

IN THE COURT OF THE MUNSIFF, KOCHI

Present :-Sri.Praveen Kumar .G, B.A.L., LL.B, Principal Munsiff

Wednesday, the 9th day of November, 2016, 18th Karthika, 1938

I.A.No.2651/2016 in O.S.No.350/2016

Petitioners/Plaintiffs:-

1. Roshen Aruja, aged 46 years, S/o. Late Stanly Aruja, H.No.CC15/316(1), Kandathil Parambil House, Near Lorretto Church, Moolamkuzhi, Mundamveli P.O., Kochi - 682 507, Ernakulam District.
2. Remmington Aruja, aged 40 years, S/o. Late Stanly Aruja, H.No.CC15/316(1), Kandathil Parambil House, Near Lorretto Church, Moolamkuzhi, Mundamveli P.O., Kochi - 682 507, Ernakulam District.

By Advs. Sajan Mannali, Sashikala V.N.,
Santhi K. Pai & Sudarshan P.S.

Respondents/Defendants:-

1. Antony Anu K.G., aged about 36 years, S/o. George alias Babu, H.No.15/317C, Konnoth House, Moolamkuzhi, Mundamveli P.O., Kochi - 682 507, Ernakulam District.
2. Corporation of Kochi, Cochin Corporation Office, Near Boat Jetty, Ernakulam, represented by its Secretary.
3. Assistant Executive Engineer, Corporation Zonal Office, Fortkochi, Kochi - 1.
4. The Building Inspector, Corporation Zonal Office, Fortkochi, Kochi - 1.

R1 By Advs. Sreely Kumar K.S. & Sandeep V.G.
R2 to 4 No representation

The petition filed under Order 39 Rule 1 & 3 Section 151 of the code of Civil Procedure to pass an interim injunction restraining the 1st defendant, his men and agents restraining them from continuing the first floor construction or any other activities blocking, curtailing/reducing the quantum of plaintiffs right of light and air from the western side.

The petition having been finally heard on 07.11.2016 and the court on 09.11.2016, passed the following:-

ORDER

Application for temporary injunction.

2. Petitioners are the plaintiffs and respondents are the defendants in the suit. Parties are referred to as the plaintiffs and the defendants, as in the suit. Interim order is sought for against the 1st defendant only.

3. Plaintiffs are the owners of the plot 'A' schedule property. Plot 'B' schedule, which lies on its western side, is owned by the 1st defendant. He has constructed a double storied building in it. There is no dispute in respect of the ground floor. According to the plaintiffs, the 1st floor is being constructed in violation of the Building Rules and by obstructing their right of free flow of air and light to their house. Plaintiffs have prayed for a decree of permanent prohibitory injunction to restrain him from continuing with the constructions and for a mandatory injunction to demolish the constructions made unauthorisedly. 1st defendant denied having made any constructions in violation of the building rules or obstructing the plaintiffs' right to get light and air to their property. According to him, he has obtained a valid plan and permit to effect the construction. Alleging that the constructions are strictly in tune with it and that the attempt of the plaintiffs is to stall the construction works of which the permit expires shortly, he has prayed for an order to dismiss the application.

4. Exts.A1 to A17 from the side of the plaintiffs and Exts.B1 to B4 from the side of the 1st defendant, along with Exts.C1 & C2, have been

marked for the purpose of this I.A.

5. Heard both sides.
6. Following points arise for determination:
 1. Have the plaintiffs shown a prima facie case ?
 2. Is balance of convenience is in their favour ?
 3. Whether irreparable injury and loss would be caused to them, if injunction is not granted?
 4. Are the plaintiffs entitled to an order of injunction as sought for ?
 5. Order ?

7. **Points 1 to 5:** Parties are close neighbours. They have managed to secure time to fight for each other amidst their endeavour to put up residential buildings of their own. The suit herein is concerned with the construction works in the 'B' schedule, which is said to be owned by the 1st defendant. The 'A' schedule property, that of the plaintiffs, admittedly lies close to the 'B' schedule, on its immediate eastern side. Obviously, the plaintiffs are armed with a law that construction against Building Rules by the neighbour would give them a cause of action to sue for its enforcement. The 1st defendant's building in the 'B' schedule is a double storied one. Its ground floor was completed much before. It is more or less undisputed that the plaintiffs were gracious enough to give consent for the construction of the ground floor. 1st defendant has produced Ext.B1 to B4 which indicate issuance of building permit, approved plan etc. in his favour. The permit

and plan are Exts.B1 and B2 respectively. Exts.B3 & B4 are the occupancy certificate and property tax receipts.

