
(1997) 10 AP CK 0001
In the Andhra Pradesh High Court
Case No : S.A. No. 617 of 1997

Kanbhampati Srihari

APPELLANT

Vs

Nallamalli Kanchivaradharanjan and Others

RESPONDENT

Date of Decision : 14-10-1997

Acts Referred:

Easements Act, 1882 — Section 15, 18

Citation : (1998) 1 ALD 3 : (1998) 1 ALT 510 : (1998) 1 APLJ 138

Hon'ble Judges : B.K. Somasekhara, J

Bench : Single Bench

Advocate : Mr. Ravi Shander Jandhyala, for the Appellant; Mr. C. Trivikrama Rao, for the Respondent

Judgement

1. Having heard both sides, this appeal has to be admitted to dispose of the following questions of law:

(1) Whether there is right of privacy in India?

(2) Whether the plaintiffs in O.S.No. 158 of 1986 (who are the respondents herein) have pleaded customary right of privacy with reference to Illustration (b) of Section 18 of the Indian Easements Act, 1882 (Act V of 1882) and, if so whether they have proved the same?

(3) Whether the Courts below were right in accepting the right of privacy pleaded by the plaintiffs in regard to the opening of the window by the defendant (appellant herein) in the southern wall of his building?

(4) Whether the judgment and decree of the Court below in upholding the right of privacy of the plaintiffs is legal?

(5) Whether the Judgments and decrees of the Courts below deserve to be confirmed or set aside?

2. The respondents herein are the plaintiffs and the appellant is the defendant in O.S.No. 158 of 1986 on the file of I Additional District Munsif, Ongole. The

plaintiffs filed the suit for mandatory injunction to remove the skeleton window in the southern wall of the building of the defendant and for permanent injunction restraining the defendant from opening any window or ventilators in the wall W2 W3 and to close the openings at W W2 and W1 W3 and for a permanent injunction restraining the defendant from doing any such acts detrimental to the interests of the plaintiffs. A suit sketch is filed by the plaintiffs and the contents of the same are not in serious dispute. A, A1, A2, A3 are the houses belonging to the plaintiffs. The defendant is the owner of plot B. The defendant demolished the old house in the plot B and wanted to put up a new structure and in the southern wall W W1 he proposed to open the windows and he was trying to open the ventilators also in the wall. The plaintiffs pleaded the right of privacy to their bath room and latrine which were on the southern side of the building of the defendant. The defendant denied the right of privacy to the plaintiffs. He also pleaded that widows were in existence since long even prior to acquiring the right to property and did not concede the right of the plaintiffs to open the windows in the southern wall.

3. On the basis of the above pleadings, the trial Court framed the following issues for determination :

1. Whether the plaintiff is entitled to the mandatory injunction prayed for?

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

3. To what relief?

4. During the trial, the Plaintiff No.3 examined himself as PW1 and defendant himself as DW1 and one witness is examined as DW2. Exs.B1 to B8 were marked as -documentary evidence for the defendant and no documents were marked for the plaintiffs. After hearing both sides and with the materials before him, the learned District Munsif recorded a finding that no window was existing in the southern wall of the building of the defendant and he was opening such window or ventilators afresh while constructing the wall and it affected the right of privacy of the plaintiffs. Consequently, the suit was decreed, directing the defendant to close the windows put up in the southern wall, failing which, the plaintiffs are entitled to get the same closed through the Court at the cost of the defendant. The matter was taken up in appeal before the learned Additional District Judge, Ongole in A.S.No.105 of 1993. The learned Additional District Judge after hearing both sides and after reassessment of the entire materials, but for his own reasons, affirmed the findings of the learned District Munsif inasmuch as the Judgment and Decree passed by him. The Second Appeal thus arises out of such concurrent findings of the judgments and decrees of the two Courts supra.

