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V.M.Saineesa Vs. S.Shanthi

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Court : Chennai

Decided On : Jan-29-2013

Judge : P.R.Shivakumar

Appellant : V.M.Saineesa

Respondent : S.Shanthi

Judgement :
IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:

29. . 01 .2013 CORAM THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR S.A.No.286 of 2011 & M.P.No.1 of 2011 V.M.Saineesa .. Appellant -Vs- 1.S.Shanthi 2.The Commissioner Corporation of Chennai Rippon Building Chenna

003. 3.The Chairman Chennai Metropolitan Development Authority No.1, Gandhi Irwin Road Egmore Chenna

008. .. Respondents Second Appeal filed under section 100 of C.P.C against the decree of the Lower Appellate Court dated 06.07.2010 made in A.S.No.68 of 2008 on the file of V Addl. Judge, City Civil Court, Chennai confirming the decree of the Trial Court in O.S.No.2612 of 2003 dated 25.07.2007 on the file of III Asst. Judge, City Civil Court, Chennai. For appellant : Mr.Ashok Rajaraman For Respondent : Mr.R.Manickavel for R1 ----- JUDGMENT The plaintiff in the original suit is the appellant in the second appeal. She filed the suit O.S.No.2612 of 2003 on the file of the III Assistant Judge, City Civil Court, Chennai:

1) for recovery of a sum of Rs.50,000/- from the first respondent/first defendant as damages together with an interest on the said amount at the rate of 12% p.a from the date of plaint till the date of decree and a further interest at the rate of 6% p.a from the date of decree till payment;

2) for a mandatory injunction against the first respondent/first defendant to remove the new pipeline put up on the northern wall of the first and second floors at No.13/7, Sundaravinayagar Koil First Lane, Sembium, Chennai- 11;

3) for a mandatory injunction against the first respondent/first defendant directing the removal of the northern wall in the ground floor of the said building opposite to the two windows on the southern wall of the house of the appellant/plaintiff and thus restore the original position allowing free air and light through the windows in the rooms of the plaintiff's property;

4) for a permanent injunction restraining the first defendant from putting up shutters for the windows in the northern wall of the first and second floors of the building bearing Door No. 13/7, Sundaravinayagar Koil First Lane, Sembium, Chennai- 11 so as to open the same into the space over the plaintiff's property;

5) for a permanent injunction restraining the first respondent/first defendant from entering a portion of the property of the plaintiff bearing Door No. 9/5, Sundaravinayagar Koil First Lane, Sembium, Chennai- 11 for the purpose of plastering and whitewashing the walls of the new construction of the first defendant or any other purpose;

6) for a mandatory injunction against the defendants 2 and 3 to exercise their powers and take action against the first respondent/first defendant for the unauthorized construction of the building of the first respondent/first defendant; and

7) for costs.

2. Second respondent/second defendant remained ex parte before the trial Court. First and third defendants contested the suit. At the end of trial, the trial Court decreed the suit in part with costs and granted the reliefs of mandatory injunction

and permanent injunction as prayed for. So far as the relief of damages claimed in the suit was concerned, the trial Court dismissed the suit.

3. As against the judgment and decree of the trial Court dated 25.07.2007, the first respondent / first defendant preferred an appeal in A.S.No.68 of 2008 on the file of the V additional Judge, City Civil Court, Chennai. The learned V Additional Judge, City Civil Court, Chennai (lower appellate Judge) allowed the appeal with costs and set aside the decree passed by the trial Court. As against the judgment and decree of the lower appellate Court dated 06.07.2010, the present second appeal has been filed by the appellant herein/plaintiff.

4. The contention of the appellant/plaintiff, in brief, are as follows: The house bearing Old Door No.5 (New Door No.9/5) in Block No.9, T.S.No.42/2 at Sundaravinayagar Koil First Lane, Sembium, Chennai-11 belongs to the appellant/plaintiff. She had purchased 2000 sq.ft of land and a building with tiled roof from one Mohan under a sale deed dated 31.08.1974 registered as Document No.3174 of 1974. The said building faces west through a lane. After purchase, the tiled structure on the northern part of the building was converted into a terraced structure and the southern portion continued to be a structure with mangalore tiled roof. The said southern portion is in the occupation of tenants. There are two windows, one in the first room situated on the western side and the other in the second room situated on the eastern side. They form the only source for drawing light and air to the said rooms. The appellant/plaintiff and her predecessors-in-interest have got prescriptive right of easement for the flow of light and air through the windows by enjoying the same for over 75 years. The first respondent/first defendant owns the building bearing Door No.13/7 which is situated on the south of the southern portion of the plaintiff's building. The building purchased by the first respondent/first defendant was only a tiled structure and there was a courtyard with ample vacant space through which the plaintiff's rooms on the southern side of her building were drawing light and air. Immediately after the purchase made about 7 years prior to the filing of the suit, the first respondent/first defendant removed the tiled superstructure and put up a terraced building on the ground floor alone. The northern wall of the building of the first respondent/first defendant was put up buttressing the southern wall of the plaintiff's house, without leaving any

space. By doing so, the first respondent/first defendant completely closed the windows on the northern wall of the appellant's/plaintiff's building and deprived the flow of air and light through the windows to the rooms in which tenants of the plaintiff are in occupation. Since the prescriptive easementary right for drawal of air and light through the windows on the southern wall of the appellant's/plaintiff's house was interrupted, the appellant/plaintiff had to seek a mandatory injunction for the removal of the northern wall of the first respondent/first defendant's building in the ground floor.

