



SA(MD)No.387 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated : 25.08.2023

CORAM:

THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

S.A.(MD)No.387 of 2017

and

C.M.P.(MD)No.8248 of 2017

1.Balasubramanian

2.Shanmuganathan

3.Vadivaambal

... Appellants/Respondents 1,2 &4/

Defendants 1,2 &4

Vs.

1.T.Selvi

... 1st Respondent /Appellant / Plaintiff

2.Amirthagnanam

... 2nd Respondent /3rd Respondent /

3rd Defendant

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the decree and judgment, dated 27.04.2017, made in A.S.No.64 of 2014, on the file of the Principal Subordinate Judge, Madurai reversing the decree and judgment, dated 11.02.2014, made in O.S.No.472 of 2004, on the file of the District Munsif, Madurai, by allowing this Second Appeal.

For Appellants : Mr.G.Aravinthan

For Respondents : Mrs.A.L.Gandhimathi
Senior Counsel for R1



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JUDGMENT

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The appellants herein are the defendants 1, 2 and 4. The first respondent herein is the plaintiff and the second respondent herein is the third defendant before the trial Court.

2. For the sake of convenience, the parties are referred to as per their rank before the trial Court.

3. The plaintiff has filed the suit for the relief of mandatory injunction, for removing the additional construction in first and second floor and also for the permanent injunction, not to put up construction in the first floor.

4 The brief facts, which referred to in the plaint, are as follow:-

4.1. According to the plaintiff, she has purchased the northern portion of the house property, bearing Door No.66-A, Petchiamman Padithurai Road, Madurai, from the first defendant under registered sale deed, dated 07.12.1992. Originally, the entire property including northern portion, was owned by the 1st defendant. It is the submission of the



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plaintiff that, apart from the suit property, the first defendant has also latter on purchased the southern portion of the suit property bearing Door No.66-A, and put up construction in the year 1990. While putting up construction, the first defendant has left the open space in between her house, and also her northern portion of tiled house, which was subsequently, purchased by the plaintiff. According to the plaintiff, the suit open space measures East - West 32 feet, both on the Northern side and Southern side, and north-south side 1 feet on the Western side and 5'6" on the Eastern side. The plaintiff submitted that after the purchase of the suit property as old tiled house, she has been enjoying her property, by using the suit open space.

4.2. While this being so, the plaintiff demolished the old structure and put up a pucca R.C.C building consisting of ground, first and second floor. In the said construction, the plaintiff is having one window with sunshade measuring about 4 X 3 inches and, one ventilator with sunshade measuring about 3 X 2 inches in the ground floor. According to the plaintiff, these windows are facing the suit open space, and that they are the only source to get natural light and air.



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4.3. It is the submission of the plaintiff that, she has put up a main door way on the eastern side facing the main street. Thereafter, the first defendant has leased out the open space. Unfortunately, taking advantage of the silence of the plaintiff, the defendant has also constructed two lavatories, just immediately below the ventilators of the plaintiff. It is the submission of the plaintiff that, additional construction put up by the first defendant near their window will affect their privacy.

4.4. It is his further submission of the plaintiffs that the construction of the defendant is affecting the privacy and natural air and light. Therefore, the plaintiffs seeks for removal of those additional constructions.

5. Brief facts of the written statement are as follows:

The defendants submit that there is no open space as mentioned in the suit. The defendant further submit that the open space which defendant is having near the kitchen is occupied by one tenant – Periyasamy. According to the defendants, that said Muttram (முற்றம்) portion belong to the defendant. Therefore, the defendants submits that the



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plaintiff has right in the suit property and the very relief sought for under Easementary Act is vexatious. Even the so-called additional constructions have been put up about two years back and this plaintiff did not protest to the said construction. Hence, prayed to dismiss the suit.

6. Before the trial Court, on the side of the plaintiff, 2 witnesses were examined as P.W.1 and P.W.2 and 8 documents were marked as Exs.A1 to A8. On the side of the defendants, 2 witnesses were examined as D.W.1 and D.W.2 and 12 documents were marked as Exs.B1 to B12. Two Court documents were marked as Ex.C1 and C2.

7. Based on the evidence and materials on record, the trial Court has dismissed the suit and found that the plaintiff can't claim right of privacy as a matter of right.

8. Aggrieved with the said findings of the trial Court, the plaintiff has preferred an appeal before the First Appellate Court. In which, the first appellate Court had reversed the finding of the trial Court and decreed the suit, with the finding that the plaintiff has got a right of easementary.



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9. Aggrieved with the said finding of the first Appellate Court, the defendants have filed this Second Appeal.