5. Mr. Ravi Shankar Jandhyala, the learned advocate for the appellant has contended that both the Courts below have ignored the settled law that there was no right of privacy in India and secondly the findings of the Courts in regard to the existence or otherwise of the window in a particular wall or structure of

the defendant is conflicting and therefore no such findings can be supported. He has pointed out that according to the learned District Munsif, the window was being opened in the western wall. But, according to the learned District Judge, it was in the eastern wall. But, the Commissioner report says that it was in the southern wall. The learned advocate is right to the extent of the conflicting findings of the two Courts on facts about the existence of the window. In fact, the learned District Munsif has dealt with the matter of right of privacy in the legal position better than the learned District Judge. In fact, he has even referred to Section 18 of the Indian Easements Act inasmuch as the reported ruling of this Court in *C. Krishnamurthy v. Uppula Rajalingam*, 1979, Part I, S.N. 11 and the decision of the Allahabad High Court in *Ganeshi Jstl v. Rasool Fatitna*, AIR 1979 All. 118. Sri R.V. Subbarao, the learned advocate for the respondents has contended that from the admitted facts, there was clear violation of right of privacy of the plaintiffs by the defendant in opening the windows and ventilators in a wall which was not originally existing and further just opposite to the bath room and latrine etc. of the building of the plaintiffs effecting the right of privacy of the members of the family and, in particular, the woman members of the family. He has also relied upon a pronouncement of this Court in *Abdul Wahab v. Shamsunnisa and another* 1988 (1) A.P. L129 in support of his contention that in India, the right of privacy for ladies having due regard to peculiar circumstances as such should be recognised and in view of the implications of Illustration (b) of Section 18 of the Easements Act, the right of privacy is available in the neighbourhood as it is our national character and, therefore, the facts of the present case being almost similar to the facts in the decision in *Abdul Wahab's* case, the judgments and decrees of both the Courts below deserve to be supported. Mr. Jandhyala, the learned advocate for the appellant, on the other hand has relied upon a pronouncement of the Supreme Court in *Anguri and Others Vs. Jiwan Dass and Another*, to postulate that having due regard to the implication of Section 15 of the Easements Act, 1882, the right of privacy should be pleaded and proved and even then, if one party opens windows, it is equally open to another party to block them by raising walls.

6. On a proper approach of the matter in law, this Court is not convinced that the judgments of the Courts below can be supported. On going through the written statement of the defendant, it is clear that there is a plea of violation of right of privacy, but there is no plea of customary right of privacy. Even from the evidence, it is not brought out that there was any custom in the locality or the area or among the members of the family to which the parties belong that there was right of privacy enjoyed. There is also no plea as to the nature of custom, duration of custom and enjoyment of the custom. Even from the pronouncement of this Court in *Abdul Wahab's* case (supra), such a customary right has to be pleaded and proved. Although right of privacy is the inbuilt right by virtue of Illustration (b) of Section 18 of the Act, as confirmed in the precedent, it is not stated therein that such a right should be conceded without plea of proof thereof. The fundamentals as to the right of privacy and customary right of privacy

require a proof of record and deliberation. Any right including the right of prescription can be established or acquired as explained in Section 15 of the Act. Customary easement can also be acquired as stated in Section 18 of the Act which includes the right of privacy, according to the Illustration (b) of Section 18. Repetition of Section 18 of the Act would be useful and to repeat :

"18. Customary Easements ;--An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Illustrations

(a) By the custom of a certain village every cultivator of a village land is entitled as such, to graze his cattle on the common pasture. A, having become the tenant of a plot of uncultivated land in that, village, breaks up and cultivates that plot. He, thereby acquires an easement to graze his cattle in accordance with the custom.

(b) By the custom of certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon required an easement the B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house."