5. The first respondent/first defendant, not satisfied with the construction of the ground floor, proceeded with the construction of first and second floors without leaving any space. While doing so, the first respondent/first defendant removed several tiles from the plaintiff's building and also caused damage to the tiles which resulted in the falling of the broken bits of tiles into the rooms occupied by the tenants. However, after being questioned, the first defendant replaced some of the broken tiles and confronted the husband of the plaintiff/appellant stating that he could take any action he wished. As such the appellant/plaintiff had to replace all the tiles and re-lay the roof to make the rooms habitable. Because of the construction work undertaken by the first respondent/first defendant, the southern wall of the plaintiff's house developed heavy cracks. The eves of the roof of the plaintiff's house are resting in her southern wall and a rain water channel has been provided for draining the rain water through a hole on the western end of the channel. The construction work undertaken by the first respondent/first defendant caused damage to the said rain water channel. In addition, the first respondent/first defendant has opened four big windows on the northern wall of her building. If the appellant/plaintiff demolishes the present superstructure with tiled roof and put up a storied building, the windows of the northern wall of the first respondent/first defendant's building shall have to be closed. The first respondent/first defendant is making arrangements to put up shutters to the windows having its opening outside so as to hang on the outer space above the plaintiff's property. The first respondent/first defendant has also fixed pipelines on the outer surface of the northern wall of the new construction in the first and second floors which is a clear encroachment of the plaintiff's space. In addition, the first respondent/first defendant or her men have no right to enter into any

portion of the plaintiff's property to plaster and whitewash the newly constructed wall in the first and second floors of the property of the first respondent/first defendant. Since the said construction was put up unauthorizedly without obtaining a sanctioned plan, the statutory authorities, namely Respondents 2 and 3 are under a legal obligation to prevent the progress of the illegal construction and take immediate measures for the removal of the unauthorized construction. In view of the damage caused to the roof of the building of the appellant/plaintiff, the appellant/plaintiff is entitled to claim a sum of Rs.50,000/- as damages, besides mandatory injunction for the removal of the northern wall of the ground floor portion in the defendant's property and for the removal of the pipelines put up on the northern wall of the first and second floors of the first respondent/first defendant's property and also for permanent injunction as indicated supra.

6. The first respondent/first defendant resisted the suit by filing a written statement containing averments that are, in brief, as follows: The suit of the appellant/plaintiff, who is unable to bear the growth and development of her neighbour, is a vexatious one filed out of jealousy. The first respondent/first defendant has obtained a sanctioned plan for her construction and the construction was completed in the third week of April 2003. The appellant/plaintiff and her husband had been creating all kinds of troubles by raising objection even if a workman was keeping one leg on her property and if a handful of sand or cement had fallen on the plaintiff's side. The building constructed by the first respondent / first defendant is well within the four boundaries of her property. Only in the year 1999, the appellant/plaintiff converted a portion of her building into a terraced portion. The area as per the classification is a contiguous building area consisting of street houses. As such there is no obligation or necessity to leave any space in between the houses. The appellant/plaintiff did not have two windows on the southern wall of her property as claimed by her in the plaint. On the other hand she had windows only on the other side. The objection of the appellant/plaintiff was on the basis that, in case she would demolish the tiled building and develop her property into a storied building, she would be providing windows facing the property of the first respondent/first defendant and hence she wanted the first respondent/first defendant to leave three feet open space in between. Having put up a construction right on the southern boundary line of her

property without leaving even an inch, she has chosen to complain strongly about the act of the neighbour putting up a construction without leaving space.

7. The claim of the appellant/plaintiff to have acquired prescriptive easement as if her property was drawing light and air through windows facing the property of the first respondent/first defendant for over 75 years is false and untenable. The appellant/plaintiff cannot expect the neighbour, namely the first respondent/first defendant, to keep her property vacant and open without any development so that the appellant/plaintiff can enjoy free air and light for ever. The other allegations regarding the alleged damage caused to the roof of the plaintiff's house and obstruction caused to the channel provided for draining rain water are all false. It is also not correct to state that the first respondent/first defendant has opened four big windows on the northern wall of her building. On the other hand, she has opened two ventilators and two small windows without window pans. In the event of the appellant/plaintiff putting up construction in her property, she can very well close the windows as the first respondent/first defendant undertakes not to claim right of easement of air and light through windows. The very purpose for which the suit has been filed is to prevent the first respondent/first defendant from claiming easementary right to draw light and air through the windows provided in the northern wall of her property. The first respondent/first defendant also gives an undertaking that the plaintiff may put up construction of her building abutting the northern wall of the building of the first respondent/first defendant and she will not claim any easement of free flow of light and air through the open space over the property of the appellant/plaintiff. The alleged damage caused to the roof of the house of the appellant/plaintiff is false and hence, the appellant/plaintiff is not entitled to damages as claimed in the plaint. The appellant/plaintiff shall not be entitled to any of the reliefs sought for in the plaint and hence the suit should be dismissed with costs.

8. The brief averments made in the written statement of third respondent/third defendant are as follows: As there is an express bar provided under Section 101 of the Town and Country Planning Act, 1971, the suit as against the third respondent/third defendant is liable to be dismissed as not maintainable. Any order of the third defendant or any of the officers under the Town and Country

Planning Act shall be final and shall not be questioned in any court of law. If any development has been made in Chennai Metropolitan area without a valid planning permission, the third respondent/third defendant is entitled to deal with the same under the provisions of the Town and Country Planning Act and the development control rules. The present dispute is primarily a dispute between the plaintiff and the first defendant with regard to the construction of the northern wall of the first defendant's house providing windows with shutters on the first and second floors of the building of the first defendant. On receipt of the summons in the suit, the officials of the Chennai Metropolitan Development authority inspected the suit property on 24.02.2004 and noticed that the construction consisting of ground, first floor and second floor with 8 residential units was completed and occupied. As the approved plan was not produced at the time of inspection, a demolition notice was issued on 24.02.2004 and in response to the demolition notice, the first appellant/first defendant furnished a copy of the plan approved by Chennai City Corporation vide PPA.No.2058 of 2003 and BA2387 of 2003 dated 14.05.2003 for ground floor and first floor for residential purpose. Further the third respondent will take action immediately after the disposal of the suit in accordance with Town and Country planning Act, 1971 in respect of the unauthiorised construction in the second floor. As the suit against the third respondent/third defendant is not maintainable, the same is liable to be dismissed in liminie.

