

B. Venkatappa Vs. B. Lovis

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Court : Andhra Pradesh

Decided On : Feb-10-1984

Reported in : AIR1986AP239

Judge : Ramaswamy, J.

Appeal No. : Second Appeal No. 1255 of 1980

Appellant : B. Venkatappa

Respondent : B. Lovis

Advocate for Def. : A. Gopala Rao, Adv.

Advocate for Pet/Ap. : T. Bati Reddy, Adv.

Judgement :

1. The unsuccessful defendant at the appeal state is the appellant herein. He filed a suit for perpetual injunction to restrain the appellant from constructing ovens of 'XY' of the plaint schedule land and also for perpetual injunction restraining the appellant from constructing the chimney along the Western place of 'AB' common wall. The trial Court dismissed the suit. On appeal, the appellate Court, while conforming the decree of the trial Court, in respect of construction of ovens at 'XY' place of the plaint schedule land, directed the appellant to close the holes in the chimney towards the East by way of mandatory injunction and if he fails to do so the respondent-plaintiff be at liberty to get it done through Court and recover the

costs thereof, challenging this part of the decree, the defendant filed this appeal. Against the concurrent decree of both the Courts refused to grant injunction in respect of the first part of the relief the respondent filed cross-objections. Thus this matter.

2. In the appeal, Sri Bali Reddy, learned counsel for the appellant, contended that without any proof of an injury or discomfort to the plaintiff on account of emanation of the smoke from the chimney, there is no cause of action for the plaintiff to lay the action seeking mandatory injunction. In support thereof, he relied upon a passage in Halsbury's Laws of England 1. Halsbury's Laws of England, 4th edition, Volume 34 pp. 117 para 329 which reads thus :

'When Smoke Amounts to Nuisance : Even when unaccompanied by noise or noxious vapours and although not injurious to health, smoke may constitute an actionable nuisance or be the subject of indictment provided that the nuisance produced is such as affects materially to interfere with the ordinary comfort. The fact that the smoke arose from premises in the manufacturing town does not affect the question of nuisance if it can be shown that the annoyance otherwise caused has been materially increased. Nuisance of this kind is now to a substantial extent regulated by statute.'

3. Therefore, the decree of the appellate Court is clearly unsustainable in law. On the other hand, Sri Gopal Rao, learned counsel for the respondent, contended that the report of the Commissioner, Ex. A. 2 and the oral evidence of the parties, clearly establish that the chimney is 3'- in width and it extends to the top of the first floor. It is also stated that the chimney-holes are projecting towards the plaintiff's side. It is also admitted that the smoke and other fumes are emitting through the holes of the chimney into the plaintiff's side. On these admitted facts, the lower appellate Court has come to the conclusion that the emanation of smoke and fumes would cause discomfort in the enjoyment of the property and that therefore the principle *cujus est solum ejus est usque ad coelum* meaning thereby that the owner of the soil is the owner also of the whole column of space above the surface, shall be applicable to the air space within the height of the buildings and capable of effective possession. Relying upon this, Sri Gopal Rao, contends that

the view of the appellate Court is perfectly legal and it does not warrant interference.

4. Upon the restrictive contentions, the question that arises for consideration is whether the mandatory injunction granted by the appellate Court is vitiated by an error of law. As stated earlier, the admitted facts are that the appellant and the respondent are neighbours. The appellant constructed the chimney and according to him, the height of the chimney is 35' and the width of it is 30' and holes to the chimney are projecting towards the plaintiff's side on east-west.

It is common knowledge that when the smoke emanates, it would also pass through the holes of the chimney and when the smoke is thus emanating, it causes (sic) and would be injurious to the health of the neighbours. Therefore it would cause discomfort in the enjoyment of the property and injuries to the health as well. The maxim *conject est solum ejus est usque ad coelum* would equally apply to the enjoyment of the open space. Smoke fumes and smell, either together or singly, which materially interfere with the ordinary physical comfort of human existence, constitute a nuisance in law. They need not be actually noxious or injurious to health. It is immaterial whether there are other sources of discomfort in the neighbourhood, if the one complained of has a material addition to it. The fact that the nuisance existed long before the complainant occupied his premises, does not relieve the offender unless he can show that as against the complainant he has acquired a right to commit nuisance complained of. The necessary conclusion thereby would be and be held that emitting smoke would constitute actionable nuisance furnishing cause of action to lay the suit for appropriate relief. Applying the above statement of law to the admitted facts, it will be clear that an actionable wrong has been committed by the appellant erecting the chimney with the holes emitting smoke through them towards the side of the plaintiff. Accordingly, held that the mandatory injunction granted by the appellate Court is perfectly legal and it does not warrant interference in the second appeal.

With regard to the first relief, namely perpetual injunction restraining the defendant from constructing the ovens in 'XY' of the plaint schedule land, both the Courts have held that the existence of the ovens in the defendant's premises does not

give rise to any actionable cause for inconvenience. This is a finding of fact based on the appreciation of evidence and though cross-objections have been filed, it does not warrant interference in the second appeal. Accordingly the cross-objections are dismissed. In view of the fact that both the parties, not satisfied with the decree of the appellate Court, have filed the appeal and in view of the findings recorded above, I direct both the parties to bear their own costs. The second appeal is accordingly dismissed.

5. Appeal dismissed.

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