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S.A.Nos.717 of 2012 & 88 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.06.2024

PRONOUNCED ON : 30.07.2024

CORAM

THE HONOURABLE MR.JUSTICE V.SIVAGNANAM

S.A.Nos.717 of 2012 & 88 of 2013

S.A.No.717 of 2012

K.G.Paul

... Appellant

Vs.

1.K.Ramesh

2.Hotel Residency Lodging House,
Rep by its Partner, K.Ramesh,
No.4-47, Venkat Road, Salem – 636 001.

3.Salem Municipal Corporation,
Rep by its Commissioner,
Sevapet Main Road,
Fort Salem.

4.The Tamil Nadu Pollution Control Board,
Rep.by its officer,
District Environment Office,
Meyyanur, Salem.

... Respondents



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S.A.No.88 of 2013

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1.K.Ramesh

2.Hotel Residency Lodging House,
Rep by its Partner, K.Ramesh,
No.4-47, Venkat Road, Salem – 636 001.

... Appellants

Vs.

1.K.G.Paul

2.Salem Municipal Corporation,
Rep by its Commissioner,
Sevapet Main Road,
Fort Salem.

3.The Officer,
Tamil Nadu Pollution Control Board,
District Environment Office,
Meyyanur Salem.

... Respondents

Common Prayer:- Second Appeals have been filed under Section 100 of CPC against the Judgment and Decree of the II Additional Subordinate Court, Salem, dated 23.11.2011, in A.S.No.107 of 2010, modifying the Judgment and Decree of the II Additional District Munsif Court, Salem, dated 21.11.2009 in O.S.No.394 of 2006.

In S.A.No.717 of 2012

For Appellant	: Mr.T.Murugamanickam, Senior Counsel for M/s.Zeenath Begum.
For R1 & R2	: Mr.M.Devaraj
For R3 & R4	: Given up



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In S.A.No.88 of 2013

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For Appellant : Mr.M.Devaraj

For R1 : Mr.T.Murugamanickam, Senior Counsel
for M/s.Zeenath Begum.

For R2 : No appearance

For R3 : No appearance

COMMON JUDGMENT

Challenge in these second appeals is made to the Judgment and Decree dated 23.11.2011, in A.S.No.107 of 2010, on the file of the II Additional Subordinate Court, Salem, modifying the Judgment and Decree dated 21.11.2009 in O.S.No.394 of 2006, on the file of the II Additional District Munsif Court, Salem.

2. For the sake of convenience, the parties are referred to as per their rankings in the Trial Court.

3.The case of the plaintiffs, in brief, is that the 1st plaintiff purchased the A schedule property on 16.08.1985. A settlement deed was executed on 04.02.2005 in favour of the 1st plaintiff's father by his brother. In turn, the 1st



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plaintiff's father executed a settlement deed in favour of the 1st plaintiff on

10.02.2005. A partnership firm was registered on 07.04.2009 in the name and

style of Hotel Residency. The assets were transferred to the partnership firm.

On 10.02.2005, the 1st plaintiff's wife joined as a partner in the firm. In the

suit property, a lodging house was constructed in the year 1986 and was

functioning from that year onwards. The northern side of the wall has

windows for light, ventilation and passage and free air into the suit property.

The 1st plaintiff is enjoying the same for 20 years uninterruptedly. The 1st

defendant purchased the B schedule property and runs an hotel by name Hotel

Sri Krishna. The B schedule property is adjacent to the A schedule property.

The 1st plaintiff was granted licence for the Hotel Residency. The 1st defendant

has demolished the construction in the B schedule property and attempting to

construct new building in the B schedule property. The 1st defendant

demolished the wall which belonged to the plaintiff and planning to construct

his kitchen in the B schedule property. If the kitchen is constructed in the B

schedule property abutting the wall of the B schedule property, the heat will

affect the walls of the lodge and disturb the public in general. The construction

will obstruct the light and air. The construction will cause loss to the 1st

plaintiff. The kitchen will create health hazard and fire risk. The 1st plaintiff



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questioned the unauthorized construction, but the defendants did not care.

Hence the suit.

4.The first defendant denied the allegations in the plaint and filed a written statement contending that the suit is not maintainable, the 1st plaintiff's lodge, Hotel Residency is running from 06.08.1991. The allegations that the 1st plaintiff was receiving light, air and ventilation for the past 20 years from the northern window is totally false. The 1st defendant is putting up construction in the B schedule property and did not demolish the compound wall belonging to the 1st plaintiff. It is false to say that the kitchen will disturb the public, who visits the lodge. The B schedule property was purchased by the defendant on 24.08.2005. The property is a vacant place measuring 820 sq.ft. The B schedule property is situated on the north of the 1st plaintiff's lodging house. The 1st plaintiff has constructed to the edge of his property, no vacant space was left by the 1st plaintiff. The 1st plaintiff demanded the 1st defendant to sell the suit B schedule property. Having failed in his attempt, he is causing trouble to the 1st defendant. The 1st plaintiff is not having any right of easement by prescription since their lodge is running from the year 1989



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March onwards only. So, there is no easement. The photographs have nothing to do with the suit. Thus, he prayed for the dismissal of the suit.