9. Based on the above said pleadings, the learned trial Judge framed three issues and four additional issues which are as follows: Issues:

1) Whether the plaintiff is entitled for the relief of mandatory injunction as claimed?

2) Whether the plaintiff is entitled for the relief of permanent injunction as claimed?

3) Whether the alleged cause of action is correct? Additional Issues:

1) Whether the plaintiff has perfected her easementary rights for light and air through the two windows on the southern wall of her building?

2) Whether this defendant had put up her northern wall of her building in flush with the southern wall of the plaintiff's building and closed the windows completely thus

depriving the light and air to the two rooms?

3) Whether the defendant had caused damage to the roof of the plaintiff's building and broken the rain water channel thus causing seepage of water and whether the plaintiff's building had suffered crack and damages?

4) Whether the plaintiff is entitled to a decree for mandatory injunction and injunction as prayed for? 10. One witness was examined as Pw 1 and 10 documents were marked as Exs.A1 to A10 on the side of the appellant/plaintiff. One witness was examined as Dw 1 and 4 documents were marked as Exs.B1 to B4 on the side of the respondents/defendants. The learned trial Judge, after hearing the arguments advanced on both sides, considered the evidence and upon such consideration, decreed the suit in respect of mandatory and permanent injunctions and dismissed the suit in respect of the relief of damages. Aggrieved by and challenging the same the appellant herein/1st defendant filed the appeal before the lower appellate court, namely City Civil Court in A.S.No.68 of 2008. The learned lower appellate Judge allowed the appeal with costs and set aside the decree passed by the trial Court. Now the appellant/plaintiff has come forward with the present second appeal challenging the decree passed by the lower appellate Court.

11. At the time of admission of the second appeal, the following question was formulated as substantial question of law: "Whether the first appellate Court grievously erred in dismissing the suit as not maintainable in the teeth of the First Bench Judgment of this Court in 2009 (3) CTC 60.that a suit by a person against a neighbour questioning the neighbours construction is maintainable?" 12. This Court heard the arguments advanced by Mr.Ashok Rajaraaman, on behalf of the appellant/plaintiff and by Mr.R.Manickavel on behalf of the first respondent. The judgments of the courts below, the pleadings, evidence and other materials available on record were also perused and this Court paid its anxious consideration to the same.

13. The plaintiff in the original suit is the appellant in the second appeal. The suit was filed based on the plea that the appellant/plaintiff had a prescriptive right of easement to draw light and air to the two rooms on the southern part of the

appellant's/plaintiff's house through two windows provided in her southern wall and that the first respondent/first defendant, who constructed the first and second floor portions without leaving any space in between her property and the property of the appellant/plaintiff, should not be allowed to have pipelines or windows, shutters of which could be opened protruding into the open space above the property of the appellant/plaintiff. The property of the appellant/plaintiff and the property of the first respondent/first defendant are abutting each other. According to the contention of the appellant/plaintiff, the property of the first respondent/first defendant, which lies on the south of the building of the appellant/plaintiff, was vacant when the appellant/plaintiff purchased her property in 1974 and the southern side rooms of the appellant's/plaintiff's house were drawing light and air through the two windows provided in the southern wall of the appellant's/plaintiff's building. The further case of the appellant/plaintiff is that the said right of easement to draw light and air through the property of the first respondent/first defendant was interrupted by the first respondent/first defendant by putting up the construction of the ground floor of her house with the northern wall of her house buttressing the southern wall of the plaintiff's building and thereby completely closing the light and air flowing through the windows provided in the southern wall of the appellant's/plaintiff's building.

14. The contention of the first respondent/first defendant is that there was no window in existence on the southern wall of the plaintiff's building; that the building had got windows only on the other side; that even when the first respondent/first defendant purchased her property which lies on the south of the plaintiff's building, there was a tiled structure whose northern wall was buttressing the southern wall of the plaintiff's building; that subsequently in 2000, after getting necessary sanction from the planning authority, she put up a new building consisting of ground and first floor and a single room in the second floor and that the said construction was made well within the boundary of the first respondent/first defendant without encroaching upon an inch on the plaintiff's property. The further contention of the first respondent/first defendant is that though she has provided two ventilators and two small windows in the first and second floors of her building, she had not provided any shutter; that the windows were made with aluminum panels without window pans that may protrude into the open space over the plaintiff's property; that though she provided such ventilators and windows on the

northern wall of her property, she would undertake not to claim any easement of drawing light and air through them and that in case the appellant/plaintiff would put up a storied building in her property after demolishing the existing tiled structure, she could very well put up her southern wall completely closing the ventilators and the windows provided on the northern wall of the building of the first respondent/first defendant. The claim of prescriptive easement for drawal of air and light through the open space over the plot of the first respondent / first defendant has also been stoutly denied and disputed.

15. The appellant / plaintiff has also pleaded for a direction against the respondents 2 and 3 / defendants 2 and 3 to take action against the first respondent / first defendant as if she had put up the construction without obtaining a planning permission. The said contention of the appellant / plaintiff was resisted by the first respondent/first plaintiff based on the plea made in the written statement that the area was designated as contiguous building zone (CBS) or street house area, wherein the buildings can be put up touching each other without leaving a space in between and that as per the rules, the first respondent/first defendant got planning permission and put up the constructions without any violation of the development rules and without deviating from the sanctioned plan.

