
(2003) 12 AP CK 0028
In the Andhra Pradesh High Court
Case No : SA No. 318 of 1993

Gopiseti Reddy and Another	Vs	APPELLANT
Makam V. Balaramaiah Gupta and Another		RESPONDENT

Date of Decision : 29-12-2003

Acts Referred:

Easements Act, 1882 — Section 13, 15

Citation : (2004) 2 ALD 562 : (2004) 3 ALT 562 : (2004) 2 CivCC 642

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : K.V. Reddy, for the Appellant; R. Radhakrishna Reddy, for the Respondent

Final Decision : Allowed

Judgement

P.S. Narayana, J.—Heard Sri K.V. Reddy, the learned Counsel representing the appellants.

2. The unsuccessful plaintiffs in both the Courts below had raised the following substantial question of law in the present second appeal. "When once it is admitted that the wall originally belonged to the joint family, whether the right to light and air claimed by the appellants-plaintiffs be negated especially in the light of Section 13 of the Indian Easements Act, 1882".

3. The learned Counsel made elaborate submissions relating to the respective pleadings of the parties and also had explained in detail the scope and ambit of Section 15 of the Indian Easements Act, 1882 and Section 13 of the Indian Easements Act, 1882; The learned Counsel also on facts had pointed that the Court of first instance, while appreciating the evidence available on record, had recorded findings in detail that if the relief is not granted in favour of the plaintiffs, the house would be as dark as in the night, but however, ultimately had negated the relief on the ground that joint ownership of a wall would not go along with the right to claim an easement. The learned Counsel also pointed

out that the Appellate Court had also proceeded on the same ground that a right of easement cannot be claimed in the case of a joint wall and had negated the relief. The Counsel maintained that there is no dispute or controversy that originally these houses were owned by the Menta joint family. Subsequent thereto, all these parties by virtue of their purchase had been in possession and enjoyment of the respective houses and in the light of this background inasmuch as Section 13 of the Indian Easements Act, 1882 alone is applicable negating the relief, cannot be sustained.

4. The appellants-plaintiffs originally had instituted OS No. 573 of 1987, on the file of District Munsif Court, Madanapalle, for declaration of the easementary right to free flow of light and air from the north through the windows in the northern wall of their house and restraining the 1st defendant by way of permanent injunction from building walls on his site to the north of the plaintiffs' house higher than the bottom portion of the five windows in northern wall of the ground floor of the plaint schedule house, or put his roof over the windows or anywhere except at the height where the original roof rested on the rafters inserted in the said northern wall indicated by the openings in the wall caused by removing the rafters of the roof.

5. The said suit was transferred and re-numbered as OS No. 22 of 1983 on the file of District Munsif, Vayalpad. The appellants-plaintiffs had pleaded in the plaint as hereunder:

"The house property detailed in the schedule hereunder originally belonged to Menta Akkanachetti. By successive dispositions the property came to be owned by Batchu Krishnamurthi who sold the same to Gopiseti Ramalingaiah Chetty, father of the 1st plaintiff and the 2nd defendant and the husband of the 2nd plaintiff for valuable consideration under the registered sale deed dated 4-8-1958 and put him in possession of the same. On the death of the said Ramalingaiah about 3 years back the property devolved upon the plaintiffs and the 2nd defendant as his heirs. The schedule mentioned house has a ground floor and a first floor. In the ground floor in the northern wall there are 5 windows facing north. In the wall over it and supporting the first floor roof, there are 5 windows opening to the north. The ground floor windows are at a height of 11 feet from ground and the first floor windows are about 5 feet above the top of the ground floor windows. The plaintiffs have been enjoying the suit house comprising the ground floor and the first floor with free flow of light and air from the north since nearly 100 years through the windows, stated above. The plaintiffs have got the right to such full passage of light and air through those windows to their house. It is an easementary right as well. The house north of the plaintiffs' house is owned by the 1st defendant whose father purchased the same from M.R. Anjaneyulu in 1943. The said M.R. Anjaneyulu had purchased from Yadalam Narasimhaiah Chetty who had purchased the same at the auction sale conducted by the official Assignee, Madras in the Insolvency proceedings of Menta Ramalingaiah Chetty, and Menta Gopalakrishnaiah Chetti. The official Assignee

