.No.179 of 2013.

12. This Court at the time of admitting the second appeals in S.A.No.152 of 2013 has formulated the following substantial questions of law:

" 1. When the Commissioner report Ex.C1 clearly mentioned that the northern side wall has been white washed and painted, whether the plaintiff is entitled to the prayer for injunction restraining the defendant from objecting the plaintiff to reach the northern side for the purpose of white washing and painting the wall?

2. Whether the lower appellate court is justified in relying upon the commissioner report Ex.B1 filed in the other case O.S.No.8 of 2005 filed by the defendant and the said document Ex.B.1 has not been confronted with P.W.1 in his evidence?"

13. This Court at the time of admitting the second appeals in S.A.No.179 of 2013 has formulated the following substantial questions of law:

" 1. When the findings of the lower appellate court is sustainable in law, when the lane has been in possession and enjoyment of the defendant and it is absolutely necessary for the convenient enjoyment of the defendant's property to white wash and to paint the northern side wall as per the judgment reported in 1964 (2) MLJ, Page 241 and 1965 (2) MLJ, Page 522?

2. Whether the suit is liable to be dismissed on the ground of limitation and whether Article 113 of the Limitation Act will apply and suit has to be filed within 3 years from the date on which the right to sue accrues as per the judgment reported in 2009 (4) CTC, Page.47?

3. When the plaintiff P.W.1 herself clearly admitted that the northern side wall has been white washed and painted and the defendant has been using the lane for maintaining the parent wall on the northern side, the plaintiff is entitled for prayer for mandatory injunction?"

14. Since in both the second appeals, the subject matter is the same and the parties also same, these second appeals are disposed of by this common judgment.

15. Heard Mr.S.Sadasivan for M/s.S.Sathiamurthi,



the learned counsel for the appellant in both appeals and Mr.P.Satheesh Kumar, the learned counsel for the respondent in both appeals.

16. The substantial questions of law 1 and 2 in S.A.No.152 of 2013 and 1 to 3 in S.A.No.179 of 2013:-

The learned counsel for the appellant in both the second appeals has submitted that the First Appellate Court erred in reversing the well considered judgment of the Trial Court. He further submitted that the Staff of Muthupet Town Panchayat namely Gangadharan was examined as P.W.2 in O.S.No.107 of 2004 and D.W.2 in O.S.No.8 of 2005 and he had categorically deposed that the appellant's house should have been constructed 20-25 years ago. Further, he had produced extract of Property Tax Register from the year 1998-99 and the aforesaid fact would show that the appellant has not made any new construction as alleged by the respondent. He further submitted that even before the construction of present terraced building, even at the time of purchasing the property by the appellant's father in the year 1936 itself, there was a house in the appellant's property and that would show that the appellant and her predecessor in title had been using the suit lane for whitewashing and maintaining their northern side wall and thereby acquired easementary right. He further submitted that the respondent in her evidence also admitted that the appellant had constructed the portigo and sunshades at the time of constructing her house. However, she purposely deposed that she does not know when the appellant had constructed her house. He further submitted that since the respondent in her evidence has stated that she does not know when the appellant had constructed her house, the allegation made in the plaint in O.S.No.8 of 2005 that the appellant herein had constructed the portigo and sunshades on 10.01.2004 would be false. He further submitted that the appellant has proved that she had constructed her house in the year 1982 itself and at that time itself she had constructed the portigo and sunshades and at the time of said construction, the respondent did not raise any objection and after 24 years, he had come forward with a suit for mandatory injunction to remove the aforesaid constructions is not maintainable. He further submitted that the Advocate Commissioner's report and plan would show that the outer wall of the appellant on the northern side was already plastered and white washed and that would also show that the appellant and her predecessor in title were using the suit lane for white washing and maintenance of her northern wall. He further submitted that taking into consideration of the aforesaid facts, the Trial Court has rightly decreed the suit filed by the appellant and



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dismissed the suit filed by the respondent, but, the First Appellate Court without considering the facts in proper perspective had allowed the appeals and set aside the judgments and decrees passed by the Trial Court and dismissed the appellant's suit and decreed the respondent's suit and therefore he prayed to allow the second appeals and set aside the judgments and decrees passed by the First Appellate Court and restore the judgments and decrees passed by the Trial Court.

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

- (i) Subramania Mudaliar Vs. Pachaiyappa Mudaliar - 1956 (1) MLJ 570 : AIR 1956 (MAD) 577
- (ii) L. Damodaraswami Naidu Vs. S.T.Damodaraswami Naidu - 1965 (2)MLJ 522
- (iii) S.Ramadoss and Others Vs. Arulmighu Sri Lakshimi Narayanan, Srirangam by its Trustee M.Bride Mohan Ramanuja Doss and others - (2000) 3 MLJ 443.