16. The third respondent/defendant, namely Chairman, Chennai Metropolitan Development Authority, has contended that the suit as against the said respondent is not maintainable as it is barred by Section 101 of the Town and Country Planning Act. Of course, the trial Court has not framed a specific issue regarding the maintainability of the suit as against the third respondent in the light of the provisions of Town and Country Planning Act, 1971. But the same can be read into Issue No.1 and Additional Issue No.4. In fact, Additional Issue No.4 is consolidation and duplication of Issue Nos.1 and 2. While considering the question whether the Civil Court can grant an injunction or mandatory injunction against the third respondent, the question "whether a bar for entertaining such a prayer by the civil Court against the third respondent is provided under Section 101 of the Town and Country Planning Act?" - becomes a necessary question to be decided in the said issue. The learned trial Judge omitted to consider the issue and hence, the same was raised as a specific ground before the lower appellate court leading to

the formulation of the first and fifth points for consideration, which were as follows: "1) Whether the Town and Country Planning Act, 1971 creates bar to the jurisdiction of the Civil Court, in respect of the contravention under the Act" "5) Whether the Civil Court has jurisdiction to direct the second and third respondents to exercise their power to take action against the appellant/first defendant for the alleged unauthorized construction?" 17. The learned lower appellate Judge referred to various judgments dealing with the statutory bar provided by special statutes baring the jurisdiction of the Civil Court either expressly or by implication and opined that the suit filed by the appellant herein/plaintiff seeking a mandatory injunction against the third respondent/third defendant was barred under Section 101 of the Tamil Nadu Town and Country Planning Act 1971. For arriving at such a conclusion, the learned lower appellate Judge also referred to Sections 76, 79, 85 and 102 of Tamil Nadu Town and Country Planning Act, 1971. As rightly pointed out by the learned senior counsel appearing for the appellant, making a reference to Section 85 of the Tamil Nadu Town and Country Planning Act, which is a penal provision prescribing the penal measures for violation of development rules, is unwarranted. Not content with making such an unwarranted reference to Section 85 of the Tamil Nadu Town and Country Planning Act, the learned lower appellate Judge has gone further to state that a contravention of Section 47 or 48 of the Tamil Nadu Town and Country Planning Act is made punishable under Section 85 of the said Act with fine and that the violation has to be dealt with by a Magistrate of First Class. The learned lower appellate Judge made a further observation that a prayer for demolition and restoration of the property to its original state came under the purview of the planning authority and therefore, as per Section 101 of the Tamil Nadu Town and Country Planning Act, 1971, the civil Court had no Jurisdiction to try the case. The said observation of the learned lower appellate Judge cannot be sustained.

18. Sections 101 and 102 of the Town and Country Planning Act read as follows:

101. Bar of jurisdiction of Courts.- Any decision or order of the Tribunal or the Government or the planning authority or other authority or of any officer under this Act shall, subject to any appeal or revision or review provided under this Act, be final and shall not be liable to be questioned in any Court of law 1(and no

injunction shall be granted by any court against the notices served to any person by the planning authority under section 56 or under section 57 of this Act).

102. Indemnity.- (1) No suit or other proceeding shall lie against the Government for any act done or purporting to be done under or in pursuance of this Act. (2)(a) No suit, prosecution or the proceeding shall lie against any planning authority or other authority or officer or person for any act done or purporting to be done under or in pursuance of this Act or the rules or regulations made thereunder without the previous sanction of the Government; (b) No planning authority or other authority or officer or person shall be liable in respect of any such act in any civil or criminal proceeding, if the act was done in good faith in the exercise of the powers conferred, or discharge of the duties imposed or performance of the functions entrusted, by or under this Act or the rules or regulations made thereunder. (3) No suit, prosecution or other legal proceedings shall be instituted against any planning authority or other authority or officer or person for any act done or purporting to be done under or in pursuance of this Act or the rules or regulations made thereunder after the expiration of six months from the date of the act complained of." 19. A conjoint reading of Section 101 and 102 of the Tamil Nadu Town and Country Planning Act, 1971 will make it clear that any decision taken or order passed by the Tribunal or the Government or the planning authority or any officer under the Act subject to any appeal, revision or review, as provided under the Act, shall be final and no civil Court shall have jurisdiction to question it. Clause (1) of Section 102 of the Tamil Town and Country Planning Act provides a total ouster of the civil Courts jurisdiction to entertain a suit or other proceedings against the Government for any act done or purported to be done under or in pursuance of the provisions of the Act. However, there is no such absolute bar for a suit or prosecution or other proceedings against the planning authority or other authority. It provides a condition that previous sanction of the Government should be obtained for the same. Sub-clause (b) of Clause (2) of Section 102 protects acts done in good faith in exercise of the power conferred or in discharge of the duties imposed. Absence of good faith will make such authority or officer liable to be proceeded with. Sub-section 3 of Section 102 provides a limitation of six months.

20. According to the contention of the learned senior counsel for the appellant, the bar provided under Section 102 is not unqualified and the bar provided either under Section 101 or under Section 102 shall be attracted only against any order passed by the planning authority. Learned senior counsel has contended that if a person, while putting up a construction, violates the development rules to the detriment of his neighbour, and despite the fact that such violation is brought to the notice of the planning authority, it keeps quite, the aggrieved person, while suing such neighbour can also sue the planning authority for a direction to enforce the development rules and remove the unauthorized construction and that such a suit shall be perfectly maintainable. In support of his contention, the learned senior counsel for the appellant drew the attention of the Court to the decision of a Division Bench of this Court in Babu and another Vs. The Member Secretary, Chennai Metropolitan Development Authorityand others reported in 2009 (3) CTC 609.In the said case, when a suit was filed against the neighbour of the plaintiff making the Chennai Metropolitan Development Authority and the Corporation of Chennai as co-defendants with a prayer against them to take action against the alleged illegal construction put up by the neighbour, the plaint was returned by the trial Court as not maintainable in view of the judgment in Consumer Action Group Vs. The State of Tamil Nadu reported in 2006 (4) CTC 483.The same was challenged before the High Court invoking its Writ Jurisdiction and the Division Bench of this Court held that such a suit was perfectly maintainable.

