

(2009) 12 MAD CK 0188

In the Madras High Court

Case No : S.A. No. 1260 of 1995 and C.M.P. No. 1900 of 2009

Kokila Kaliamoorthy

APPELLANT

Vs

K. Mani and Others

RESPONDENT

Date of Decision : 15-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 33
Madras City Municipal Corporation Act, 1919 — Section 362

Citation : (2010) 4 LW 44

Hon'ble Judges : M. Jeyapaul, J

Bench : Single Bench

Advocate : Sinthamathar, for the Appellant; S.V. Jeyaraman for V.V. Krishnamoorthy, for RR 1, 3, 4, T. Mathi, for R6, for the Respondent

Final Decision : Dismissed

Judgement

M. Jeyapaul, J.—The Plaintiff is the Appellant herein.

2. The suit was filed seeking mandatory injunction directing the Defendants to demolish the unauthorised construction shown in the sketch attached along with the plaint and also for permanent injunction restraining the first Defendant from putting up any unauthorised construction. A direction has also been sought against the second Defendant not to sanction any plan or approval in the process of the regularisation of the illegal and unlawful Act of the first Defendant.

3. The Plaintiff has alleged in the plaint that she is the owner of the property bearing Door No. 56, Hospital Road, Saidapet, Chennai-16. The adjacent property bearing Door No. 57 is owned by the first Defendant. The first Defendant has recently started putting up unauthorised construction in his premises. He has made an attempt to make a window near the compound wall of the Plaintiff's house. The unauthorised construction has been put up encroaching upon the easementary rights of the Plaintiff for light and air. The first Defendant has started construction without any sanctioned plan from the Corporation of Chennai, the second Defendant herein. The Corporation authorities, having taken

cognizance of the complaint emanated by the Plaintiff, took action against the first Defendant and the first Defendant was fined heavily by the Corporation of Chennai. The authorities concerned have not taken suitable action for demolishing the unauthorised construction. The second Defendant has no right to regularise the illegal action of the first Defendant. Hence the suit for the aforesaid reliefs.

4. In the written statement, the first Defendant has contended that it was true that the first Defendant at the first instance constructed a staircase adjacent to the compound wall of the Plaintiff and he also put up a ventilator on the wall facing the Plaintiff's property. The Plaintiff, however, took objection thereof. The first Defendant demolished the staircase that was put up adjacent to the Plaintiff's property. There is no staircase adjacent to the Plaintiff's property or a ventilator near the compound wall as on date. The first Defendant has obtained now a new plan duly sanctioned by the Corporation of Chennai. The present structure has been put up by the first Defendant only in conformity with the duly sanctioned plan. The present staircase has been constructed only as per the sanctioned plan. It is not for the Plaintiff to prescribe either to the second Defendant or to the M.M.D.A. (Madras Metropolitan Development Authorities) as to what sort of plans should be sanctioned for the neighboring owners of property. Every property owner has right to make a construction suitable for him. There was no hampering of the easementary right to light and air and free passage to the Plaintiff. There is virtually no cause of action for the suit. With the aforesaid contentions the first Defendant sought for dismissal of the suit.

5. In the additional written statement filed by the first Defendant it has been contended that there was no easementary rights for the Plaintiff. The easementary right, if any, for the Plaintiff automatically gets extinguished upon the demolition of the super-structure in the Plaintiffs property.

6. In the further additional written statement filed by the first Defendant it has been contended that the plan sanctioned by the Corporation was approved by the Madras Metropolitan Development Authorities. Inasmuch as the Plaintiff having demolished the existing building in his property put up a new construction without adhering to the conditions laid by the Madras Metropolitan Development Authorities cannot seek for such a direction against the Defendants.

7. The second Defendant has contended that the first Defendant put up unauthorised construction adjacent of the compound wall of the Plaintiff's premises. The second Defendant took steps against the first Defendant for removal of unauthorised construction. In fact, the first Defendant was penalised by the Metropolitan Magistrate Court at Nungambakkam. The first Defendant applied for a new plan for regularising the unauthorised construction under the M.C.M.C. Act, and the same was approved except the staircase constructed by the first Defendant. The first Defendant had also given an undertaking to remove the staircase within one month. On the basis of the said undertaking, the new plan was regularised and the second Defendant has authority and jurisdiction to

regularise the unauthorised construction, if at all the unauthorised construction satisfies the building rules framed by the Madras Metropolitan Development Authorities. The second Defendant has sought for dismissal of the suit.