5.The third defendant denied the allegations in the plaint and filed a written statement contending that the suit is not maintainable and the 1st defendant has not obtained any consent from the Tamil Nadu Pollution Control Board. The construction has not at all commenced. The Civil Court does not have jurisdiction as per Section 58 of the Water (Prevention and the Control of Pollution) Act, Section 46 of the Prevention and Control of Pollution Act and Section 22 of the Environmental Protection Act and thus prayed for the dismissal of the suit.

6.On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for consideration:

1.Whether the Civil Court has jurisdiction?

2.Whether the plaintiff is entitled to permanent injunction as prayed for?

3.To what other relief?

7.Before the Trial Court, in support of the plaintiffs' case, PWs 1 & 2



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were examined, 11 documents were marked as Ex.A.1 to Ex.A.11. On the side of the defendants, no oral evidence was adduced and 1 document was marked as Ex.B.1.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Trial Court granted permanent injunction restraining the 1st defendant from putting up any construction in any way affecting the northern wall of the 1st plaintiff's property and dismissed the suit as far as the prayer against the defendants 2 and 3 without costs.

9. Aggrieved over the same, the 1st defendant filed A.S.No.107 of 2010 before the II Additional Subordinate Court, Salem. The First Appellate Court, after considering the entire materials and evidence on record, allowed the appeal and modified the decree and judgment of the Trial Court. Aggrieved by the same, the S.A.No.88 of 2013 has been filed by the plaintiffs and S.A.No.717 of 2012 has been filed by the 1st defendant.

10. The second appeals have been admitted on the following substantial



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questions of law:

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a) When the plaintiffs have not sought for any declaration of the easementary right, whether the Lower Appellate Court was correct in granting a decree for permanent injunction against the defendant by imposing conditions subjecting him to an easement?

b) When the plaintiffs claim a right of enjoyment of easement, but the evidence on record shows that the plaintiffs have made construction in the suit A schedule property about 17 years prior to the institution of the suit, whether a right easement can said to have been established?

c) Whether the judgment of the Lower Appellate Court is vitiated in that it is erroneously presumed the existence of certain physical features of the suit properties, without there being any evidence on record to prove such features?



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11.The learned counsel appearing for the appellant in S.A.No.717 of

2012 submitted that the judgment of the Lower Appellate Court is against law.

It ought to have allowed the appeal in entirety on the ground that, without seeking for a declaration of easementary right, the plaintiffs had filed suit for bare injunction on the basis of imaginary rights of easement. The 1st plaintiff failed to prove that he had free access of light and air for the suit A schedule building by peaceful enjoyment as an easement and as of right, without interruption for twenty years. The Lower Appellate Court erred in incorporating the period of twenty years and failed to note the fact that the 1st plaintiff purchased the property on 16.08.1985 and the building was constructed only in the year 1989. Further, the Lower Appellate Court failed to consider the fact that there is no evidence to show that the plaintiff had left any vacant space on the southern side between their building and their boundary and they have no right to complain that the neighbouring owner defendant should not put up any construction. The defendant/appellant is entitled to make best use of his property. The plaintiffs have no right to prevent them. The plaintiffs have not established the right of easement. The 1st defendant is entitled to put up constructions. When the plaintiffs have not so far asked for declaration and easementary right, permanent injunction



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cannot be granted and the learned counsel reiterated the other grounds raised

in the grounds of appeal and thus, pleaded to allow the appeal.

12.To support his arguments, the learned counsel for the appellant in S.A.No.717 of 2012 relied on the following judgments:

(i) *Ramanatha Gupta Vs. Razaack* reported in ILR 1982 Karnataka 579.

(ii) *Moidin Kunhi Beavy Vs. K.Gopalakrishnan* reported in 1953 VOL 66 LW p.435.

(iii) *A.V.Kuppusamy Vs. S.K.Subramanian* reported in 1997 3 LW 371.

(iv) *Anguri Vs.Jiwan Das* reported in 1988 4 SCC 189.

(v) *Manohar Lal Vs. Kannan* reported in Manupatra /TN/2776/2019.