21. In Consumer Action Group case, it was held that no civil Court shall entertain a suit or proceedings or application against the action taken by the Chennai Metropolitan Development Authority or Corporation in respect of the illegal construction and encroachments of roads and pavements. The said direction, according to the clarification issued by the Division bench in Babu's case reported in 2009 (3) CTC 609.bar the Civil Court from entertaining any suit or proceedings by a person who put up illegal construction or who put up constructions encroaching upon roads or pavements and such persons cannot approach the civil Court with a civil suit against the action taken against them by the Chennai Metropolitan Development Authority or the Municipal Corporation of Chennai for the removal of encroachment or for the removal of the illegal construction. In view of the above said clarification made by the Division bench of this Court, the suits in

respect of the action taken by the Chennai Metropolitan Development Authority or Corporation of Chennai against the above said violations alone shall not be entertained by the Civil Court. On the other hand, the suit by a person claiming relief against a neighbour can also make the Chennai Metropolitan Development Authority or the Corporation as a co-defendant in the said suit and seek a direction to the Chennai Metropolitan Development Authority or Corporation for the removal of unauthorized or illegal construction. Such a suit is not barred. In view of the said pronouncement made by the Division Bench of this Court in Babu and another Vs. The Member Secretary, Chennai Metropolitan Development Authority and others , this Court holds that the lower appellate Court is wrong in holding that the suit is barred under Section 101 of the Town and Country Planning Act. The substantial question of law formulated in this second appeal is answered accordingly holding that the suit filed by the appellant is maintainable.

22. The above said answer to the substantial question of law per se shall not be enough to dispose of the second appeal as it is contended on behalf of the contesting respondents that the appellant/plaintiff had failed to prove prescriptive easement as claimed by her and also failed to prove the violation of planning permission. It is the further contention of the learned counsel for the contesting respondent (first respondent) that the lower appellate, on re-appreciation of evidence, gave a factual finding that the first respondent/first defendant failed to prove prescriptive easement to draw light and air through the windows on the southern wall of her building and also failed to prove any violation of development rules in putting up the construction and that such finding of facts cannot be termed perverse in which case alone this Court can interfere. Per contra, it is the contention of the learned senior counsel appearing for the appellant that the appellant/plaintiff had purchased her property in 1974 itself; that there were two windows on the southern wall of her building even at that point of time and that she had the benefit of drawing light and air through those windows for more than 20 years from 1974 and thus had got prescriptive easementary right. Learned senior counsel appearing for the appellant contended further that the learned trial Judge, on proper appreciation of evidence came to the conclusion that the appellant / plaintiff had proved prescriptive easementary right, which finding was improperly interfered with and reversed by the learned First appellate Judge on an

erroneous assumption that the principles governing the easement by way of necessity would apply to a prescriptive easement of drawal of light and air. This Court paid its consideration to the above said submissions made on both sides.

23. Admittedly, the property of the appellant/plaintiff and the property of the first respondent / first defendant are adjacent to each other. The appellant's / plaintiff's property lies on the north and the first respondent's / first defendant's property lies on the south. According to the appellant / plaintiff, the first respondent / first defendant put up a construction in her property, which was lying vacant, without obtaining planning permission. The said contention has been stoutly denied by the first respondent/first defendant. The appellant /plaintiff seems to have taken such a stand assuming that the development rules applicable to the area necessitates a vacant space to be left in between the houses and since the first respondent/first defendant put up the construction up to the edge of her property, without leaving any space on the north of her property, the same was done without obtaining proper planning permission and without adhering to the development rules. It is pertinent to note that the appellant / plaintiff chose to inform the authorities under the Tamil Nadu Town and Country Planning Act, namely Respondents 2 and 3, that the first respondent/first defendant was putting up construction without obtaining planning permission, based on which the officials of the third respondent (CMDA) made an inspection of the property of the first respondent / first defendant and that on demand on the spot, the sanctioned plan was not shown to them which led to the issuance of a demolition notice dated 24.02.2004. On receipt of such demolition notice, the first respondent/first defendant gave a reply under Ex.B4-Letter dated 25.02.2004 and furnished a copy of the approved plan. The approved plans have been produced as Exs.B2 and B3. From Exs.B2 and B3 it is obvious that the first respondent / first defendant did put up the construction only after obtaining permission for the same by submitting a plan and obtaining sanction for the same. The same is also reflected in the reply dated 25.02.2004 marked as Ex.B4. The approval for the plan came to be issued in Approval No.5968 of 2000 dated 06.11.2000.

24. It is made clear through evidence that the area has been classified as a consecutive building (attached building) area/street house area wherein there is no

necessity to leave side set back and that on the other hand, putting up houses without any side set back is permitted. In this regard, the appellant / plaintiff chose to aver in the plaint that the first defendant had put up a construction in her land without getting a planning permission. But her husband, who deposed as PW1, pleaded absence of knowledge as to whether the first defendant had got sanction for the plan from the second defendant in the year 2000. It is also his admission that the plaintiff's house had been put up without leaving any space beyond the building and likewise the first respondent / first defendant had put up her construction without leaving any space on the plaintiff's side . The first respondent / first defendant has also clearly stated that the area was a contiguous building zone and there was no necessity to leave any space in between her property and the property of the appellant/plaintiff; that only after getting the plan approved, she put up the construction and that the planning permission was granted for putting up a construction without leaving any space on the northern side of the property of the first respondent/first defendant. From Exs.B2 and B3 and from the averments made in the written statement of the third defendant, it is obvious that the first respondent / first defendant constructed the ground floor and the first floor in accordance with the planning permission and that the construction found in part of the second floor alone was not in accordance with the planning permission. The third respondent has stated in clear terms that for the deviation caused by putting up construction in part of the second floor, action would be taken in accordance with the Tamil Nadu Town and Country Planning Act, 1971, immediately after the disposal of the suit. In view of the said representation, the prayer made by the appellant/plaintiff for the grant of a mandatory injunction against the respondents 2 and 3 to remove the unauthorized construction of the first and second floor put up by the first respondent/first defendant on the assumption that the said construction was put up without getting planning permission is bound to be rejected so far as it relates to the first floor of the building of the first respondent/first defendant.

