

(1968) 04 MAD CK 0026
In the Madras High Court

K.S. Vaidyanathan and Others

APPELLANT

Vs

Buhari and Sons (P.) Ltd. and Another

RESPONDENT

Date of Decision : 27-04-1968

Acts Referred:

Citation : (1968) 81 LW 579 : (1969) 1 MLJ 435

Hon'ble Judges : A. Alagiriswami, J

Bench : Division Bench

Judgement

A. Alagiriswami, J.—The plaintiffs are the appellants. They are the owners of what is called the S.I.R. Ice Factory No. 1, Whannels Road, Madras. They filed the suit for a declaration of their right of way along the red marked road in the plaint plan for access to three buildings marked as No. S-1, 2 and 3 in the plan and also for an injunction restraining the defendants from putting up a transformer, which would have the effect of interfering with the enjoyment by the plaintiffs of light and air for the said buildings. Both the Courts below have held against the plaintiffs.

2. The first plaintiff's father purchased No. 1, Whannels Road, Egmore, Madras, in 1911. The first plaintiff purchased No. 2, Whannels Road, Egmore, known as "Edinboro house " in 1914. The red marked road leads to Edinboro house from Whannels Road. The plaintiff's claim was that this red marked road was the road for reaching the buildings marked as No. S-1, 2 and 3 in the plaint plan. The first plaintiff executed a settlement deed on 28th December, 1956 in favour of his son over Edinboro house and the son sold that property to the defendants. Building No. 2 has been in existence from 1911 and No. 1 from 1913 onwards. The access to the first floor of building Nos. 2 and 3 was through the disputed road by erecting stair-cases in 1946. The access to the No. 1 building had also been always through the disputed road.

3. In this case, there is no question of any right of way by grant. Neither the settlement deed in favour of the first plaintiff's son, nor the sale deed by him in favour of the defendants reserved any right in favour of the first plaintiff; nor

have the plaintiffs established their right of way by prescription. Till 1956 both the properties were owned by the same person and as no right of way was reserved by the settlement in favour of the plaintiff's son and right of way by prescription, cannot be said to have been acquired after 1956, the plaintiff's claim has to be decided on the basis of its being an easement of necessity. Clearly the Courts below were right in holding that there is no easement of necessity in this case. An easement of necessity is one without which the property in question cannot be enjoyed at all and not one merely necessary for the reasonable or convenient enjoyment of the property. (See the decisions in Krishnamarasu v. Marraju ILR (1995) Mad. 495 : 15 M.L.J. 255, (Sri Rajah Vyricherla) Narayana Gajapatiraju Bahadur Garu Vs. Sree Rani Janaki Rathayyammaji Garu, and Mariyayi Ammal v. Arunachala AIR 1956 Mad. 584. Till 1946 access to No. 1 building was only from the property which now belongs to the plaintiffs. It was only when the ground floor of that building was converted into cold storage and sales room for the ice factory in 1946, a door way was opened in the disputed road side to reach the residential quarters in the upstairs portion by closing the entrance of that first floor from the ground floor. That stair-case is still available. Therefore, access to this building could be provided by the plaintiff making the necessary changes in their building. In respect of No. 3 building the ground floor alone was put up in 1944 with entrance from the Ice factory side. When the first floor construction was put up in 1946 the entrance to the first floor was opened from the disputed road side by erecting a stair-case. A stair-case can easily be constructed inside the ice factory premises to reach the first floor of No. 3. building. In respect of No. 1 building there is a small wicket the first floor of No. 3 Ice factory side. Therefore, all these building could easily be reached by making some small changes in the property belonging to the plaintiffs.

4. But it is urged on behalf of the plaintiffs that in law it is unnecessary for the plaintiffs to make alterations in their building in order to have access to their properties and that if their buildings cannot be Reached except by marking alternations to their building and if it is necessary to pass through the servient tenement then it should be held to be an easement of necessity They also point out that in none of the Madras cases has it been held otherwise. The Madras cases, of course, do not deal with the situation where any alterations have to be made to the dominant tenement. But the Allahabad High Court and Nagpur High Court have with exactly similar situations and held that where a plaintiff can have access to this property by making necessary alterations in his own property there cannot be said to be any easement of necessity over a property belonging to another. In Sukhadeins v. Kedarnath ILR (1911) All. 467 the contention, that where an alteration to the existing state of building was necessary for having access to that building, it should be considered that there was an easement of necessity over the defendants' building for the purpose of reaching the plaintiff's building was rejected. In Md. Ata Hussain v. Quadir Baksh AIR 19030 All. 560, the right of passage for a sweeper to the latrine was held not available as an

easement of necessity as the plaintiff could make provision for it by opening a door in his own building. In AIR 1937 179 (Nagpur) where a plaintiff claimed a right of way over a stair-case as an easement of necessity and it was found that the plaintiff could have another access to the upper storey of his house by constructing one or more stair cases, the easement was not one of necessity. These decisions are well founded on principle and following them I hold that there is no easement of necessity made out in this case and the judgement of the Courts below on this point is undoubtedly right.

5. Coming now to the question of a right to light and air, it is found that there are no openings facing the disputed strip of land in the ground floor of No. 2 building and the proposed construction does not also come up to the building. In regard to No. 3 building, there are eight windows in the ground floor and seven openings to the balcony in the first floor, all facing the disputed portion. The proposed construction is in front of this building. Here also there is no question of any perspective right to light and air over a period of 20 years, nor any question of grant or reservation. But the plaintiffs would certainly be entitled to claim the right of light and air as apparent and continuous easement which they were enjoying at the time of severance. The plaintiffs would, therefore, be entitled to the easement of light and air. But the question is whether by the proposed construction, the right to light and air is in any way affected. An open space of nine feet is expected to be left between the plaintiff's buildings and the proposed construction and its height itself will not be more than 10 to 12 feet. The balcony level in the building is about 14 feet. So, the proposed construction will not affect the passage of light and air to the upstairs portion of that building. As far as the downstairs portion of the building is concerned, I think the open space of nine feet would be more than enough to provide sufficient light and air for the building of the plaintiffs. If at any future time the defendants put up any construction which will have the effect of appreciably diminishing the light and air enjoyed by the plaintiffs, the plaintiffs would then have a cause of action. The construction proposed at present does not in any way diminish the flow of light and air into the plaintiff's buildings. It follows that the conclusion of the Courts below on both the points is correct.

6. The second appeal is, therefore, dismissed with costs. No leave.