

RAJASTHAN HIGH COURT

Rajendra Singh

Vs.

Har Kanwar

Civil Second Appeal No. 284 of 1999

(Prakash Tatia, J.)

13.08.2003

JUDGEMENT

Prakash Tatia, J.

1. Heard the learned counsel for the parties.
2. Brief facts of the case are that the plaintiff filed a suit for temporary injunction on the ground that defendant has obstructed the window of the plaintiff which was opening from the kitchen and store of the plaintiff obstructing the enjoyment of air and light in the kitchen and store by the plaintiff. According to the plaintiff, by closure of window in dispute, there is a 100% loss of free air and light in the kitchen and store. The trial Court dismissed the suit of the plaintiff holding that since there are two doors and one ventilator already available in the kitchen and, therefore, by closure of window in dispute, there is no substantial diminution of air and light. The trial court's judgment and decree dated 8-11-1994 was challenged by the plaintiff by filing appeal which was allowed by the appellate Court vide judgment and decree dated 16-11-1995. The appellate Court accepted the evidence of the plaintiff and reached to the conclusion that by closure of the window in dispute, there will be substantial diminution of air and light. The first appellate Court granted decree for removal of obstruction closing the window of the plaintiff's kitchen and store.
3. The learned counsel for the appellant vehemently submitted that admittedly there are two doors for the kitchen with one ventilator of 2 ft. x 2 ft. in addition to the window in dispute. In view of the above facts itself, it is clear that there cannot be any actionable cause for the plaintiff to file the suit for getting the decree for mandatory injunction as the plaintiff is still having sufficient way for air and light in the kitchen and store. Learned counsel for the appellant submits that the diminution of air and

light must be of such extent which makes the property inhabitable or at least there must be a substantial diminution of air and light. It is also submitted that mere slight loss of air and light is not sufficient for getting the decree for mandatory injunction on the ground of easement. Learned counsel for the appellant relies upon the judgment of the Hon'ble Supreme Court in the case of *Chapsibhai Dhanjibhai Dand v. Purushottam*,¹ wherein the Hon'ble Apex Court, after considering Section 33 of the Easements Act, 1882, observed that under the explanation 2 read with explanation 1 to Section 33 where the disturbance pertains to the right of free passage of air and light passing through the openings to the house, no damage is substantial unless the interference materially diminishes the value of demanding heritage. The Hon'ble Supreme Court further observed that where the disturbance is to the right of free passes of air, damages is substantial, if it interferes materially with physical comfort of the plaintiff. Learned counsel for the appellant further relies upon the judgment of this Court in the case of *Suzan Mal v. Bhanwarlal*,² wherein this Court held that it is obligatory for the plaintiff to prove substantial damage. In this case, there was a space of 2'2" in width in between the plaintiff's house and the stair- case of the defendant. Therefore, this Court held that flow of air and light through apertures cannot be said to have been totally stopped. This act was found of reduction or diminution in the light and air but not of substantial damage.

4. After considering the facts of the case and the reasons given in the judgment of the first appellate Court, it is clear that the first appellate Court found that there are two doors for the kitchen in dispute, one is in the north which is opening in the chowk, whereas other door is in the east which opens in another room. There is one ventilator over the one door. Thus, apertures are in addition to the window in dispute which is opening in the south of the kitchen. The case of the plaintiff is that for free passes of air and light, the window in south is the only source. Learned counsel for the appellant submits that when there are two doors and one ventilator, then there cannot be a substantial demolition (diminution) of air and light because of the closure of the window of southern side.

5. In the facts of this case, I do not find any force in the submission of the learned counsel for the appellant in view of the fact that out of two doors, one is not opening in open but is appearing within another room only. Therefore, there cannot be sufficient air and light from a door opening in another room and has no reach to the air and light from open place or direct from the sky. The other door opens in the chowk and the ventilator are only available source of air and light against there was window in the

south side. Looking to the totality of the facts, even if it is not accepted that there may be 100% diminution of air and light in the kitchen and store, still there will be a substantial diminution of air and light by closure of the window in the south side.

6. Though the finding recorded by the Courts below about the diminution of air and light is a question of fact which has been considered by the first appellate Court, and based on evidence, therefore, this finding cannot be interfered and there appears to be more reason for holding that there will be substantial diminution of air and light by closure of window, situated in the southern side for two apartments, kitchen and store.

7. Therefore, I do not find any force in this appeal and the same is hereby dismissed.

Appeal dismissed.

Cases Referred.

1. AIR 1971 SC 1878
2. 1984 WLN (UC) 195