25. It has been admitted by the third respondent that the second floor had been put up without a valid sanctioned plan for the same. Hence the appellant/plaintiff shall be entitled to seek a mandatory injunction for taking action against the first respondent / first defendant in respect of the second floor construction in her property as the second floor has not been included in the plan sanctioned by the

sanctioning authority. The finding that the appellant/plaintiff shall be entitled to a direction in the nature of mandatory injunction directing the defendants 2 and 3 to take action in accordance with the provisions of Town and Country planning Act, 1971 in respect of the second floor construction alone, shall not mean that the construction has to be pulled down even if regularisation of the same is permissible under the provisions of the Town and Country Planning Act and the rules framed thereunder. This will take us to the next question whether the appellant/plaintiff has proved having acquired prescriptive easement of drawal of light and air through the windows in the southern wall of her building.

26. According to the appellant/plaintiff, the entire building of the plaintiff, at the time of her purchase, was a tiled structure and after her purchase, she converted the northern part of the said building into a terraced portion and the southern part of her building, which is abutting the property of the first respondent/first defendant, continues to be a tiled structure. According to the appellant/plaintiff, on the southern wall of the said tiled structure, there were two windows through which air and light were drawn to the two rooms on the southern part of the building of the appellant/plaintiff. The first respondent/first defendant contended that there was no window on the southern wall of the house of the appellant/plaintiff as the said building had been put up without leaving any space on the south of it and that the rooms were drawing light and air through the windows on the other side. In this regard, excepting the interested testimony of PW1, who is none other than the plaintiff's husband, there is no other evidence to prove that the southern wall of her building having a tiled roof was having two windows to draw light and air through them.

27. Ex.A1 is the certified copy of the sale deed under which the property of the appellant / plaintiff was purchased by her. The property purchased under the said document has been described to be bounded on the south by land and house of Kuppusamy Chettiar. A small passage leading from Sundaravinayagar Koil first lane has been provided as an exclusive access to the property purchased under the said document by the appellant/plaintiff. Care was taken to ensure the right of the person who had purchased the property lying on the south of the said passage to use the same for whitewashing and maintaining his/her wall that abuts

immediately on the south of the passage. At the same time, there is nothing in the sale deed to show that the building which was sold under the original of Ex.A1 had two windows on its southern wall and that the purchaser would have a right of drawal of air and light through them. For a clear picture, the field map as found in Ex.A2 is shown here. 41 _____

29. _____ 13.6 12.0 44 The photographs with negatives produced as Exs.A5 to A9 were taken only on 24.07.2003 as evidenced by Ex.A10 receipt. The said photographs do not prove the existence of any window on the southern wall of the plaintiff's building. Therefore, it has to be held that the appellant/plaintiff failed to prove her case that there were two windows on the southern wall of her building, through which two rooms on the southern part of her building were drawing air and light.

28. There is no reliable evidence to show that the property lying on the south of the plaintiff's property, which admittedly belongs to the first respondent/first defendant, remained vacant. Even Ex.A1 does not show with clarity that the property of the first defendant was lying vacant. DW1 in his evidence has stated that there is no space in between the houses of the plaintiff and the first defendant; that the houses of both the plaintiff and the first defendant have been constructed without leaving any space in between them; that the walls have been constructed abutting each other; that the rear side (southern side) wall of the plaintiff's house is touching the rear side (northern side) wall of the first defendant's house and that there is no space in between them. Of course, there is absence of plea and evidence on the part of the first defendant that her property was not lying vacant and there was a old structure after demolishing which the new structure was put up by her. However, the first respondent /first defendant has taken a clear stand that the southern part of the building of the appellant/ plaintiff, which remained with the tiled roof, did not have any window and that the other portion of the building which had been converted into a terraced portion alone had windows. Hence, the burden to prove that there existed two windows on the southern wall of her building through which the rooms in her building drew air and light lies on the appellant/plaintiff. As pointed out supra, excepting the interested testimony of PW1, the husband of the plaintiff, there is no other clinching evidence to prove that

there existed two windows on the southern wall of the appellant's/plaintiff's building through which she drew air and light lies on the appellant/plaintiff.

29. Even assuming that there would have been windows on the southern wall of the plaintiff's building when the property of the first defendant was lying vacant, unless the plaintiff is able to prove that she was drawing air and light through the said windows as a right of easement continuously for more than 20 years ending with a date within two years before the date of filing of the suit, her claim of acquisition of prescriptive easement has got to be negatived. No doubt the plaintiff's house in entirety was originally a tiled structure and the northern part of the same was subsequently converted into a terraced structure, leaving the southern portion to remain as tiled structure. When the first defendant put up the ground floor of her building, the appellant/plaintiff did not approach the Court for a declaration of her easementary right to draw air and light through the windows provided in the southern wall of her property and she kept quite. Only after the first respondent/first defendant put up the first floor and second floor portions, the appellant/plaintiff has chosen to approach the Court with the suit for the reliefs of declaration, mandatory injunction and injunction. So far as the relief of declaration of easementary right is concerned, the plaintiff should aver and prove that she had been in enjoyment of the easementary right claimed in the plaint uninterruptedly for not less than 20 years, which period of 20 years would have ended within two years prior to the filing of the suit. In other words, though a person might have acquired prescriptive easementary right by enjoying such an easementary right for more than 20 years, if any interruption takes place and the right of the owner of the dominant tenement is denied, he or she should approach the Court within two years thereafter, failing which the prescriptive easementary right acquired earlier would stand extinguished.