had executed a sale deed for the same and the registration copy of it is filed herewith. The roof of that house so purchased was only 6 feet from the ground with the rafters supporting the same having been imbedded in the joint ground floor northern wall of the plaintiff's house traces of which are still found. The 1st defendant has no right to the first floor wall over the said northern floor wall. While so, the 1st defendant demolished the old mud terraced house on the site north of the plaintiffs house. Since the plaintiffs apprehended that he would rebuild his house with its roof at a higher level than the original one got issued a notice to the 1st defendant not to raise his roof level and not to make any constructions which might obstruct the accustomed free flow of light and air into their schedule mentioned house through the windows in the northern wall. The 1st defendant has no right to close the windows or obstruct the free flow of light and air through them since the original owner himself had no such right and such a right has not been conveyed by the official Assignee to the predecessor in title of the defendant. The 1st defendant has constructed the foundations on his site and is proceeding with the construction of the walls. The defendant is giving out that he will construct the walls in such a way to pay the proposed roof at a level higher than the old one existing since more than 50 years. The rafters supporting which had been imbedded in the northern wall of the plaintiffs' house traces of which are still there. The attitude of the 1st defendant seems to be defiant and not likely to yield to the protest of the plaintiffs. He is speeding up the constructions work. This suit is therefore filed for easementary right and for permanent injunction restraining the 1st defendant from either raising the walls in his site which will have the effect of obstructing the free flow of light and air into their house through the windows in the northern wall or raising the level of the roof beyond its original height which is 1 1/2 feet below the bottom level of the ground floor windows in the northern wall of the plaintiff's house and for costs."

6. The defendant filed written statement pleading as hereunder:

"The sales of the plaintiff house and 1st defendant's house are admitted. The plaintiffs have not referred all the subsequent sales of suit house in order to suppress the rights described in the said sale deeds. It is true that the plaintiff schedule house originally belonged to Menta family. Likewise the house north of plaintiff schedule house belonging to 1st defendant also was owned by Menta family. The plaintiff schedule house was in IP No. 203 of 1926 by official Assignee of Madras to one Yadalam Narasimhaiah Chetty son of Krishnaiah Chetty, Yadalam Venugopala Krishnaiah son of Narasimhaiah Chetty after his father's death for himself and as guardian of his undivided minor son Aswat Narayana Chetty, sold the same to Menta Subhadramma and Navaneethamma on 27-1-1943. In the said sale deed dated 27-1-1943 the easementary right of getting light and air through the window in the partition wall alleged and claimed by plaintiffs in the plaint is omitted by the time his father had sold away the right as described below. The house of north of plaintiff schedule house now owned by 1st defendant was purchased by the said Yadalam Narasimhaiah Chetty son of

Krishnaiah Chetty, Kandakur of Madanapalle taluk in IP No. 203 of 1926 in the sale held by official Assignee of Madras. The said Y.Narasimhaiah Chetty sold the house now in possession of 1st defendant to one M.Anjaneyulu Chetty of Madras by a duly Registered sale deed dated 21-7-1941 and put him in possession. The said Narasimhaiah Chetty sold half joint share in the partition wall running from East to West and located between the plaint schedule house and house of 1st defendant from ground level to top level and also the right to close down all the windows in the said wall hereinafter called partition wall of joint wall, if the said purchaser M.R.Anjaneyulu Chetty constructs new house raising the height of his house and also the 1st floor. The house now owned by 1st defendant was lower in level than the plaint schedule house and hence M.R.Anjaneyulu Chetty purchased the half share in the joint wall and also right to close all the windows if he constructs a new house with 1st floor from Yadalam Narasimhaiah Chetty. The said M.R.Anjaneyulu Chetty sold the house north of plaint schedule house purchased by him from Yadalam Narasimhaiah Chetty to Sri Makam Venkatramaiah Chetty father of 1st defendant for valuable consideration by a duly registered sale deed dated 17-12-1943 and put him in possession. The said M. Venkatramaiah Chetty father of 1st defendant acquired the right to close down all the windows in the joint wall through his vendor M.R.Anjaneyulu Chetty and the 1st defendant has also acquired right of adverse possession to close all the windows. The said Subhadramma and Navaneethamma had fully known about the sale of easementary right in the joining wall to M.R.Anjaneyulu, Chetty. The said Subhadramma and Navaneethamma sold the suit house to one Bachu Krishnamurthy and S.Rangaiah Chetty respectively and in the sale deed the right of getting air and light through the windows in the joining wall is omitted. The said Bachu Krishnamurthy sold the suit house to S.Ramalingaiah Chetty father of 1st plaintiff and husband of 2nd plaintiff on 4-8-1958. The said Bachu Krishnamurthy and S.Ramalingaiah Chetty colluded and connived and created false recitals in the sale deed in the half share in ground floor in the partition wall and full right falsely in the remaining top portion above the ground floor which right neither Bachu Krishnamurthy nor his vendor had at any time after sale of the said right of Yadalam Narasimhaiah Chetty to M.R.Anjaneyulu Chetty in 1941. The said right of closing all windows in the joint wall and putting rafters in the partition wall was purchased by M.R.Anjaneyulu Chetty predecessor in title of first defendant for the sake of privacy and to avoid disputes at the lime of raising height of the ground floor or putting 1st floor. Thus the right of closing all the windows in the joining wall is perfected by adverse possession by 1st defendant through the vendor of his father and the plaintiffs or their predecessor in title are estopped by their conduct from questioning the right of first defendant to close down all the windows by raising the ground floor level of his house or by putting first floor as they never objected or questioned so far the right of first defendant to close down all the windows in the joint wall. The 1st defendant demolished the old mud house in order to construct new house raising the height of ground floor with provision to construct first floor. Plaintiff cannot question the right of first defendant to do so. For the false notice issued by plaintiff claiming