10. This Court, by order dated 05.09.2017, has admitted the second appeal on the following substantial question of law:

“ (a)Whether the decree for mandatory injunction granted by the lower Appellate Court is correct in the absence of specific extent of additional constructions put up by the defendants?

(b) Whether the plaintiff is entitled for any Right of Easement over the property belong to the defendants?

(c) Whether the decision of this Court reported in (1895)-ILR-18-Mad163 on the question of privacy apparently ignores the possibility in law of a right of privacy existing in India is applicable to the present case? ”

11. The learned counsel for the appellants would vehemently submit that, even according to the sale deed, which stands in the name of the plaintiff, there is no vacant space as pleaded by them and he would also submit that though the plaintiff seeks for the easementary right of air and



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light, he has not proved their alleged right of easementry with law. It is also the submission of the learned counsel for the appellants that the so called privacy sought for by the plaintiff is alien to Indian Law. It is the submission of the learned counsel for the appellants that the very suit property is vague and contrary to Order 7 Rule 3 C.P.C. Therefore, the appellant prayed to allow this Appeal, by dismissing the suit.

12. Per contra, the learned Senior Counsel appearing for the first respondent / plaintiff would vehemently submit that the finding of the first Appellate Court is well considered one and she would also submit that the Commissioner report would exemplify the presence of the open space. The learned Senior Counsel would also invite the attention of this Court about Ex.B7 and would submit that, even according to the defendants, between 1992 and 1998, there was a vacant space of 4 feet and therefore, the very contention of the defendant that no open space exists cannot be believed.

13. I have given my anxious consideration to the either side submissions and also perused the materials.



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14. The foremost submission urged by the learned counsel for the appellants is that there is no such vacant space as pleaded by the plaintiff.

In this regard, the learned counsel for the appellants would draw the attention of this Court in respect of the sale deed, Ex.A1, A5 and A6. The first respondent herein has filed a copy of Ex.A5 as an additional typed set of papers, in which, while describing the property purchased by the plaintiff, the northern boundary has been shown as “ராஜலெட்சுமி காலியிடமும், வீடும், என் கைவசமுள்ள கெட்டி மச்ச வீடு” .

15. However, the learned counsel for the appellants has invited the attention of this Court to Ex.A1 and A6, which are certified copies of the sale deed stands in the name of the plaintiff. Wherein such reference namely “ராஜலெட்சுமி காலியிடமும், வீடும்” is not found a place and what exists in Ex.A1 and A6 as the southern boundary of the plaintiff is that “என் கைவசமுள்ள கெட்டி மச்ச வீடு”.

16. If there exist any vacant space, there could have been a reference in the document, which has been submitted by the respondent by way of an additional typed set. Therefore, from the perusal of Ex.A1 and A6, this Court is not in a position to agree with the contention of the



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learned Senior Counsel in respect of existence of the common space in between the defendants' and plaintiff's properties.

17. Therefore, this Court is of the firm view that there is no open space in between the plaintiff and the defendants property. However, the first Appellate Court has gone into the evidence of D.W.1 and found that the defendants has agreed in respect of existence of open space between 1991 and 1998. But, we are not concerned about the existence of the open space, prior to 1998. On the contrary, we are only concerned about the existence of open space while the defendant sold the property to the plaintiff, and whether such space was treated as common between the plaintiff and the defendants.

18. At this juncture, the learned Senior Counsel has invited the attention of this Court about the words “நடைபாதை மனையிடம்”, found in Ex.A5, and would contend that the said reference is nothing, but reference to indicate open space. But, this Court is not in a position to agree with the learned Senior Counsel. As a matter of fact, while referring the southern boundary, it referred only the property belong to the defendants. Therefore,



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the mere reference “நடைபாதை” cannot be correlated with the alleged common open space. Thus, as discussed herein above, this Court is of the firm opinion that there is no common vacant space in between the plaintiff and the defendants' property.

19. The learned counsel for the appellants would refer Section 15 of Easementary Act, and would contend that in order to have an easementary right of light and air, by the plaintiff, they must comply the provision of Section 15 of the Easementary Act. As rightly submitted by the learned counsel for the appellants and from perusal of the sale deed, there is no open space provided, to have a easementary right. Further since the appellants have purchased the property during 1998 and has instituted the suit within six years, there could not have been any possibility for her even to prescribe any right of easement by prescription.