8. In the reply statement filed by the Plaintiff it has been contended that only after the Metropolitan Magistrate fined the first Defendant, the first Defendant submitted the plans for approval to the Corporation. There is no question of cessation of easementary right by mere improvement made by the Plaintiff to the existing building. The first Defendant is attempting the curtail Plaintiff's easementary rights by putting up construction without adhering to the rules and regulations.

9. The trial Court, having adverted to the evidence on record, returned a finding that the easementary right to light and air of the Plaintiff was affected. The Plaintiff also established that the first Defendant put up construction not in accordance with the sanctioned plan. The first Defendant, having undertaken to remove the offending structure, failed to remove the same, but, he had chosen to remove only the staircase. The trial Court also found that the Plaintiff could not be nonsuited just because he has put up a new structure in his premises. The trial Court ultimately decreed the suit as prayed for.

10. The first appellate Court held that in the approved plan for the construction of second floor marked as Ex. B5, the lumber room was shown and therefore, in the considered decision of the first appellate Court the existence of the lumber room was not against the approved plan. The easementary right to light and air of the Plaintiff was not affected. When the first Defendant had put up construction leaving 5 feet minimum open space, no mandatory injunction could be issued as prayed for by the Plaintiff. Further, the approved plan had already been issued by the second Defendant for the construction put up by the first Defendant. Therefore, the Plaintiff is not entitled to any relief against the second Defendant to restrain it from sanctioning any plan.

11. At the time of the admission of the second appeal the following substantial questions of law were framed by this Court for determination:

1. Whether the lower appellate Court has not failed to note that the present existing unauthorised construction, namely, the entire rear portion of the staircase as shown in Exhibits A. 10, A. 27 and A. 28 to A. 33 has not been removed by the first Defendant.

2. Whether the lower appellate Court has factually erred in observing that P.W. 1 admitted in evidence that by the construction of the Defendant the Plaintiffs comforts were not affected.

3. Whether the lower appellate Court also factually erred in observing that the Plaintiff kept quiet without filing any suit to prevent the construction and allowed the Defendant to complete construction.

12. On a perusal of the averment in C.M.P. No. 1900 of 2009, the point that

arises for determination is:

1. Whether the memo of compromise signed by the first Respondent, who is one of the legal heirs of the deceased first Defendant shall be received as additional evidence to determine the case.

13. Learned Counsel appearing for the Appellant/Plaintiff would submit that the deceased first Defendant was prosecuted for putting up unauthorised construction in his premises. Exs. A12 and A14 would go to show that the deceased first Defendant was imposed with penalty of fine u/s 362 of the M.C.M.C. Act. Even after the first Defendant was punished, the substantial portion of the deviation made by the deceased first Respondent has not been set right. In the counter filed for the injunction application moved by the Plaintiff before the Trial Court, it has been unambiguously admitted that there had been unauthorised construction made by the first Defendant. In fact, he had undertaken to demolish the offending portion put up in his premises. Quite against the undertaking given by the first Defendant, the rear portion of construction which was made behind the staircase was not removed. The revised sanction plan alleged to have been obtained by the first Defendant was not produced by him. The construction put up on the sideways was not in accordance with the sanctioned plan obtained by the first Defendant. It is his further submission that despite the fact that the Plaintiff has come forward with a prayer as against the Corporation, Chennai not to accord sanction for putting up construction by the first Defendant, the Corporation had the audacity to ignore the pendency of the suit and sanction revised plan before ever any original plan was sanctioned. The Plaintiff, who was fighting the case before the Court, was not given opportunity by the Corporation to air her views. In the compromise memo filed in the year 1994 before the first appellate Court, the first Respondent has unambiguously admitted the offending construction existing in the said premises and offered, in view of the compromise clinched by the parties, to remove the offending construction. To top it all, the undertaking given by the first Defendant to the Corporation of Chennai when the plan was sanctioned was not adhered to by the first Defendant. The expression "sanctioned" does not find a place in Ex. B1 produced before the Court. The Commissioner of Corporation chose to file a report before this Court wherein he has specifically referred to an unauthorised structure in existence in the property of the first Defendant. The learned Counsel appearing for the Appellant would vehemently attack the report submitted by the Commissioner of Corporation on the ground that the subordinate, who in fact, visited the property in question did not subscribe his signature to the report filed by the Commissioner. It is also not the case of the Corporation that the Commissioner himself paid a visit to the property in dispute. The first Defendant failed to establish before the Court the nature of condition imposed on him while granting the sanction by the Corporation of Chennai and compliance of those conditions while putting up construction in his property. It is his vehement submission that the undertaking given by the first Respondent before the Trial Court that he would remove the offending constructions had not