30. Section 15 of the Indian Easements Act, 1882 is relevant and the same is extracted hereunder: "15. Acquisition by prescription.- Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years, and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an

easement, without interruption, and for twenty years, and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years, The right to such access and use of light or air, support, or other easement, shall be absolute. Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contexted. Explanation I: Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease. Explanation II: Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorising the same to be made. Explanation III: Suspensions of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section. Explanation IV: In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage. When the property over which a right is claimed under this section belongs to Government, this section shall be read as if, for the words "twenty years" the words "thirty years" were substituted." Though a person who enjoys a right to use the other man's property as an access to his property to draw light and air to his property peacefully without any interruption for 20 years to make the easementary right an absolute one, such 20 years period shall be taken as a period ending within two years next before the institution of the suit wherein the claim to such period relates is contested. Here the claim of easement made by the plaintiff is contested in the present suit. The suit was filed on 29.04.2003. Therefore, the plaintiff should prove that she enjoyed the easement of drawing light and air through the property of the first defendant without any interruption for well over 20 years ending within two years next before the institution of the present

suit. The plaintiff should have averred and proved that her easementary right to draw air and light over the property of the first defendant came to be interrupted only within a period of two years next before the institution of the suit and that within two years after the date of interruption, she has come to the Court with the suit. In this case, of course there is a plea that right from the date of her purchase under Ex.A1 in 1974, she was in enjoyment of the right of easement to draw light and air through the windows provided on the southern wall of her property. The appellant/plaintiff has even gone to the extent of stating that her predecessors-in-title and after them, she enjoyed the said right of easement for more than 75 years. Even if it is assumed that she was in enjoyment of right to draw air and light through the windows facing the property of the first defendant, if it is admitted or proved that the same was interrupted and the suit has not been filed within two years from the date of such interruption, then the appellant/plaintiff shall not be entitled to the declaration that she has got prescriptive easementary right to draw air and light through the windows facing the property of the first defendant. 31.In the plaint, the plaintiff has clearly admitted that the first defendant's property was not vacant and it had a tiled structure with which the first defendant purchased the same about 7 years prior to the date of filing of the suit. It is the further admission of the plaintiff, in paragraph 4 of the plaint, that immediately after the purchase was made by the first defendant, she removed the tiled superstructure and put up a terraced building with ground floor portion alone and that while doing so she put up the northern wall of the ground floor portion in flush with the southern wall of the plaintiff's house without leaving any open space and thereby completely closed the windows that existed on the southern wall of the plaintiff's building depriving her of the light and air through the said windows. The relevant part of the plaint averment is extracted hereunder: The plaintiff states that the 1st defendant's building bearing Door No.13/7, Sundara Vinayagar Koil First Lane facing West is situated on the Southern side of the plaintiff's southern portion of the building. The 1st defendant purchased only a tiled structure about seven years back and there was a court-yard in the said building and there was ample vacant space through which the plaintiff's room on the southern side were drawing light and air. Immediately, after the purchase the 1st defendant removed the tiled superstructure and put up a terraced building with only a ground floor and she put

up her Northern Wall in flush with the building regulations and the plaintiff submits that the said construction is an un-authorized one without any plan sanction from the Corporation of Chennai. While constructing the Northern Wall in flush in the Southern Wall of the plaintiff the 1st defendant has completely closed the two windows existing on the Southern wall of the plaintiff's building and has thus completely deprived the light and air through the two windows to the rooms in which the tenants of the plaintiff are in occupation. The same would go to show that if at all there were windows on the southern wall of the plaintiff's house, the flow of air and light through them were closed when the first defendant put up the ground floor construction 7 years prior to the date of filing of the suit. The very same admission is found in the evidence of PW1 in chief examination in the form of proof affidavit. During cross-examination also, PW1 has clearly admitted that the ground floor portion of the first defendant's house was put up 7 years prior to the filing of the suit and that while putting up the ground floor portion the windows that existed on the southern wall of the building of the appellant/plaintiff was totally blocked. The relevant portion in his evidence in cross-examination is extracted hereunder: "1Mk; gpujpthjp mtuJ brhj;ij fpiuak; bgw;w gpd;dh; 7 Mz;LfSf;F Kd;dh; jiu jsj;ij fl;odhh;" "jiujsk; fl;Lk;nghnj vd; tPl;L Rtwpy; ,Ue;j $d;diy K:otpl;lhh;/" The said admission will show that, if at all there were windows on the southern wall of the plaintiff's house, they were closed even at the time of putting up the ground floor portion of the first defendant's house. Admittedly, the same was done 7 years prior to the filing of the suit. As it is admitted that the windows were blocked while putting up the ground floor portion by erecting the northern wall of the first defendant in flush with southern wall of the appellant/plaintiff, she ought to have approached the Court within two years from the sadi date. The plaintiff had kept quite for 7 years and approached the Court with the suit only after a period of 7 years from the date of closure of the windows that allegedly existed in the southern wall of her property. As per Section 15 of the Indian Easements Act, she will not be entitled to the prescriptive easement as the period of 20 years of enjoyment had not ended within two years next before the filing of the suit in which the right is contested. For the said reason alone, the claim of the appellant/plaintiff for declaration that she has got prescriptive easementary right to draw air and light through the windows which allegedly existed on the southern wall of her building,

which were closed 7 years prior to the filing of the suit, is bound to be rejected as unsustainable. Therefore, the finding of the lower appellate Court that the appellant/plaintiff is not entitled to the relief of declaration that she has such prescriptive easementary right does not deserve any interference in this second appeal.