8. It appears that the plaintiffs' grievance is in respect of the construction of the 1st floor. According to the plaintiffs, the 1st defendant has put up constructions close to their property and even encroaching into it, thereby obstructing their right of light and air to their house. It is also their contention that the constructions are in violation of the Building Rules. Insofar as the first contention is concerned, it is the case of the plaintiffs that they had been enjoying the natural right of light and air through the ventilators and windows on the walls. The allegations would show that what is claimed is a natural right of light and air which comes horizontally and not vertically. As per illustration (d) to Sec. 7 of the Easements Act, the owner of a property has a right to so much light and air as pass vertically thereto. In *Ouseph vs. Thomas* (1986 KLT 1001), it is held that any every owner of a property has only the natural right to light and air vertically coming to his property and not laterally, as existence of natural right to light and air coming laterally would involve a serious restriction of the natural rights of the adjacent owner to build over his land as he pleases or to cultivate the property as he pleases. It is further held that even if the neighbour builds with a view to obstruct the light, he cannot complain or prevent and such complaint or prevention could be had only if he acquires an easement by grant or prescription. In *Thambi Cheriyan v. Babu* (2015 (2) KLT 314) also, the position has been explained that what is claimable as a natural right under Sec.7 is a right to light or air passing vertically to the property and

even light or air received horizontally is not a natural right. Therefore, the claim of natural right will not sustain. Plaintiffs have yet another contention that they had been using the flow of light and air from the western side, openly, continuously, peaceably, uninterruptedly, as of right, for the more than four decades, as an easement. Learned counsel for the 1st defendant argued that the plaintiffs obtained their property itself in the year 1995 and there cannot be any user prior to this and as such, the claim of a right of easement for four decades has to be turned down. However, if the claim is one of prescription, the plaintiffs are entitled under law to continue the user tacked on from their predecessor. Yet, there are no specific pleadings in that respect and even the ingredients of a prescriptive easement right are not specifically pleaded. So, prima facie I am unable to accept a case of easement as well.

9. Exts.A1 & A2 reveal that the Corporation had issued stop memo to the 1st defendant in respect of the disputed construction. The stop memo alleges construction in violation of the approved plan and permit. It is stated in the counter affidavit by him that this was based on a false complaint given by the plaintiffs and when this falsity was realised, the corporation authorities informed that the “stop memo was only a formality” and the work could be continued as there was permit. Exts. C1 & C2 along with the photographs show that the constructions in the 'B' schedule are so close to the plaintiffs' building and even the latter are prevented from opening their windows. Exts.C2 commission was issued after about 2 weeks on the request of the plaintiffs that the 1st defendant effected further constructions

pending suit. Ext.C2 shows that the 1st defendant has made substantial constructions, after the first commission visit. Ext.A1 is clear enough that the construction is not in tune with the building rules and this aspect corroborates the case of the plaintiffs and thus, a clear case of violation of the building rules is apparent. Though the 1st defendant has contended that the plaintiffs too have carried out constructions in their property contrary to the building rules, there are no materials to substantiate it and till date, he has no raised any grievance against it.

10. Ext.A3 is said to be a consent letter allegedly signed by the 1st plaintiff. It is stated that she has no objection in the construction of a staircase close to the northern boundary. On behalf of the 1st defendant, it is argued, relying on Exts.B1 & B2, that the 1st defendant did not submit any such consent letter before the corporation and he need not have obtained any consent from the neighbour. Learned counsel for the plaintiffs, on the other hand, has pointed out that Ext.A3 is received as per the right to information act. This would show that Ext. A3 was also submitted for obtaining plan and permit. Plaintiffs have stoutly denied having executed any such consent letter. It is alleged that Ext.A3 is a forged document. The question whether it is forged is indeed a matter of evidence. Exts. A10 and A12 to A14 however show the plaintiffs' attempt to proceed against the alleged forgery. Ext.A4 is the copy of the consent letter issued by the 1st plaintiff in the year 2013, for which there is no dispute. Notwithstanding that Exts.A3 & A4 are photocopies, a mere comparison of the signatures

purporting to that of the 1st plaintiff in Exts.A3, A4, the plaint and vakalath shows that the allegation of forgery cannot be brushed aside lightly. If that be so, the plaintiffs have presented a prima facie case for trial.