18. Per Contra, the learned counsel for the respondent in both the second appeals has submitted that admittedly, the suit lane belongs to the respondent. He further submitted that the appellant failed to prove that she acquired easementary right over the suit lane. He further submitted that the appellant failed to prove that she had constructed sunshades and portigo in the year 1982. Under the said circumstances, the contentions of the respondent that the appellant had constructed the portigo and sunshades only on 10.01.2004 has to be accepted. He further submitted that even assuming that the appellant had been using the suit lane for the purpose of white washing and maintenance of the wall, the Trial Court ought not to have granted decree for permanent injunction without imposing the limitations. He further submitted that the Trial Court without taking into consideration of the aforesaid facts has mechanically decreed the suit of the appellant and dismissed the suit of the respondent, but, the First Appellate Court after considering the evidence in proper perspective had rightly reversed the findings of the Trial Court and dismissed the appellant's suit for permanent injunction and decreed the respondent's suit for mandatory injunction. In the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the second appeals.

19. In support of the aforesaid contentions, he relied upon the following decisions:

- (i) Rajaraman and another Vs. Subramanian 2015 (6)



CTC

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(ii) Arumugam Mooper (died) and others Vs.
K.Arumugham @ Periyasamy and Others - 2013(3) MWN
(Civil)104.

He also relied upon the decision in L. Damodaraswami Naidu
Vs. S.T.Damodaraswami Naidu (cited supra).

20. Admittedly, the suit lane is situated on the north of the appellant's house. According to the respondent, the suit lane absolutely belongs to her husband. It's her further case that at the time of construction of her house, she left the said lane only for her own use. The appellant also does not claim any title over the said lane. She is claiming only easementary right through the said lane for the purpose of white washing and repairing the northern side of her wall. According to her, her father had purchased the property under a registered sale deed dated 09.03.1936 and from that date onwards, he had been using the said lane for white washing and repairing northern wall and subsequently he gifted the suit property to her under a registered settlement deed dated 13.05.1965 and from that date onwards she also using the said lane for the aforesaid purpose and thereby she acquired easementary right. She had produced the said sale deed dated 09.03.1936 and marked as Ex.A.3 in O.S.No.107 of 2004 and produced a copy of the said sale deed in O.S.No.8 of 2005 and marked as Ex.B.5. In the said sale deed itself, it is stated that the appellant's father had purchased the site measuring east west 26 feet; north south 26 feet with a tiled house thereon.

21. In the partition deed filed by the respondent dated 11.02.1989 said to have been executed between the respondent's husband namely Abdul Rahman and his brother, it is stated that only a vacant site was allotted to Abdul Rahman. Therefore, the contention of the respondent that she demolished the old building and constructed a new house by leaving the suit lane for her own purpose cannot be accepted.

22. Since the property of the respondent's husband was lying vacant, the appellant would have used the said lane for the purpose of white washing and repairing the outer side of her northern wall.

23. In Subramania Mudaliar Vs. Pachaiyappa Mudaliar (cited supra) this Court has held that it is a common knowledge that the boundary walls of houses not capable of being repaired from the owner's side are generally repaired by entering into the adjoining owner's house and no



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reasonable neighbour would ever object to repairing such walls by gaining access in to his house as he would be in the same position with his other neighbours with regard to repairing of his boundary walls. It was further held that for repairing the said wall there is no need to acquire any prescriptive right. It was further held that repairs of such walls carried out only periodically as and when there is necessity and therefore such a right cannot expected to be acquired by prescription. It was further held that the repairing of such walls is a customary easementary right and could only be acquired by virtue of legal custom.

24. In S.Ramadoss Vs.Arulmighu Lakshminarayana, Srirangam by its Trustee M.Bride Mohan Ramanuja Doss and others (cited supra) in Paragraph No.15 had observed as follows:

" However, exercise of such right is subject to the convenience of the owner through whose property access is claimed. The lower appellate court has proceeded on the footing that the plaintiffs/appellants had not proved by any acceptable evidence that either they or their predecessors in title exercised any such right. In my view, it is not the correct approach to the matter. In fact, it is conceded in the written statement that the defendants would attend to the repairs to the northern wall of the plaintiffs. In my view, this undertaking by itself will not solve the problem. It will be a difficult proposition to enforce the undertaking and we cannot also ensure that the undertaking would be honoured in letter and spirit. The plaintiffs will not have means of knowing as to whether the repairs had been carried out in a proper manner or even whether any repairs had been at all carried out. Having regard to the strained relationship between the parties that the parties had gone to the police to bring pressure on each other, it is neither feasible nor advisable to go by the undertaking. On the contrary, if the relief is granted to the appellants with necessary safeguards to ensure that the defendants are not unnecessarily harassed and put to inconvenience when it came to the plaintiffs repairing their wall on the northern side, the problem would be solved. Mr.M.N.Padmanabhan, learned Senior Counsel made a very pointed reference to the first defendant being a temple



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and the sanctity of the place being affected by such a relief being granted in favour of the plaintiffs. I do not think that a mere permission to go to the defendants' property at the most once a year with necessary advance notice to the defendants would in any way affect the sanctity of the first defendant temple. The defendants should have grace enough to permit the plaintiffs on prior notice to enter their property for the purpose of carrying out repairs to their wall. At the risk of repetition, I fail to see how the sanctity of the temple will be affected by allowing the workmen of the plaintiffs for carrying out repairs. It may not be out of place to mention that the defendants themselves may require their building to be repaired and for which purpose they have to give access to the workmen trained in that field and it cannot be said that the sanctity of the place will be affected. The difficulties pointed out, by the learned Senior Counsel are really no difficulties, but only imaginary and without substance. It is a matter of mere adjustment between the parties and it should not be grudged by the defendants to the plaintiffs. The decision of the learned District Judge reversing the decision of the trial court with regard to the decree for access through the defendants property cannot therefore be sustained ".