13.The learned counsel for the appellant in S.A.No.88 of 2013 submitted that the Lower Appellate Court failed to note that the plaintiffs have come forward with the specific relief. The defendants had not come forward before the Court praying any relief. Permitting the 1st defendant to construct the building in his land is preventing the plaintiff from enjoying his easementary right. There is no ground to modify the judgment of the Trial



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Court. The First Appellate Court while holding that the plaintiff is entitled to the right of easement, on the other hand, had permitted the 1st defendant to construct the building over the B schedule property contrary to the findings, being erroneous, is liable to be set aside and the learned counsel reiterated the other grounds raised in the grounds of appeal and thus, pleaded to allow the appeal.

14.I have considered the matter in the light of the submissions made on either side and perused the materials on records as well as the Judgments passed by the Courts below.

15.On perusal of the records and documents, it is seen that the plaintiffs in O.S.No.394 of 2006 filed the plaint with the following prayer:

a) Restraining the 1st defendant or his men in nor making a construction in Schedule B of the suit property in defiance of the rule of the Government and not to disturb the peaceful enjoyment of the property by the plaintiff by any construction that would be detrimental to the plaintiff or his men,

b) Restraining the 2nd defendant not to grant any permission for any construction in schedule B of the property without bearing the plaintiff or to



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allow the 1st defendant to construct any building in total defiance of any rules of the Government.

c) Restraining the 3rd defendant not to grant any permission for having the Kitchen in the said suit premises of schedule B of the property that would be hazardous to the public and causing pollution hazards.

d) Pass such other relief or reliefs as this Court deems fit and proper in the circumstances of the case and

e) Award the costs of the suit.

16.From the above, it is seen that the plaintiffs have not asked to declare their easementary right of light and free air from the northern side of the wall. From the facts, it is seen that it is not disputed that the plaint A schedule property is owned by the 1st plaintiff and B schedule property is owned by the 1st defendant. It is further seen that, the 1st plaintiff constructed a building and running a lodging house, namely, the Hotel Residency. On the B schedule property, the 1st defendant is running an hotel by name, Hotel Sri Krishna, now demolished for reconstruction. Now the place is vacant. The 1st defendant proposed to construct a hotel. If it is constructed, it would obstruct the light and air that the plaintiffs are enjoying in the A schedule property.

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Hence, he filed the suit. Admittedly, the plaintiffs are not seeking declaration of their easementary right by prescription but seeking only injunction not to construct any building and not to disturb the peaceful enjoyment of the plaintiff A schedule property by the plaintiffs and restraining the 2nd defendant and from granting any permission for any construction in the B schedule property in violation of the Government rules.

17. On a perusal of the records and evidence, it is seen that the plaintiffs constructed the present building after demolishing the old building in the A schedule property. At the time of construction, whether the plaintiff had left any space on the northern side, there is no evidence for the same. The plaintiffs failed to file a building plan with the plaint to show that the plaintiffs had left sufficient space on the northern side before constructing the building. It is recorded by the Trial Court in paragraph No.13 of its judgment. It is also not disputed that for the B schedule property, they have not filed their title deeds. It is also recorded by the trial Court. The Trial Court, on considering the evidence, decreed the suit as prayed for considering the public interest. Aggrieved by this, the 1st defendant had filed an appeal in A.S.No.107 of 2010. On a perusal of the judgment of the First Appellate Court, it is noticed



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that the First Appellate Court, having not set aside the plaintiff's right of easement by prescription, permitted the 1st defendant to put up construction in the B schedule property without affecting the light and air through the northern wall of the A schedule property.

18.On perusal of the entire evidence, it is noticed that the plaintiff purchased the property in the year 1985 and it is evidenced by Ex.A1. On perusal of Ex.A1 sale deed, dated 16.08.1985, in the description of the property, it is noticed that there is an old Madras terrace building and RCC terrace building and in the first floor Mangalore tiled building with the windows. The northern wall is the wall of the vendor and the southern wall also belong to the vendor and there is a compound wall on the side of the Venkatrao road and Dr.Subbarayan Road.

19.Further, on perusal of the sale deed, it is noticed that the sale deed is silent about the windows on the northern side of the building on the date of their purchase. Therefore, the 1st plaintiff cannot claim that he is enjoying the free air and light through the northern side wall. Further, it is noticed that the plaintiffs have failed to file a building plan with the plaint to show that while



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constructing the new building, they had left sufficient space on the northern side in the year 1989. Further, it is noticed that during 1989, a three storeyed building was constructed to run a Hotel and licence was granted in the year 1991. In the above factual situation, the findings of the First Appellate Court that the plaintiffs are entitled to free light and air is erroneous one and for that there is no support on record.

20.The first plaintiff's claim is that he has so acquired easementary right by way of prescription by enjoying free light and air for more than 20 years from the northern side wall of the B schedule property. Now the 1st defendant is making arrangement for constructing a building close to the A schedule property and thereby causing trouble in using the building at the A schedule property of the plaintiff.