20. In this regard, the learned counsel for the appellants would also invite the attention of this Court about the judgment of the Hon'ble Supreme Court reported in **1971-AIR(SC)-1878 (Chapsibhai Dhanjibhai Danad V. Purushottam)**. The relevant portion of the judgment reads as



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follows:-

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*“21. Assuming, however, that the said strip of land was used by him as a passage, the evidence clearly showed that it was permissive. There was evidence of a permission having been asked for from the respondent's father by the appellant for installing a hand-pump over the respondent's well in plot No. 93. If the appellant, and previously his father, were permitted to draw water from that well, the use of the well for drawing water and of the strip of land as a passage for going to the well was clearly permissive and not as an open hostile use over the lessor's property. The appellant himself admitted that his father had taken a portion of plot No. 93 on lease paying separate rent therefore at Rs. 45/-a year, and had put up thereon a tin-shed which stood there from 1935 to 1941. It is clear that the strip of land was allowed to be used as a passage both to the well and the said tin-shed. He admitted two letters, dated September 30, 1958 and December 4, 1959, having been written by him to the respondent both relating to rent due by him in respect of the said land on which the said tin-shed stood. **On these facts it is impossible to sustain the right of passage over the said strip of land as an easementary right by prescription for a continuous period of 20 years.**”*

((Emphasis supplied by this Court))



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By relying the above judgment, the learned counsel would submit that, even if the plaintiff had any usage, the same can't be converted as a right under Easementry Act, as the plaintiff did not have occasion to use the alleged space for a statutory period of 20 years. As such, the plaintiff cannot have any right of easementry by prescription. Therefore, this Court is of the view that even on the ground of easementry right, the appellants cannot have any remedy from this Court.

21. The other ground raised by the plaintiff is that the construction of the defendants affects their privacy. In this regard, the learned counsel for the appellants has also relied upon the judgment of this Court reported in **1984-1-MLJ-253 (S.Ramalingam Pillai V. Dhanalakshmi Ammal)**. The relevant portion of the judgment reads as follows:-

*“6. Even in the book referred to by the learned Counsel, namely, Law of Easements and Licences by B. B. Katiyar (Ninth Edition) the learned author has summed up as follows at page 501: **There is no such thing as natural right of privacy recognised anywhere in India and it is only in the Bengal Presidency where the right has been recognised as capable of acquisition by prescription as an easement, all***



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the other High Courts holding it to be only a customary easement arising by virtue of local custom. In support thereof, the learned author had relied on Sayyad Azuf v. Ameerubibi (obviously being a mistake) and several other decisions of the other High Courts. Thus, it is fairly established that a right of privacy is not an actionable wrong unless such a right has been in enjoyment by the aggrieved person as a custom. I have already pointed out that the respondents never pleaded that they have a right of privacy according to the custom prevalent in that particular locality. In view of the binding precedent found in Sayyed Azuf (1895) I. L. R. 18 Mad. 163 : 5 M.L.J. 26, Ameerubibil. I am unable to draw any inspiration from the several decisions quoted by the learned Counsel for the respondents. Further, none of these decisions, namely, Baqridi v. Rahim Bux A.I.R. 1926 Oudh 352, Keshab Sahu v. Dasaratha Sahu A.I.R. 1961 Orissa 154, Bhagwan Dai v. Zamurrad Hussain A.I.R. 1929 All. 676 and Syed Habib v. Kamal Chand , has ever laid down the principle that the right of privacy de hors custom is a legal right and if infringed can be enforced and relief obtained in a Court of law. Indeed, in Keshab Sahu v. Dasaratha Sahu , the learned Judge observed that a customary right of privacy cannot be presumed to exist in the absence of pleading and proof of such custom. The above observation is totally against the point that was urged by the learned Counsel for the respondents.” (Emphasis supplied by this Court)



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22. The learned counsel for the appellants has also relied upon the judgment of this Court reported in **2019-3-LW-740 (Mr.Manohar Lal V. Mr.A.Kannan)**. The relevant portion of the judgment reads as follows:-

“24. It is to be noted that as already stated, in between the plaintiff’s land and the defendant’s land, there is 10 ft gap and a common passage is running right from the main road. Therefore, it cannot be said that merely because the neighbour has put up the window facing the other’s property, others right of privacy is affected. In a city like Chennai, when the buildings are constructed in a similar manner and the buildings constructed vertically like flats and other aspects, one cannot contend that neighbouring buildings will affect his privacy. If such a contention is accepted in the present scenario no one can have any window or open air in the city. If at all the plaintiff is aggrieved that his privacy is affected by opening the window by the neighbour, which is situated 10 ft away from his house, it is for him to take necessary precautions to make alteration or to put up some construction so that others will not view his house.” (Emphasis supplied by this Court)

From the harmonious reading of the above precedents, what would emerge is that, no one have a luxury of privacy by restraining the neighbour from



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putting up construction or opening up a window. Further even to have a right except for right of air and light, as a easementary, there should have to claim it as a matter of right, been a continuous usage for statutory period.

