(2013) 07 P&H CK 0685

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 2026 of 1986 (O and M)

Chita Nand	APPELLANT
Vs	
Smt. Pujari Bai and Another	RESPONDENT

Date of Decision: July 15, 2013

Citation: (2013) 172 PLR 204

Hon'ble Judges: K. Kannan, J

Bench: Single Bench

Advocate: O.P. Hoshiarpuri, for the Appellant; Kabir Sarin, for the Respondent

Judgement

K. Kannan, J.
The following substantial question of law arises for consideration in this second appeal:-

Whether the appellate Court, while reversing the findings of fact regarding the prescriptive right to light and air and the finding regarding the peaceable manner of enjoyment of light and air, could have denied the relief by applying the provisions of Sections 33 and 35 of the Indian Easements Act, 1882?

The second appeal is by the plaintiff, who sued for injunction restraining the defendant from raising any construction that could cause obstruction to free light and air through two windows at the first floor and deprived the plaintiff''s right of his prescriptive easementary right to obtain the accustomed quantum of air and light. The trial Court dismissed the plaintiff''s suit holding that the plaintiff''s construction at the first floor itself had been raised only in the year 1976 and there had been also no proof that he had an unobstructed peaceful flow of air and light. It set out another principle of law as well that there must be a gross hardship caused and the same must be established but finding that all these parameters for the relief of injunction not obtaining in favour of the plaintiff, he proceeded to dismiss the suit.

2. In appeal to the lower appellate Court, the appellate Court reversed the finding both as regards the prescriptive right of easement and the peaceful enjoyment thereon. However dealing with Sections 28, 33 and 35 of the Indian Easements Act, the lower appellate Court found that apart from the bare averment of serious hardship and inconvenience, nothing had been proved to establish that the closure of 2 windows could cause a serious impairment to the enjoyment at the first floor. The injunction which was sought was therefore declined and the appeal was also dismissed.

3. The learned counsel reads from the averment of plaint that there is a specific statement made that the accustomed user of light and air will be completely disturbed if construction is put up and there would be an irreparable loss and hardship caused to him if the construction is made by the defendant that could cause such obstruction. The learned counsel also argues that if the appellate Court was reversing both the findings regarding the prescriptive easement as well as the peaceful enjoyment without obstruction during the entire period of the prescription, the Court ought to have held also on the third aspect that there was proof of irreparable loss and hardship.

4. While considering the third aspect, the trial Court observed that, of the four windows on the east, the plaintiff was restricting the claim only for an apprehended injury of obstruction of air and light only to two of the middle windows. Two other windows on either side were free of obstruction and two rooms at the first floor had therefore an access of light through two windows. Even apart from the windows at the eastern side of the respective rooms, there were four doorways that opened to courtyard which were open to sky. The trial Court had actually observed therefore the particular rooms had not merely two more windows but doorways opening to the courtyard and therefore the plaintiff could not have suffered any inconvenience. I have gone through the provision of Sections 28, 33 and 35 of the Indian Easements Act. Section 28 of the Easement Act describes the extent of easements and as regards the prescriptive right to light or air, the statutory provision is reproduced as follows:-

Section 28(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 irrespective of the purposes for which it has been used.

5. There is no denying the fact that the content of easement is the quantity of light or air that a person is accustomed to obtain during the entire prescriptive period and that there existed a prescriptive right cannot therefore be denied. If the appellate Court''s findings were to be upheld, namely, that the municipal plan had shown that the sanction was obtained in the year 1959 and if the construction was completed within one year in the manner that the sanction order itself prescribed, the construction must have been in existence in its present condition with doors and

windows for more than 20 years at the time when the suit was filed.

6. Sections 33 and 35 of the Act are provisions that would require to be examined to assess the extent of disturbance that could be actionable. These contain specific reference to the extent of invasion of the engagement of a dominant heritage. Section 33 is an empowering provision to institute a suit for compensation for disturbance of easement and a compensation would be justified in the manner set out in Explanations 1 & II as follows:-

Explanation I. - The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this Section and Section 34.

Explanation II. - Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

7. The plaintiff has not sought for any compensation, but he has a suit for injunction for which Section 35 will be the answer. Section 35 is to be read subject to the provision of the Specific Relief Act and the Court will grant injunction under clause (b) if the disturbance is only threatened or intended. When the act threatened or intended must necessarily, if performed, disturb the easement. The injunction therefore will be competent in a case where the plaintiff has a reasonable justification for his belief that the disturbance which is likely to be caused will disturb the easement. Section 35 cannot be viewed without reference to Section 33, which is a statutory recognition of a person to claim also damages as well as the provisions of Specific Relief Act, which sets out parameters for grant of injunction through Sections 36 to 43. Under the Specific Relief Act, injunction will be refused, if damages will be substantial and appropriate relief. Section 41(h) of the Specific Relief Act set out the circumstance ''when equally efficacious relief can certainly be obtained by any other mode of proceeding, except in case of trust. This is always perceived as a situation where damages would be adequate relief. Preventive relief u/s 36 of the Specific Relief Act is granted at the discretion of the Court by injunction, temporary or perpetual. Section 40 of the Specific Relief Act, Court is a power to grant damages either in addition to or in substitution for relief of permanent injunction. A typical situation of instance of other door ways and light and air to enter was considered by Rajasthan High Court in Sohan Lal v. Prem Bar, 1988(1) RLW 655, when the Court held that relief of damages was adequate relief to injunction. The appropriate relief could have been only damages when the Court found that the accustomed light or air would have been diminished in this case but there were other sufficient openings for light and air. The appellate Court, even while dismissing the appeal could have awarded compensation for the partial reduction of light which it was surely likely to

entail by allowing construction of the defendant to come up. I thought for a white whether the plaintiff should be awarded the relief of damages but considering the fact that the defendant has been prevented all these years the right of putting up the construction by virtue of the interim injunction that had been obtained, he had been more damnified than what the situation demanded. The defendant has suffered greater injury in the process of allowing for the interim order to continue this long. No act of the Court could prejudice a party and, therefore, an order of injunction granted itself ought not to be a justification ordinarily for awarding any damages, but at least, I am convinced that the damages which should have been otherwise awarded to the plaintiff is more than offset by the inconvenience which the plaintiff imposed by obtaining an order of injunction for all these years. I do not think there was any justification for the appeal itself and if the plaintiff had preferred the appeal confining his relief only to damages, then his conduct would have been justified. The question of law raised is answered against the plaintiff-appellant and I find no reason to interfere with the orders of the courts below. The second appeal is dismissed. No costs.