imaginary right, 1st defendant got proper reply issued mentioning all true facts. The plaintiffs demanded cash consideration from 1st defendant to permit him to close windows by raising the ground floor of 1st defendants house in the presence of Mogili Ramanjulu Chetty, Popelle Ramayya Chetty, Tabjoolachinna Reddenna Chetty and K.L.Narasimhulu Chetty. As 1st defendant refused to pay any amount, plaintiffs have filed this suit with false allegations to coerce the 1st defendant to come to terms. The plaintiffs have no easementary right to receive light and air through the windows in the joint wall simultaneously plaintiffs have no right to restrict right of 1st defendant from constructing to any height and close down all the windows. There is no cause of action for the plaintiffs to file this suit".

7, On the basis of the respective pleadings of the parties, the Court of first instance had settled the following issues:

- (1) Whether the first defendant has purchased easementary right of closing all the windows in the joint wall of the houses of plaintiffs" and defendants ?
- (2) Whether the first defendant acquired adverse possession to close all the windows in the joint wall of the plaintiffs and defendants ?
- (3) Whether the plaintiffs and 2nd defendant are estopped by their conduct to question the right of first defendant to close down all the windows ?
- (4) Whether Sri Ramalingaiah Chetty father of the first plaintiff purchased joint wall without easementary right of getting air and light in the joint wall?
- (5) Whether plaintiffs demanded money from 1st defendant to permit him to close down all the windows?
- (6) Whether the plaintiffs are not entitled to restrict first defendant regarding height of the walls of the house under construction or to be constructed by first defendant?
- (7) Whether the suit is misconceived and unnecessary ?
- (8) Whether the suit is false and vexatious and whether defendants are liable to pay exemplary costs u/s 35(a) of C.P.C?
- (9) To what relief ?

8. On behalf of appellants-plaintiffs, PWs.1 to 3 were examined and Exs.A-1 to A-3 were marked. Likewise DWs.1 to 3 were examined and Ex.B-1 was marked. Exs.X-1 to X-4 were also marked.

9. The evidence of DW.2 was scrapped as per the memo filed in this regard. The Court of first instance, on appreciation of both oral and documentary evidence in detail, ultimately came to the conclusion that the appellants-plaintiffs are not entitled to restrain the first defendant from raising the height of the walls of the house under construction to be constructed and ultimately had negated the relief.

10. It is pertinent to note that at para 17 of the judgment of the Court of first instance, the learned District Munsif had observed that there is evidence to show that there is no light and air to plaintiffs house. PWs.2 and 3 deposed that even if doors are opened, the plaintiff cannot get light and air into house rooms and if doors are closed, the plaintiffs house will be as dark as it will be in the night even in day time. The Commissioner's report dated 19-9-1996 supports the evidence of PWs.2 and 3 and there is absolutely no light to the plaintiffs' house except to the verandah on the western side and in bathroom on the eastern side and the rest of the rooms will not get light and air if the defendant is allowed to proceed with his construction on the northern side of his house.

11. The unsuccessful plaintiffs, being aggrieved by the judgment and decree made by the Court of first instance, preferred AS No. 19 of 1987 on the file of Additional District Judge, Madanapalle and the learned Judge mainly on the ground that in a joint wall, the right of easement cannot be claimed, had confirmed the findings recorded by the Court of first instance.

12. The Appellate Court had framed the following points for consideration:

(1) Whether the plaintiffs have acquired a right of easement by prescription to the light and air from the northern side?

(2) Whether the plaintiffs are entitled for declaration of their right and injunction?

(3) Whether the judgment and decree of the learned District Munsif is liable to be set aside?

(4) To what result ?

13. It is no doubt true that as pointed out by the learned Counsel for the appellants several factual aspects had not been well discussed by the Appellate Court while discussing the points for consideration. It is needless to say that an Appellate Court, as a final fact finding Court, is expected to discuss both oral and documentary evidence in detail since it is a final Court of fact. Be that as it may, the fact remains that a clear finding had been recorded that by proceeding with the further construction, virtually, the house of the appellants-plaintiffs would become dark. It is a finding of fact clearly recorded by the Court of first instance. Both the Courts mainly had proceeded on the ground that inasmuch as a joint ownership in a wall and a right of easement, being inconsistent, cannot be claimed. Such right is not available to the appellants-plaintiffs.

