SUPREME COURT OF INDIA

K. Sivaramaiah

Vs.

Rukmani Ammal

(R.C. Lahoti and Ashok Bhan JJ.)

20.11.2003

ORDER

1. The appellant and respondent are the owners of adjoining properties situated at Iyyasamy Chetty Street, Triplicane, Chennai-5. Both the properties earlier belonged to M.M. Abdul Shukur Saheb. The appellant purchased his property described as Door No. 5 (New Door No. 6) under sale deed dated 28^th April, 1975. The property situated on the western side of the appellant's property was purchased by the respondent under sale deed dated 30^th June, 1976. The respondent's property is described as Door No. 4 (New Door No. 5). It appears that at the time of purchase by the appellant his property was double storeyed i.e. having a ground floor and the first floor. The appellant demolished the first floor of his building and re-constructed the first floor and second floor above. In the western wall of his property situated towards the respondent's property the appellant opened three windows in the first floor and three windows and one ventilator in the second floor at the time of construction of the above said two floors as stated hereinabove. The respondent's mother filed the Original Suit No. 8206/1976 against the appellant seeking a mandatory injunction directing the appellant to close all the windows and ventilator overlooking the respondent's property. The respondent's mother also claimed compensation for the damage caused to his eastern wall in the process of reconstruction by the appellant. According to the respondent's mother, the appellant had newly opened all windows and the ventilator overlooking the respondent's property through the windows and the ventilator and did not have any right to do so. The appellant pleaded, inter alia, that the first floor which existed prior to the new construction and which was demolished also had three windows overlooking the respondent's property and, therefore, the respondent's mother was not entitled to the mandatory injunction sought for. The learned Civil Judge who decided the civil suit by the order dated 26^th July, 1979 did not decide the guest ion as to whether any easmentary right to light and air had accrued to the appellant. However, the learned Civil Judge found that the windows in the preexisting first floor overlooking the respondent's property did not exist for about 40 years as was urged by the appellant. The learned Civil Judge proceeded on the legal proposition that a neighbour was not entitled to mandatory injunction seeking closure of the other neighbour's windows and ventilator or any openings overlooking his property, and it is always open for any one to raise a wall on his own property and close the openings in the adjoining property if the adjoining property owner had not perfected his right to light :and air by prescription extended

over 20 years of period. This judgment has achieved a finality as it was not appealed against by either party.

2. In the year 1989, the appellant filed a suit (O.S. No. 7359/1989) against the respondent, the exact subject matter of the suit is not ascertained as copies of the pleadings in that suit are not available on record. However, it appears that the windows and the ventilator overlooking the respondent's property were the subject matter of controversy and the appellant was seeking relief alleging the acquisition of prescriptive right. The suit came to be dismissed. The plaintiff preferred an appeal registered as FA 312/1991. However, the appeal could not be decided on merits as the appellant sought for withdrawal of the suit with liberty to file a fresh suit on the same cause of action. The Appellate Court permitted the suit to be withdrawn with liberty as prayed for and the appeal was dismissed as infructuous in view of the suit itself having been withdrawn.

3. In view of the permission allowed by the Appellate Court in FA No. 312/1991, the appellant filed a fresh Suit registered as OS No. 234/1994. The appellant canvassed in his plaint, right for light and air through the six windows and the ventilator situated in the western wall of his property having been acquired by way of prescription. He also sought for a preventive injunction restraining the respondent from raising any construction which would have the effect of blocking the openings in his western wall. The suit was contested by the respondent by raising all possible defences including the plea that the appellant's suit was barred by res judicata. It was submitted that in earlier two rounds of litigation the appellant has failed in establishing his right of easement and the same right of easement is sought to be established in the present suit which would be barred by Section 11 of the. Code of Civil Procedure. Though all the issues were tried but the trial court dismissed the appellant's suit solely on the finding that appellant's suit was barred by res judicata. This finding of the trial court has been upheld in First Appeal and also in Second Appeal preferred by the appellant.

4. The short question which arises for decision in this appeal is whether the appellant's suit filed in the year 1994 can be said to be barred by res judicata. Having heard the learned counsel for the parties, we are satisfied that the High Court and the two Courts below have committed an error of law in holding the suit filed by the appellant to be barred by res judicata. In the present suit instituted in the year 1994, the appellant shall have to establish the acquisition of prescription right of easement under Section 15 of the Indian Easements Act, 1882 by reference to the date of the institution of the suit. This issue did not and could not have arisen for decision either by way of ground of attack in the 1989 suit filed by the appellant or by way of defence in the 1976 suit filed by the respondent's mother. Moreover, the 1976 suit filed by the respondent's mother was dismissed insofar as relief of injunction sought for by the respondent's mother against the appellant is concerned. It was an admitted case of the parties, as has been noted by the trial court also in its judgment dated 4^th August, 1979, that the openings in the western wall of the appellant had existed and yet respondent's mother was held not entitled to the grant of compensation because in the opinion of the trial court the remedy of the respondent's mother was not to seek an injunction against the appellant but to raise a wall on her own property so as to block the openings in the wall of the appellant standing on his own property. By no stretch of imagination the

judgment dated 4^th August, 1979 can constitute res judicata for the purpose of the present situation.

5. So far as the Original Suit No. 7359/1989 is concerned, the findings recorded in the judgment therein could have constituted res judicata, but the fact remains that the Appellate Court permitted the withdrawal of the suit and once the suit has been permitted to be withdrawn all the proceedings taken therein including the judgment passed by the trial court have been wiped out. A judgment given in a suit which has been permitted to be withdrawn with the liberty of filing a fresh suit on the same cause of action cannot constitute res judicata in a subsequent suit filed pursuant to such permission of the Court.

6. We are, therefore, of the opinion that the trial court ought to have examined the evidence, oral and documentary, on other issues as well and recorded findings thereon.

7. The appeal is allowed, the judgment and decrees of the trial court, the First Appellate Court as also of the High Court are set aside. The case is remanded to the trial court for hearing and decision afresh except on the issue of resjudicata which as we have already held does not arise for decision. The appeal stands disposed of in the above said terms. The trial court shall notice the parties for appearance before it and then appoint a date for hearing