been complied with. Such an act of the first Defendant would amount to contempt of Court. Inasmuch as the first Respondent has admitted unambiguously and that there are offending constructions in his property and the same are proposed to be removed, the first Defendant cannot set up a plea now that there is no offending construction in his property. When the Corporation of Chennai has not woken up to set right the wrong committed by the first Defendant, the Plaintiff, being a neighbour, is entitled to agitate before the Civil forum to protect her right. Even after demolition of the old structure and putting up a new construction, the right of the Plaintiff is still affected on account of the failure to remove the offending construction put up by the first Defendant. The first appellate Court, without actually advertent to the core issues involved in this case, has casually upset the judgment of the Trial Court. Therefore, he would submit that the judgment of the first appellate Court warrants interference.

14. The learned Senior Counsel appearing for Respondents 1, 3 and 4, who are the legal representatives of the first Defendant, would submit that the Plaintiff failed to establish before the Court that her easementary right to light and air enjoyed by her for so long a time was adversely affected on account of the alleged unauthorised construction put up by the deceased first Defendant. There is no specific pleading as to the nature and extent of easementary right offended by the first Defendant. It is his submission that no cause of action for the easementary right claimed by the Plaintiff now survives inasmuch as the old structure put up by the Plaintiff was admittedly removed and a new structure has come up. The Plaintiff has not come up with any amended pleadings that the right to light and air to the new structure is affected on account of the alleged offending construction put up by the first Defendant. Referring to the evidence of P.W. 1, he would submit that P.W. 1 categorically admits in his evidence that there is no disturbance at all to his property with new construction on account of the superstructure put up by the first Defendant. The Plaintiff has come out with an atrocious suit as against the first Defendant, who had put up construction within his premises. In spite of the fact that the construction put up by the first Defendant does not affect in any way the right of the Plaintiff, the Plaintiff has simply filed the suit only to harass the first Defendant. The first Defendant undertook to remove the staircase and close the ventilator put up by him in his property. The plea made in the additional written statement was not denied in the reply statement filed by the Plaintiff with respect thereto. P.W. 1 categorically admits that the staircase was removed and the ventilators were closed by the first Defendant. Therefore, there is no question of committing any contempt for having not complied with any undertaking given by the first Defendant. Referring to Exs. B1, B4 and B5, the learned Senior Counsel appearing for Respondents 1, 3 and 4 would submit that the existing structure found in the premises of the first Defendant is only in accordance with the plan sanctioned by the Corporation as well as MMDA. Specifically referring to Ex. B5, the learned Senior Counsel appearing for Respondents 1, 3 and 4 would submit that the existence of the lumber room was specifically shown in Ex. B5 which was approved by MMDA.

Even if the deceased first Defendant had made any deviation, the second Defendant has the required authority to regularise the unauthorised construction. Referring to the MMDA Rules, he would submit that any deviation with respect to the construction of lumber room can very well be condoned by the authorities concerned. As far as the compromise memo sought to be produced at the second appellate stage, it is his submission that the said compromise memo cannot be received as additional evidence before this Court. Just to purchase peace, a small portion found on the rearside was agreed to be demolished by the first Respondent in the compromise memo. The said deviation was specifically noted down by the Commissioner of Corporation of Chennai in his report. Inasmuch as the said compromise memo was not signed by the Plaintiff, the said compromise memo cannot be given effect to. Secondly, he would submit that the MMDA Rules with respect to the deviation made by constructing a lumber room comes to his rescue. Therefore, the question of removing the portion agreed to be removed in the compromise memo at this distance of time does not arise for consideration. The learned Senior Counsel appearing for Respondents 1, 3 and 4 would submit that no substantial question of law has arisen in this case for determination and therefore, the appeal deserves to be dismissed.