From the aforesaid decisions, it is clear that in the urban areas for repairing boundary walls, the owner of the said walls can repair by entering into adjoining owner's house and the same cannot be prevented by the adjoining owner.

25. In L. Damodaraswami Naidu Vs. S.T.Damodarasamy Naidu (cited supra), this Court has held that it would be seen that the plaintiff is permitted to go on the defendant's land for repairing the wall in question once a year. Further, it was held that he must give fortnight's notice in writing at that time when he intends to make the repairs and the said repairs already provided should be between 9 a.m., and 5p.m and shall not exceed four days in the year. Therefore, this Court is of the view that the appellant's can enter into the respondent's property for repairing the wall in question once a year by giving fortnight's notice in writing at that time when he intends



to make the repairs and the said repairs already provided should be between 9 a.m., and 5 p.m and shall not exceed seven days in the year.

26. In Rajaraman and another Vs. Subramaniyan (cited supra), this Court has held that the person claiming easementary right should precisely plead property over which he claims easement.

27. In Arumugam Mooper (died) and Others Vs. K.Arumugham @ Periyasamy and Others (cited supra), the plaintiff claimed easementary right by prescription but he has subsequently pleaded that he used the defendant's property as cart-track for twenty years continuously and in the said circumstances, the Trial Court as well as First Appellate Court held that the plaintiff's claim proved easementary right by prescription. Under the said circumstances, this Court dismissed the second appeal concurring with the views of the courts below. Whereas, in this case as already pointed out that the appellant is claiming only right of repairing and whitewashing the outer wall on the northern side. In view of the decisions in Subramania Mudaliar Vs. Pachaiyappa Mudaliar (cited supra), S.Ramadosh Vs.Arulmighu Lakshminarayana (cited supra), and also L. Damodaraswami Naidu Vs. S.T.Damodarasamy Naidu (cited supra), the appellant is entitled to repair her northern side wall subject to the limitations as aforesaid.

28. In so far as the mandatory injunction is concerned, according to the appellant, she constructed the portigo and sunshades even in the year 1982 and at that time, the respondent has not raised any objection. The evidence of Panchayat staff would show that the appellant's building is in existence for about 20 to 25 years. The respondent in her evidence has admitted that the appellant has constructed portigo and sunshades even at the time of constructing her house, but she has stated she does not know when the appellant has constructed her house. The said statement would show that since the appellant had constructed the portigo and sunshades long ago, the respondent has deposed that she does not know as to when the appellant has constructed the aforesaid portigo and sunshades. When she did not raise any objection at the time of construction and also keeping silence for several years, it would not be proper on her part suddenly to file a suit to remove the aforesaid portigo and sun shades. The respondent has acquiescence. So, she is not entitled to the relief of mandatory injunction.



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29. For the aforesaid reasons, this Court is of the view that the second appeal in S.A.No.152 of 2013 has to be allowed partly with a modification of the decrees of the Courts below to the effect that the appellant is entitled to repair and white wash her northern wall once in a year by giving 15 days notice. The second appeal in S.A.No.179 of 2013 has to be allowed and the respondent is not entitled for the relief of mandatory injunction and accordingly, the substantial questions of law are answered.

30. In the result, the second appeal in S.A.No.152 of 2013 is partly allowed. The judgment and decree passed by the First Appellate Court in A.S.No.11 of 2011 are set aside and the judgment and decree passed by the Trial Court in O.S.No.107 of 2004 are modified as follows:

i) That the plaintiff is entitled to go on the defendant's land for repairing and white washing the wall in question once a year by giving fortnight's notice in writing at the time when she intends to make the white washing and repairs. The said white washing and the repairs should be done between 9 a.m and 5 p.m and shall not exceed 7 days in the year and

ii) that the parties are directed to bear their respective costs.

31. Insofar as the Second Appeal in S.A.No.179 of 2013 is concerned, the said second appeal is allowed. The judgment and decree passed by the First Appellate Court in A.S.No.17 of 2011 are set aside and judgment and decree passed by the Trial Court are restored and the suit in O.S.No.8 of 2005 is dismissed. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

Vv

To

1. The Subordinate Judge,
Mannargudi.



2. The District Munsif ,
Thiruthuraipoondi

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

+2ccs to Mr.P.Satheesh kumar , Advocate SR.No. 44279

S.A.No.152 and 179 of 2013
and
MP.Nos.1 of 2013 and 1 of 2013

A.SK(08/11/2019)