14. Section 15 of the Indian Easements Act, 1882 deals with acquisition by prescription and the said provision reads as under:

"Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years.

and where support from one person's land or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or

by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support, or other easement, shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I :--Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II:--Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorizing the same to be made.

Explanation III :--Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV:--In the case of an easement to pollute water the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to Government, this section shall be read as if, for the words "twenty years" the words (thirty years) were substituted.

15. Section 13 of the said Act deals with easements of necessary and quasi easements and the said provision reads as hereunder:

Where one person transfers or bequeaths immovable property to another--

(a) If an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or

necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons--

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement; or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (a), (c) and (e) are called easements of necessity.

16. Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

17. It is pertinent to note that u/s 13 of the said Act, it is specified where a partition is made of the joint property of several persons, if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easements or if such an easement is apparent; or if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied be entitled to such easement. Illustrations (c), (d) and (e) of Section 13 of the Act also may be relevant and the said illustrations read as hereunder:

(c) A sells B a house with windows overlooking A's land which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.

(d) A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A sells the land to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in A's hands; and

(e) A is the owner of a house and adjoining land. The house has windows

overlooking the land. A simultaneously sells the house to B and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A impliedly grants B a right to the light, and C takes the land subject to the restriction that he may not build so as to obstruct such right.

18. Elaborate arguments were advanced in relation to Ex.A-6 the registration copy of the sale deed by the Official Assignee, Madras in favour of Yadalam Narsimhaiah Chetty dated 30-11-1939, Ex.B-2 the registration copy of sale deed executed by Yadalam Narasimhaiah Chetty in favour of M.R.Anjaneyulu Chetty dated 21-7-1941 and also Ex.B-3 the registered sale deed executed by M.R. Anjaneyulu Chetty in favour of M.Venkatramaiah Chetty dated 17-12-1943. The recitals in these documents also had been referred to.

19. In *M. Nageswara Rao Vs. S. Ramachandra Rao*, , the Division Bench of this Court held:

"A co-owner cannot acquire an easement in or over the joint property. The opening of two windows in the joint wall by the plaintiff should be treated to be incidental to the joint property and it does not amount to trespass on the rights of the others."

20. In *K. Mohideen Ibrahim Vs. M. Muhammed Abdullah*, , it was held that:

"In the case of a common wall, each co-owner is entitled to a reasonable user of the wall owned in common and so long as each co-owner uses it reasonably without interfering with the enjoyment of that wall by the other co-owner or without doing anything which would weaken, damage, increase or diminish the wall enjoyed in common, he is entitled to do what he likes and the other co-owner will have no cause for complaint unless the acts alleged amount to his ouster or to the destruction of the party wall".

21. In *Yeshoda Bai v. G. Yelaji Rao* ALT 1970 AP 193, this Court while dealing with quasi easements, the right to take light and air through windows had observed:

"The right to receive light and air is apparent and continuous and necessary for enjoying the subject as it was enjoyed when the transfer took effect as provided in Section 13 of the Indian Easements Act, Section 5 of the Act defines a continuous easement as "one whose enjoyment, is or may be continual without the act of man" and it is apparent if its existence is shown by some permanent sign which upon careful inspection by a competent person would be visible to him. Illustration (a) to Section 5 makes mention of the right to receive light through windows without obstruction by a neighbour as a continuous easement".

22. In *D.K. Murthy and Anr. v. B.V. Venkatesuchetti*, 1987 (1) LS 266, easementary right of air and light with regard to party wall had been discussed.

23. Here is a case where there is no controversy. That all these houses belong to

Menta family and the present parties fighting the litigation are enjoying the respective houses. It is pertinent to note that the right to receive air and light claimed by the appellants-plaintiffs would fall u/s 13 of the Indian Easements Act, 1882. Incidentally, it may be a case not falling u/s 15 of the Act, but definitely this right to receive light and air in the light of the peculiar facts and circumstances and the provisions of Section 13 of the Act and the illustrations in relation thereto may fall u/s 13 of the Indian Easements, Act 1882. In all fairness, the Counsel representing the appellants-plaintiffs had submitted that specific stand was taken that the wall is a joint wall and hence this aspect was neither adverted to nor touched by both the Courts below. In the light of the same and in view of the peculiar facts and circumstances, I am of the considered opinion that this is a fit matter to be remanded to the Court of first instance for the purpose of affording opportunity to both the parties to let in further evidence, if any, on this crucial aspect and decide the matter afresh in interest of justice.

24. Accordingly, the second appeal is hereby allowed and the matter is remanded to the Court of first instance. This Court makes no order as to costs.