15. Respondents 2 and 5 remained absent during the course of hearing of the second appeal.

16. Learned Counsel appearing for the 6th Respondent Corporation would submit that except a small portion found on the rear side of the property of the first Defendant, no other deviation was found. Therefore, he leaves the issues for the determination of this Court.

17. It is true, as contended by the learned Counsel appearing for the Plaintiff, that the deceased first Defendant was charge-sheeted for the unauthorized construction he made u/s 362 of the M.C.M.C. Act as found from Ex. A12. In fact, the learned Metropolitan Magistrate, having found that about 242 sq.ft. of unauthorised construction was made without prior sanction, imposed fine on the deceased first Defendant as found from Ex. A14. Having pleaded guilty, it appears that the first Defendant had paid a fine of Rs. 140/-. The aforesaid proceedings initiated as against the first Defendant by the Corporation of Chennai, of course, would show that there had been some deviation made by the first Defendant originally. The Court will have to find whether the first Defendant got any sanction for revised plan for the structures he had put up in the premises.

18. On a perusal of Ex. B1, it is found that the expression "sanctioned" is clearly found on the reverse thereof. A staircase and the portion behind the staircase shown in Ex. B1 was directed to be removed by the Corporation of Chennai while sanctioning Ex. B1 plan submitted by the first Defendant. It appears that the first Defendant applied for sanction of plan for the construction of the first and second floors. Under Ex. B4, the first Defendant was directed to come out with a revised plan showing specifically the construction he had already made. The first Defendant had submitted a plan thereafter showing the existing structure and

the proposed construction of the first and second floors. It is to be noted that a staircase has now been put up leaving sufficient space from the compound wall. The space behind the staircase also was shown a few feet away from the compound wall. The plan, Ex. B5 was sanctioned by the Madras Metropolitan Development Authority. Though Ex. B5 plan has been sanctioned for putting up first and second floor construction, the Madras Metropolitan Development Authority wanted to ascertain as to whether the ground floor was constructed as per the sanctioned plan. The Court will have to presume that the said act of the authority had been done only after the site inspection made by them.

19. On a perusal of the sanctioned plan, Ex. B5, it is found that not only the staircase portion but also the portion behind the staircase had been put up not adjoining the compound wall, but, well beyond the compound wall.

20. In this context, it is relevant to refer to the additional written statement filed by the first Defendant. He has specifically stated that the staircase and the ventilators were completely removed. As rightly pointed out by the learned Senior Counsel appearing for Respondents 1, 3 and 5, in the reply statement filed by the Plaintiff, the aforesaid removal spoken to by the first Defendant in the additional written statement was not denied. P.W. 1 in his evidence has categorically admitted that the staircase was removed and the ventilators were closed by the first Defendant.

21. Of course, the lumber room was not removed by the first Defendant. But, it is found that the first Defendant, having specifically shown in the application the existence of the lumber room, got sanction. It is also pertinent to note that the Plaintiff has not pleaded about the existence of the lumber room in the plaint.

22. Therefore, it is found that though there was imposition of fine for the deviations in construction made originally, the said deviations have been removed prior to the sanction obtained under Ex. B5.

23. It is the specific case of the Plaintiff that the constructions put up by the first Defendant affects the easementary right to light and air of the Plaintiff. Except the ipse dixit of the Plaintiff, no other material is produced or any other witness has been examined on her side to establish that the structure which has been put up by the first Defendant affects the air and light that has been enjoyed quite a long time by the Plaintiff. In fact, the Plaintiff, during the course of cross-examination before the Trial Court, has candidly admitted that the construction put up by the first Defendant, in no way, affects his right of enjoyment.

24. It is in evidence that the Plaintiff completely demolished the original superstructure standing in her property and put up a pacca new structure. The Plaintiff has to establish that the cause of action which originally existed at the time of filing of the suit continued even thereafter. Ex. B5 would go to show that the staircase and the portion behind the staircase have been newly constructed leaving a space of about 5 to 7 feet. In the changed scenario, the Plaintiff has to establish that the right to light and air enjoyed by her is affected even after she

has put up new construction in her premises. No convincing evidence has been adduced by the Plaintiff to show that the right to enjoy light and air to the new structure put up by the Plaintiff is also affected.

