

(1966) 11 AP CK 0011

In the Andhra Pradesh High Court

Case No : Second Appeal No. 892 of 1962

Santhannagari Ramayya and Others

APPELLANT

Vs

Narasimhapuram Narayana Chetty

RESPONDENT

Date of Decision : 16-11-1966

Acts Referred:

Easements Act, 1882 — Section 1, 15, 28

Citation : AIR 1968 AP 151

Hon'ble Judges : Chandrasekhara Sastry, J

Bench : Single Bench

Advocate : S. Suryaprakasa Rao, for P.A. Choudary and P. Venkayamma, for the Appellant; A. Gopala Rao, for the Respondent

Judgement

1. This second Appeal arises out of a suit for a declaration of the plaintiff's easementary right for free access of light and air through the ventilators shown as V-1 and V-2 in the southern wall of the plaintiffs house shown as FGA in the plaint plan and for a permanent injunction restraining the defendants and their men from in any way interfering with the plaintiff's rights by putting up any construction in their site and for a mandatory injunction for the removal of the Varanaku put up by the defendants adjacent to the plaintiff's southern wall obstructing the access of the usual light and air through these ventilators. The plaintiff claimed that he acquired a right to receive light and air through the two ventilators by such enjoyment for over the prescribed period. In fact the plaintiff purchased the suit house in the year 1915 under Ex A-1 dated 15-2-1915. Even by that time there were these two ventilators.

2. The defendants plea was that there was an agreement between their predecessors-in-title and the plaintiffs predecessors-in-title initially and again between the plaintiff and the predecessor-in-title of the defendants when the plaintiff purchased the house to the effect that the plaintiff would close these ventilators as and when the defendants wanted them to be closed. This was the main plea in the written statement and is reflected by the Court issue framed by

the trial Court which is as follows;

"4 Whether the agreement and the undertaking pleaded by the defendants that ventilator V(1) and V(2) are to be closed up or removed when the defendant demanded so is true, valid and binding?

3. The trial Court on a consideration of the evidence held that the agreement is true. It also held that even if these two ventilators are closed, the plaintiff would be getting sufficient light and air if the door-way and the window in the wall EF and also a doorway in the northern wall EH in the plaint plan are opened, as well as the ventilator which opens into the hall on the west. As a result, the District Munsif dismissed the suit. But on appeal by the plaintiff the learned Subordinate Judge, Chittoor after a consideration of the evidence found that the defendants had not proved any agreement or undertaking pleaded by them, that is, the main defence raised by the defendants to non-suit the plaintiff and which is called by issue No. 4 is found against by the learned Subordinate Judge on an appreciation of the evidence. The learned Subordinate Judge further found that for over 45 years the plaintiff has been receiving light and air through the two ventilators, V-1 and V-2. On the question whether the plaintiff would have sufficient light and air even if the ventilators were closed, the learned Subordinate Judge held in paragraph 8 of his judgment that the plaintiff is entitled to insist upon his enjoyment of so much light and air as was then available to him. In the result the plaintiff's suit was decreed by the learned Subordinate Judge. Hence this second appeal is filed by the defendants

4. The finding on the question raised by the 4th issue is a finding of fact and is not open to attack in second appeal. The learned Subordinate Judge referred to the evidence of the witnesses. D.Ws. 2, 3 and 4 and did not accept it. He held that he is not inclined to believe that the plaintiff had undertaken to close the ventilators whenever asked by the defendants. Therefore it is clear that the plaintiff has acquired the right of receiving light and air through the two ventilators V-1 and V-2 by enjoyment for over the prescriptive period u/s 15 of the Indian Easements Act, 1882 (hereinafter called the Act) because the said Act applies to this area,

5. But it is argued by the learned Counsel for the appellants that on the finding of the trial Court that the plaintiff will be having sufficient light and air if the door and window of the eastern wall and the door-way on the north and the ventilators on the west are kept open, the plaintiff is not entitled to a decree and that his suit has to be dismissed because the plaintiff will be setting reasonable amount of light and air even though the two ventilators in question marked as V-1 and V-2 in the plaint plan are closed. In support of his argument reliance is placed upon the following decisions:-

(a) Rajani Kanta Das, on his death, Golap Sundari Dasi Vs. Nirmal Chandra Das and Another,

(b) Alifannessa v. Ali Akbar AIR 1958 Gau 83.

(c) Bansidhar and Another Vs. Matru Mal and Others, ,

(d) Yadavalli Thimmaraju v. Sait Ramchandrar Sevanarain Bang (1958) 1 AnWR 78.

But this argument ignores the facts that the extent of a right of easement is specified by Section 28 of the Act. The said Section says that with respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:-

"(c) The extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purpose for which it has been used."

It follows that if the plaintiff has been receiving light and air through the two openings, V-1 and V-2 for over the statutory period and has thus acquired an easementary right to receive light and air through those two ventilators, then he can insist that he is entitled to continue to receive the same amount of light and air as before through the two ventilators though he might be setting sufficient light and air by other means. The decisions of the High Courts of Calcutta, Assam and Patna relied upon by the learned Counsel for the appellants will not apply to the present case as the Act does not apply to the areas from which those cases arose. Section 1 of the Act states that the Act extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg. In places where the Act does not apply the Courts have applied the English law on the point. As stated in the decision of the House of Lords in *Colls v. Home and Colonial Stores* 1904 AC 179 "to constitute an actionable obstruction of ancient lights it is not enough that the light 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 and (in the case of business premises") to prevent the plaintiff from carrying on his business as beneficially as before. (Vide. Head Note of the Report). It was also pointed out that "the nature of the right to light & of an infringement was not altered by the Prescription Act (2 and 3 Will. 4, c 71)" That was the law that seems to have been followed in the decisions of the Calcutta, Assam and Patna High Courts cited before me by the learned Counsel for the appellants. But clearly the Act applies to the Madras Provinces and the case before me governed by the Act and Section 28 of the Act is a complete answer to the contention raised by the learned Counsel for the appellants. In this context It is necessary to refer to the decision of Justice Umamaheswaram in 1958 1 An WR 78. The learned Judge referred to the decision in *P.C.E. Paul v W Robson*. ILR CRL 46 AIR 1914 PC 451 which quoted the following passage from the decision of the House of Lords summarising the opinion of the Lord Chancellor in 1904 A.C. 179.

"The opinion of the Lord Chancellor in that case is equally clear on the essential

points that the easement acquired by ancient rights is not measured by the amount of light enjoyed during the period of prescription, and that there is no infringement unless that which is done amounts to a substance "

Justice Umamaheswaram purported to follow this statement of law. The facts of that case are not quite clear from the report. It is not also clear whether the attention of the learned Judge was drawn to Sections 1 and 28 of the Act. which define the applicability of the Act, and also the extent of the easementary right to light and air acquired by prescription u/s 15 of the Act. Therefore I am unable to follow the decision in 1958 1 AnWR 78 The language of Section 28 of the Act is clear and unambiguous and admits of no argument.

6. 1 may also point out that the learned Subordinate Judge does not seem to entirely agree with the finding of the trial Court that the plaintiff will have sufficient light and air even if the two ventilators. V-1 and V-2 are closed The learned Subordinate Judge pointed out that the door-way and the window in the eastern wall open into the public street and that they cannot always be kept open There is also the fact that in the present case the right claimed is not merely with respect to light which is received through the two ventilators, but also with respect to air

7. In the result this second appeal fails and is dismissed with costs.