21.Easement is a specific right subtracted from the general rights constituting ownership of one property and attached to the ownership of another property. In the language of the Act an easement is a restriction of a natural right.



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22.The right to light and air may be either a natural right forming one of the incidents of property, or it may be an easement. The easement of light and air is a continuous easement and negative easement. The owner of land can take and use for his own property as much light and air as come within the boundaries of his land, but the quantity of light and air available for his use is, in a large measure, dependent upon act of his neighbour. So if his neighbour, in the free enjoyment of his own property, erect buildings thereon in such manner as to diminish the flow of light and air on to the other's land, the latter would have no redress unless he could show a right on his part precluding his neighbour from erecting such buildings. Such a right if it existed would clearly be restrictive of the other's right to enjoy his property as he pleased, and could only arise as an easement. An easement of light and air is the purely legal right that servient owner shall not, by any act on the servient tenement, diminish the quantity of light and air to which the dominant owner is entitled.

23.A scrutiny of section 13 reveals that the following conditions should exist before an easement can become absolute by prescription-(1) There must be pre-existing easement which must have been enjoyed by the dominant owner; (2) the enjoyment must have been peaceable; (3) the enjoyment must



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have been as an easement; (4) the enjoyment must have been as of right; (5) the right must have been enjoyed openly; (6) the enjoyment must have been for a period of 20 years; and (7) the enjoyment for 20 years must have been without interruption.

24. In this case, on fact, there is no declaration is claimed for existence of such right. Further, the plaintiffs have failed to prove that they are enjoying the easementary right of light and free air from the northern side of the wall for more than 20 years.

25. The settled position of law is that in a suit for injunction, based on a prescriptive easementary right, the plaintiff should seek for a declaration from the Court that he has so acquired the prescriptive right of easement. In the present suit, however, the plaintiff has not sought for declaration that he has acquired prescribed right of easement with regard to free air and light through the windows and ventilator from the northern side. Hence the suit is liable to be dismissed. The Trial Court as well as the First Appellate Court failed to follow the settled position of law and erroneously granted the easementary right.



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26.The findings of the First appellate Court with regard to the right of the 1st defendant to construct a building in the B schedule property without affecting the light and air is unsustainable when the plaintiff is failed to prove the prescribed right of easement by prescription through the windows situated in the northern wall of the A schedule property. In the absence of the plaintiff's right of easementary right of light and air, imposing such a conditions by the First Appellate Court is erroneous one.

27. The principles settled in the decision in *Ramanatha Gupta Vs. Razaack reported in ILR 1982 Karnataka 579* relied by the learned counsel for the appellant in S.A.No.717 of 2012 is applicable to the present case on hand. For better appreciation, it is extracted hereunder:

11.It is therefore, necessary that in a suit for injunction based on a prescriptive easement right, the plaintiff should seek for a declaration from the Court that he has so acquired the prescriptive right of easement. In the present suit, however, the plaintiff has not sought for declaration that he has acquired prescriptive right of easement with regard to the inflow of air and light through the windows and ventilator. Without more, therefore,



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the suit is liable to be dismissed. The Courts below have obviously missed this legal aspect.

28.The principles in *Moidin Kunhi Beavy Vs. K.Gopalakrishnan* reported in 1953 VOL 66 LW p.435 that if the persons 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, 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.

29.In this case, the 1st defendant is the owner of the northern side of the B schedule property. In such circumstances, in the absence of proof of prescription of easementary right, the plaintiff is not entitled to get any relief. Therefore, when the plaintiffs have not sought for any declaration of easementary right, the Lower Appellate Court was not correct in granting the decree for permanent injunction against the 1st defendant by imposing a conditions subjecting him to easement when the 1st plaintiff had not established his right of easement of enjoying more that 20 years. The Lower Appellate Court is erroneous in holding the existence of the window on the northern side of the building which is purchased by the plaintiff in the year



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1985. Without any evidence on record, the findings of the First Appellate

WEB COURT is erroneous and liable to be set aside.

30.The judgment and decree of the Trial Court and the First Appellate Court is unsustainable and it is liable to be set aside and accordingly, set aside. The substantial questions of law formulated in the second appeals are accordingly answered.

31.In the result, S.A.No.717 of 2012 is allowed and S.A.No.88 of 2013 is dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

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30.07.2024

Index : Yes/No

Internet: Yes/No

Speaking order/Non-Speaking order

Neutral Citation : Yes/No



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To

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V.SIVAGNANAM, J.

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Pre-Delivery Judgment made
in S.A.Nos.717 of 2012 & 88 of 2013

30.07.2024