25. In the counter filed by the first Defendant in the application for appointment of advocate commissioner moved by the Plaintiff, the first Defendant had undertaken that he would carry out the demolition of staircase and a portion shown in the revised sanctioned plan. He had also undertaken to remove the window and close it. The proposal to remove the lumber room has not been specifically referred to in the counter affidavit filed by the deceased first Defendant. As per the plan submitted showing the existing structure for the purpose of obtaining sanction for constructing first and second floor, the removal of the staircase and a small portion lying behind the staircase have been indicated. Admittedly, the window was also closed by the first Defendant. Therefore, there is no question of violation of any undertaking given by the first Defendant before the Court in this matter.

26. Of course, there is a small deviation measuring 4'10" x 8'3" in the rear portion of the superstructure built by the first Defendant as per the report filed by the 6th Respondent before the Court. The said report is attacked on the ground that the official, who, in fact, visited the premises, has not subscribed his signature. We cannot expect the Commissioner of Corporation of Chennai to go and visit a small disputed portion and file a report. He has every authority to employ his own subordinate official to discharge such a function to enable him to file a report before the Court. Secondly, it is found that no direction has been issued to the Commissioner of Corporation of Chennai to go over to the disputed premises for personal inspection and file a report. Therefore, the report submitted by the Commissioner of Corporation of Chennai based on the personal inspection done by his subordinate official is proper.

27. In the very same report, it has been mentioned that the subject properties fall under the category of contiguous areas as defined under the Master Plan. Wall to wall constructions could be allowed, provided 35% of the plot area is left open to sky for air and sunlight. As per Ex. B5, more than 35% of the plot area has been left open by the first Defendant.

28. Development Control Rules for Chennai Metropolitan Area provides that structures like lavatory, lumber room, garage, etc., not intended for human habitation and servant quarters may be permitted in the rural set up provided such structures do not occupy more than 1/3 of the real width of the site and 6 metres of depth of the site and that the height of such structures does not exceed 4 metres measuring from the ground level of the site.

29. As per the aforesaid norms fixed under the Development Control Rules for Chennai Metropolitan Area, the first Defendant can very well approach the authorities concerned seeking permission for the alleged deviated portion measuring 4' 10" x 8'3" pointed out by the Commissioner of Corporation of

Chennai in his report filed before the Court.

30. The 6th Defendant has categorically taken a stand in the written statement that the 6th Defendant has the authority to regularise any deviation made in construction of the buildings in accordance with the rules and regulations. Therefore, the Plaintiff, who could not establish that the easementary right of light and air was adversely affected, cannot supervise the plan sanctioned by the authority concerned and the structure put up by the first Defendant. If any deviation has been made, it is for the authorities to take personal inspection and remove the same in accordance with the rules.

31. It is found that the 6th Respondent, in fact, prosecuted the first Defendant having found that there was a deviation from the sanctioned plan accorded to him under Ex. B 1. Therefore, it is not as if the 6th Defendant has completely slept over any deviation that was made by the persons who got sanction of plan.

32. The plan, Ex. B5 was sanctioned during the pendency of the suit. The grievance of the Plaintiff is that she was not associated while considering the sanction of the plan, Ex. B5. Firstly, it is found that the Plaintiff had not obtained any prohibitory order as against the 6th Defendant from according sanction of any plan submitted by the first Defendant. Secondly, the 6th Defendant is not supposed to give any audience to a third party to decide a matter which lies within his domain as far as the decision to grant or not to grant sanction for putting up construction is concerned. The Corporation or the MMDA, as the case may, are the authorities to take a decision. The third parties cannot poke their nose in the power of sanction accorded on the authorities concerned.

33. Coming to the compromise memo now sought to be introduced as additional evidence before this Court, it is found that it was only the first Respondent, who had mooted a compromise and having signed the compromise memo, circulated the same to the Plaintiff. It is to be noted that the said compromise memo was not signed by the other Respondents who were parties to the suit. It is also seen that the said compromise memo was not signed by the Plaintiff. When a compromise memo was not signed by both the parties who are concerned with the issues arisen in the lis, the said compromise memo is only a trash which cannot be acted upon by the Court of law.