23. The yet another submission was also made by the learned counsel for the appellants that, the suit property has not been described as mandated under Order 7 Rule 3 of C.P.C.. While reading the suit property, it refers some additional construction. But, the measurement of such additional construction has not been provided. When the plaintiff comes forward to seek a relief of mandatory injunction, it is essential to provide measurement, so as to identify the suit property in a precise manner. Here, such precise measurement, much less any measurement has been provided. Therefore, as rightly submitted by the learned counsel for the appellants, the suit property has not been described as mandated under Order 7 Rule 3 of C.P.C.

24. In this regard, the learned counsel for the appellants has also relied upon the judgment of this Court reported in **2022-3-MLJ-417 (Y.Devendran V. D.Shanmugam)**. The relevant portion of the judgment



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reads as follows:-

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*“10. Both the Courts below also failed to notice the fact that Order VII Rule 3 of C.P.C., specifically mandates that where the subject matter of the suit is an immovable property, the plaint shall contain the description of the property sufficient to identify it. In the present case, **there is absolutely not a single averment made in the plaint as to the nature of illegal construction put up by the 1st defendant and the extent to which it has been made. The plaintiff did not even take steps to appoint an Advocate Commissioner to identify the so called encroachment. Both the Courts went by the ipse dixit of the plaintiff and have proceeded to decree the suit even without understanding the extent of encroachment made by the 1st defendant.**”*

(Emphasis supplied by this Court)

25. In this regard, the learned counsel for the appellants has also relied upon the judgment of this Court reported in InduLawLib-1492906 (*Venkatachalam V. Sambayal*). The relevant portion of the judgment reads as follows:-

*“15. In the said circumstances, as pointed by the Courts below, in the suit for mandatory **injunction**, **there must be a specific identification of the property for the Court to act upon and make the decree executable. Vague***



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description of the property referring the old suits without proper measurement, had invited dismissal of the suit. Therefore, this Court finds that the dismissal of the suit filed by the plaintiffs is perfectly in accordance with law and no substantial question of law involved in this case for interference. “

(Emphasis supplied by this Court)

26. The learned counsel for the appellants has also relied upon the judgment of this Court reported in 2015-1-MLJ-183 (***K.S.Pururaras V. P.N.V.Easwaran***). The relevant portion of the judgment reads as follows:-

“23. The Advocate Commissioner, in his report under Ex.C-1, has also stated about the availability of the road. But what Mr.V.Raghavachari has contended is that the definite boundary as well as the exact measurement of the common pathway have not been described properly in the plaint schedule and therefore, in the absence of proper description of the property, the suit itself is not at all maintainable and liable to be dismissed.

24. In support of his contention, he has placed reliance upon the decision of this Court in Mariappan and others vs. Marudan and others {1999 MLJ (Supp.) 260} wherein the learned Single Judge of this Court has held that the existence of a path running in the property is not at all adverted to in the plaint description nor any plan has been filed whereas in the evidence, it is categorically admitted that there is a pathway. But the plaint description proceeds as though there is no such pathway and that the entire property is in one block. Therefore, ignoring the material circumstance placed before the Court by way of Commissioner's Report and the admissions of plaintiff's witnesses, the Court has passed a decree which will become



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unworkable. There is absolutely no whisper to this aspect at all by the Courts below. In such circumstances, the plaintiffs have come to Court without any definite case and without any definite pleading as regards the boundaries, the location of properties. The vague manner in which 'B' schedule property is described in the plaint would go to show that the plaintiffs have failed to place before Courts satisfactory and sufficient materials."

(Emphasis supplied by this Court)

Here, though the defendant come forward to have the relief of mandatory injunction, the defendant did not refer about the extent of alleged encroachment. Here, this Court held that no encroachment has been proved. Even for argument sake if we consider any encroachment in view of absence of precise measurement of the alleged encroachment the suit must fail.

27. Therefore, this Court is of the firm view, as rightly submitted by the learned counsel for the appellants, the first Appellate Court misdirected itself by relying about the physical features of the property prior to 1998, qua prior to purchase by the defendant. Therefore, the finding of the learned first Appellate Judge about the existence of some space prior to purchase of land by the plaintiff has no relevance to decide the case. Therefore, the findings of the First Appellate Court that the



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plaintiff is entitled for an easementary right is contrary to law. Hence, the substantial question of law is answered in favour of the appellants. Therefore, this Court is of the firm view that the order of the first Appellate Court is liable to be reversed.

28. In the result, the instant Second Appeal is **allowed** by reversing the findings of the first Appellate Court, thereby, the judgment and decree of dismissal passed by the trial Court is restored. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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C.KUMARAPPAN.,J.

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To

- 1.The Principal Subordinate Judge,
Madurai.
2. The District Munsif,
Madurai,
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

Judgment made in
S.A.(MD)No.387 of 2017

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