32. We have seen supra that the appellant/plaintiff had not proved that she has prescriptive right of easement of drawing air and light through the windows that allegedly existed in the southern wall of her building and hence, the prayer for declaration in the said regard is bound to be rejected as unsustainable. The appellant/plaintiff seems to have come forward with the suit since first defendant while putting up construction of her first floor and second floor portions without leaving any space on the north of her property has provided four windows on her northern wall and she may later on claim right of easement to draw air and light through those windows thereby providing obstruction for the plaintiff's development of her property into a storied building. In addition to the said apprehension, the appellant/plaintiff has also contended that the window pans were provided in such a way so as to hang on the open space above the plaintiff's property if they are opened. The first respondent/first defendant denies the fact that four windows have been provided in the northern wall of the first floor and second floor of her building. On the other hand, she has contended that two ventilators and two small windows without window pans and without sunshades have been provided in the northern wall of her building. As it has been admitted by the first defendant that she has put up her northern wall just on the border of her property without leaving any space on the northern side, she has come forward to state that she would give an undertaking not to claim any easement of drawal of light and air through the said ventilators and windows and that in case the appellant/plaintiff chooses to put up a storied building in her property, she can put up her southern wall buttressing the northern wall of the first defendant's building and close those ventilators and the windows. In view of the said undertaking, there shall not be a valid objection on the part of the appellant/plaintiff for provision of windows and ventilators on the northern wall of the building of the first defendant which could be closed as and when the appellant/plaintiff puts up a storied building in her property. There is clear pleadings and evidence to the effect that the windows do not have any sunshades

protruding into the open space of the plaintiff or window pans capable of being opened on the open space above the property of the appellant/plaintiff. The same has not been successfully disproved by reliable evidence. Therefore, the prayer for direction in the nature of mandatory injunction against the first defendant to close the windows and the ventilators provided in the northern wall of the first defendant's property also deserves to be rejected and the lower appellate Court, on proper reappreciation of evidence, has rightly rejected the said prayer.

33. Admittedly the first respondent/first defendant has put up her northern wall right on the borderline without leaving any space on the north. Having done so, the first respondent/first defendant cannot have any right to enter the outer space on the north of her northern wall to maintain, repair or whitewash the same without getting the permission of the appellant/plaintiff. Hence, the appellant/plaintiff shall be entitled to a permanent injunction against the first respondent/first defendant from entering any portion of the plaintiff's property or the open space over it without the permission of the appellant/plaintiff, for the purpose of plastering, whitewashing or maintaining her northern wall. The learned lower appellate Judge has committed an error in holding that the appellant/ plaintiff is not entitled to such relief of injunction also. The said finding is not only defective but also perverse. Hence, the same deserves to be reversed in the second appeal.

34. Similarly, it is an admitted case of both the parties that the first respondent / first defendant has not left even an inch of space on the north of her northern wall. That being so, the fact that she has provided pipe connection on the northern surface of her northern wall will amount to trespass over the property of the plaintiff and hence, the appellant/plaintiff is entitled to a direction in the nature of mandatory injunction to remove the pipelines put up on the northern surface of her northern wall of the first and second floor portions of her building. She has to remove the encroachment and provide the pipeline within her boundary. The lower appellate Court has failed to consider the above said aspect in proper perspective and committed an error and rendered a perverse finding that the appellant/plaintiff was not entitled to the relief of mandatory injunction for the removal of the pipeline on the northern wall of the first and second floor portions of the first defendant's building. The said finding also deserves to be interfered with and reversed.

35. So far as the prayer for damages on the premise that the first respondent / first defendant caused damage to the tiled roof of the appellant / plaintiff while putting up her construction, the trial Court itself, on appreciation of evidence, came to the conclusion that the appellant/plaintiff had not proved her entitlement to recover damages, as against which no appeal or cross-objection was filed by the appellant/plaintiff. The same has become final.

36. For the reasons stated above, this Court comes to the conclusion that the dismissal of the suit in entirety by the lower appellate Court is against law and the same deserves to be set right by this Court in exercise of its appellate power in the second appeal. The appellant/plaintiff shall be entitled to the reliefs sought for in Sub-clause (b), (e) and also (f) of paragraph 12 of the plaint. Hence ,the appeal is allowed in part setting aside the decree passed by the first appellate Court and the decree passed by the trial Court is modified as follows: The plaintiff is granted

1) a mandatory injunction against the first defendant directing her to remove the new pipelines put up on the northern wall of the first and second floor at No.13/7, Sundaravinayagar Koil First Lane, Sembium, Chennai 11;

2) a permanent injunction restraining the first defendant from entering any portion of the property of the plaintiff at No.9/5, Sundaravinayagar Koil First Lane, Sembium, Chennai -11 for the purpose of plastering or whitewashing the walls of the new construction or for any other purpose without the permission of the plaintiff; and

3) a mandatory injunction directing the defendants 2 and 3 to exercise their powers and take action against the first defendant regarding the unauthorized construction of the second floor portion of the building at No.13/7, Sundaravinayagar Koil First Lane, Sembium, Chennai 11 by initiating appropriate action within 3 months in accordance with the provisions of the Town and Country Planning Act and the rules framed thereunder with a clarification that such powers will also include the power of regularisation according to rules. The suit shall stand decreed in respect of the above said prayers alone and in respect of all other prayers, the suit shall stand dismissed. There shall be no order as to costs and the parties shall bear their respective costs in all the three courts. Consequently, the

connected miscellaneous petition is closed. 29.01.2013 Index: Yes/No Internet: Yes/No gpa P.R.SHIVAKUMAR.J., gpa Judgment in S.A.No.286 o

29. 01.2013

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