34. Concessions are made by the respective parties for purchasing peace during the pendency of the suit. Such a concession is made only to bring an amicable settlement between the litigating parties. The party, who has extended such a concession, has liberty to withdraw such a concession when such a concession was not accepted by the opponent party. Here is a case where the compromise mooted by the first Respondent was not accepted by the Plaintiff. Such a compromise cannot be held to be a compromise in the eye of law. Therefore, the petition filed by the Plaintiff seeking to mark the said compromise memo circulated to her by the first Defendant cannot be marked as additional evidence at this second appellate stage for the aforesaid reasons. Hence, the petition in

C.M.P. No. 1900 of 2009 stands dismissed.

35. It is submitted by the learned Counsel appearing for the Plaintiff that the deceased first Defendant has not disclosed as to what are actually the conditions imposed on him while according sanction for putting up construction of the building. Admittedly, there was some deviation made by the first Defendant from the plan Ex. B1 sanctioned by the authority concerned. The existing structure shown in Ex. B5 would go to show that the material part of the deviation had been removed by the first Defendant. If at all the conditions imposed by the Corporation or by the MMDA have not been properly adhered to by the first Defendant, it is for the authorities concerned to take action as against the first Defendant. Unless and until the Plaintiff establishes that her right has been affected on account of the construction put up by the first Defendant, she has no right to question the plan sanctioned by the authority concerned. Sanction of the plan, construction of the building and adherence of the conditions imposed in the plan are the issues between the first Defendant and the Corporation or the MMDA concerned.

36. Of course, the Plaintiff has every right to question the construction put up by the first Defendant only when she establishes that her right to enjoy her property was in any way affected by such construction put up by the first Defendant. The first appellate Court has rightly held that the claim for easementary right for light and air was not established by the Plaintiff. Under such circumstances, the Plaintiff cannot question the wisdom of sanction of the plan by the Corporation or MMDA or the construction put up by the first Defendant in his premises.

37. Admittedly, a different shape of construction has now been put up by the Plaintiff demolishing the erstwhile construction in her premises. The cause of action to lay a suit for easementary right of light and air would survive only if the Plaintiff establishes that the new construction put up by the Plaintiff also does not receive air or light. As already pointed out by this Court, P.W. 1 has categorically admitted that the construction now in existence in the premises of the first Defendant does not affect her right. No evidence has been let in by the Plaintiff to establish that the light and air for the newly put up construction was also affected.

38. The learned Counsel appearing for the Plaintiff refers to a decision in Balram Singh Vs. Bhikam Chand Jain and Others, wherein it has been held as follows:

The only question is whether the breach of the said undertaking amounts to contempt. To go beyond that might come into the field of discussion of the merits of the case. It is true that the condemnors have deleted the caption or legend "Design invented by Shri Bhikam Chand Jain" from the advertisements, brochures etc issued by them, but instead they have prominently printed the photograph of Tikam Chand Jain, partner of the said firm. Prima facie a reading of the advertisement, brochure etc issued by the contemnors is bound to mislead the public. Faced with this situation, learned Counsel for the contemnors in sheer

desperation offered that the contemnors would drop the trade description "Balram Septic Tank". As a last resort, he contended that even if they are committed for contempt, they should be sentenced to pay a fine. It would be a travesty of justice if the Court were to allow such gross contempt of Court to go unpunished, without an adequate sentence and we find no mitigating circumstances whatever not to pass a sentence of imprisonment. We accordingly commit the contemnors for contempt of Court and sentence each of them to undergo simple imprisonment for a period of three months and to pay a fine of Rs. 1000 or in default, to undergo simple imprisonment for a further period of one month.

39. That was a case where an assurance given before the Honourable Supreme Court was willfully dishonoured in its essence and spirit by the contemnor. Therefore, the Supreme Court has held that such a contemnor will have to be punished. In this case, there was no undertaking given by the first Defendant before the High Court which has the authority to invoke the provisions of the Contempts of Courts Act. Secondly, the first Defendant had undertaken only to remove the staircase as well as the ventilator. On facts, it is found that the staircase was removed and the windows were closed. There is also material compliance of the undertaking given by the first Defendant before the Court below. Therefore, the aforesaid ratio will not apply to the facts and circumstances of this case.