On the basis of which, such a custom is peculiar to a town whereby the owner or occupier of a house cannot open a new window so as to substantially invade the neighbour's privacy. That requires a clear plea and proof. It can be popularly called as "local custom". As already indicated above, there is no such plea by the defendant. The law is so certain that the right of privacy is a customary right not attached to any individual person but to the "locality". But, it can be proved by particular instances in which such right was claimed, recognised or exercised. In cases of well known customs the Court can take even judicial notice. (See Syed Habib Hussain and Others Vs. Kamal Chand, . This is a clear case of individuals pleading right of privacy and that is not available to them. Similar is the view taken by the High Court of Patna in Parbhawati Devi and Others Vs. Mahendra Narain Singh and Others, and our own High Court in Pasitpuleti Krishnamurihi v. Annadasu Bapanayya, 1956, An.W.R. 719. The Courts below have not dealt with this question in the light of the settled law. In the absence of clear pleading and proof in support of right of privacy by the plaintiffs, such a right has been held to be established to grant the reliefs unjustifiably.

7. Now coming to the fundamentals as to the right of privacy and the customary right of privacy, the law is more than settled. There is no such thing as to the natural right of privacy recognised anywhere in India, (page 508 of Katiyar's Easements and Licences, 10th Edition, 1984). The High Court of Mysore (later Karnataka) in Deepchand v. Hansraj Sail AIR 1971 Mys 322 has also on an occasion to deal with the aspect. His Lordship Justice V.S. Malmath (as he then was) observed that "there is no such thing as a natural right of privacy recognised by

law anywhere in India. It is only a customary easement arising by virtue of a local custom. As provided by Section 18 of the Indian Easements Act, 1882, an easement may be acquired by virtue of a local custom, illustration (b) to Section 18 of the Indian Easements Act makes it clear that a right of privacy can be acquired as a customary easement. In order to entitle the plaintiff to a decree for a mandatory injunction directing the defendant to close the window put up in his own property, the plaintiff must establish that there is such a customary right in the town where the properties are located that no owner or occupier of house can open a new window therein so as to substantially invade his neighbour's privacy. The plaintiff, therefore, has to plead and prove that there is a custom in the town where the properties are situate that no owner or occupier of a house can open a new window therein so as to substantially invade his neighbour's privacy. He has to further establish that the plaintiff has enjoyed such customary right of privacy and that there is an infringement or a threat to the infringement of such a right." Therefore, even the precedent of our own High Court in Abdul Wahab's case (supra) should be read into such settled law as to the right of privacy to be pleaded and proved, with reference to illustration (b) to Section 18 of the Act. Patently, the learned District Munsif as well as the learned District Judge have gone beyond such settled law.

8. Mr. Subbarao, the learned advocate for the respondents-plaintiffs has rightly pointed out that although the defendant tried to prevent the plaintiffs from having the right of privacy, he himself has pleaded the right of privacy acting in contradiction to the right claimed. That is no answer to seek a right in law. There is no concession in law. There is no bargain in gaining a right by the counter plea of a right of privacy. The same principles of law stated above equally applies to the defendant also. What is not available to the plaintiffs cannot be made available to the defendant also. Both of them should be shackled with the consequences in law. Moreover, the defendant did not put up a counter plea or a counter relief in this regard which requires no consideration or grant of relief.

9. Judging the matter in any angle, the judgments of the learned District Munsif and the learned District Judge suffer from serious infirmities both on facts and also in law which are settled as above and on all materials before the Court, it was not a fit case to decree the suit. Therefore, the Judgments and Decrees of both the Courts below, against which this Second Appeal is preferred, deserves to be set aside. However, it is made very clear, as rightly proposed by Mr. Subbarao, learned advocate for the plaintiffs, that in view of the dictum of this Court in Abdul Wahab's case (supra), any such right which the plaintiffs arc understanding to protect, can be had to prevent the intervention into a right of privacy by blocking the view by raising walls or otherwise. However, this should be without encroaching any other right which is available for the defendant.

10. In the result, the appeal is allowed. The Judgments and Decrees of both the Courts below are set aside and the suit shall stand dismissed, however, subject to the observations made above. In the facts and circumstances of the case, the

parties shall bear their own respective costs.