40. The learned Counsel appearing for the Plaintiff also referred to the decision of this Court in T.M.A. Abdul Hameed v. S. Radhakrishnan 1989 TLNJ 13. That was a case where the tenant, who undertook to vacate the premises within a timeframe before the High Court, refused to comply with such an undertaking. The aforesaid ratio also will not apply to the facts and circumstances of this case.

41. The decision in Mandal Panchayath Hunsagi Vs. North Eastern K.R.T.C., was also cited by the learned Counsel appearing for the Plaintiff. That was a case where the Mandal Panchayat started constructing shops under a Social Welfare Scheme on the land not belonging to it. Such a construction virtually blocked the ingress and egress of the passengers using the bus stand. The Road Transport Corporation challenged the said construction made by Mandal Panchayat. It was contended by the Mandal Panchayat, Hunsagi that the construction had been put up only based on the sanction granted by Zilla Parishad. It was held by the Supreme Court that mere grant of approval for construction by Zilla Parishad would not non-suit the Road Transport Corporation which has a right to maintain the suit as Mandal Panchayat, Hunsagi has started putting up construction not in their land, but, in the land of others.

42. In the instant case, admittedly, the construction had been put up by the first Defendant in his site. In view of the above, the aforesaid ratio also will not apply to the facts of this case.

43. The learned Counsel appearing for the Plaintiff cited the decisions of the

Supreme Court in Mathakala Krishnaiah Vs. V. Rajagopal, and Wyawahare and Sons and Others Vs. Madhukar Raghunath Bhawe, wherein it has been held that in the second appeal, the High Court, u/s 100 of the Code of Civil Procedure, is bound to frame the substantial question of law before ever taking up the appeal for determination. With due respect, I may say that those decisions would apply only in a case where this Court failed to frame substantial questions of law for determination of the second appeal and they would not apply to a case where the first appellate Court failed to frame points for determination. Therefore, the aforesaid ratios also have no relevance to the facts on issue.

44. Sustainable claim for easementary right has been succinctly stated by the Supreme Court in Chapsibhai Dhanjibhai Danad v. Purushottam (1971) SCC. SCR. 335 as follows:

As to the light and air through the windows on the western side, it is clear from Explanations II and III to Section 33 that to constitute an actionable obstruction of free passage of light or air to the openings in a house it is not enough that the light or air is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable, according to the ordinary notions of mankind. See Colls v. Home and Colonial Stores

45. In the instant case, it has been established that the material part of the deviation made by the first Defendant from that of the sanctioned plan Ex. B1 was set right when he obtained sanctioned plan under Ex. B5. The burden lies all the more on the Plaintiff to establish that even after removal of such portion of constructions made by the first Defendant, there has been substantial privation of light and air to render the occupation of the Plaintiff uncomfortable. A partial blockage of light or air on account of construction made by the opponent party cannot give a cause of action to raise a suit for easementary right. There should have been substantial blockage of light and air leaving the aggrieved party to face un-comforts. As already pointed out, there was no pleading to highlight the point that there was substantial deprivation of light and air on account of the deviations made by the first Defendant. Sufficient evidence also was not let in by the Plaintiff to substantiate the plea that there was substantial privation of light and air.

46. It is not as if the first appellate Court failed to note down the deviations made by the first Defendant in the aftermath of the sanction obtained by him under Ex. B1 and the removal of the substantial portions of the deviations made by him. This Court has held that negligible portion of deviation could very well be regularized even as per the case of the 6th Respondent in accordance with the Development Control Rules for Chennai Metropolitan Area. The first appellate Court has rightly analysed the evidence of P.W. 1 and arrived at a decision that as per his own admission, the enjoyment of her property was not affected.

47. Considering the fact that the Plaintiff had knocked at the doors of the Court only after the first Defendant had put up the entire construction, the first

appellate Court made an observation that the Plaintiff had kept quiet without filing a suit in time to prevent the construction on deviation made by the first Defendant. It is a casual observation made by the first appellate Court based on the fact situation of the case. The Plaintiff was not non-suited on that sole account by the first appellate Court.

48. In view of the above facts and circumstances, the Court finds that the first appellate Court has rightly analysed the evidence on record and has returned a finding that the Plaintiff is not entitled to the relief sought for by her. There is no warrant for interference with the well considered judgment of the first appellate Court. Therefore, the appeal fails and it is dismissed. There is no order as to costs.