11. It is urged on behalf of the 1st defendant that he has unloaded all the construction materials at the site and that the permit would expire by 19.11.2016 and if an injunction is granted, he would be put to irreparable injury and loss and hence, balance of convenience is in his favour. Ext.A1, as stated earlier, indicates that 1st defendant has made construction in violation of the approved plan. Ext.A2 is a letter addressed to the police by the Asst. Exe. Engineer in which it is stated that even after issuance of stop memo, the 1st defendant continued with the construction and hence, action be taken. The contumacious conduct of the 1st defendant, who has filed caveat and obtained adjournment, is even more clear from his pending suit constructions, evidenced by Exts.C1 & C2. Exts. B1 & B2 have been issued for construction in tune with the approved plan and nothing else. If construction is carried out in violation of it, the 1st defendant cannot be heard to contend that he be permitted to finish off the work in haste and before the permit expires. In view of this matter, I hold that the hardships which would be caused to the plaintiffs if injunction is not granted is more than if it is granted. Therefore, balance of convenience is in favour of the plaintiffs. The materials on record show that the plaintiffs would be put to irreparable injury and loss, if injunction is not granted. Therefore, the plaintiffs are entitled to an order of temporary injunction as prayed for. So,

the petition is allowed as follows:

1. 1st defendant and men under them are restrained from effecting any further construction works in the 'B' schedule till the disposal of the suit.
2. Parties, being close neighbours, are directed suffer their respective costs.

Dictated to the Confdl.Asst; transcribed and typed by her, corrected and pronounced by me in open court on this the 9th day of November, 2016.

Praveen Kumar .G
Principal Munsiff

APPENDIX:

Petitioner's Exhibits:-

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| A1. | 30.09.2016 | Stop Memo issued by Asst.Engineer, Corporation of Kochi (copy). |
| A2. | 01.10.2016 | Copy of the complaint filed by Asst.Executive Engineer, Corporation of Kochi, bearing No.FCP1-3335/2016 before police authorities. |
| A3. | 05.05.2016 | Copy forged & fabricated consent letter submitted by the 1 st defendant before Corporation of Kochi. |
| A4. | 08.08.2013 | Copy actual consent letter issued by 1 st plaintiff to the 1 st defendant. |
| A5. | 14.05.2014 | Copy occupancy certificate of 1 st plaintiff from Corporation of Kochi. |
| A6. | 21.05.2014 | Copy of building tax receipt. |
| A7. | | Copy of location sketch issued from Village Office, Rameswaram. |
| A8. | 23.10.2009 | Copy of Settlement Deed No.3378 of Kochi Sub Registry. |

- A9. Copy of building permit/plan of the 1st defendant's building obtained by plaintiffs under information Act.
- A10. 27.09.2016 Copy receipt issued from Mattancherry SDPO.
- A11. 29.08.2016 Copy of receipt from Corporation of Kochi, relating to the complaint filed by the 1st plaintiff.
- A12. 27.09.2016 Copy of the complaint filed by the 1st plaintiff before Asst. Commissioner of Police, Mattancherry.
- A13. 27.09.2016 Copy of petition filed by 1st plaintiff before Secretary, Corporation of Kochi.
- A14. 29.09.2016 Copy of the complaint filed by 1st plaintiff before Asst. Executive Engineer, Corporation of Kochi.
- A15. 03.10.2016 Copy of the complaint filed by 1st plaintiff before Secretary, Corporation of Kochi.
- A16. 03.10.2016 Copy of the receipt issued to the 1st plaintiff by Secretary, Corporation of Kochi.
- A17. 03.10.2016 Copy of the complaint filed by the 1st plaintiff before Asst. Executive Engineer, Corporation of Kochi.

Respondent's Exhibits:-

- B1. 20.11.2013 Copy of building permit No.FCP1-607/2013.
- B2. 20.11.2013 Copy of building plan.
- B3. 09.05.2016 Copy of Occupancy certificate issued by the corporation.
- B4. 04.07.2016 Copy of building tax receipts.

Witness for both sides:- Nil

Court Exhibits:-

- C1. 27.10.2016 Commission report filed by Adv. Dipu P.S.
- C1(a) Rough sketch.
- C2. 03.11.2016 Commission report filed by Adv. Dipu P.S.

Principal Munsiff

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compd by:

I.A.No.2651/2016 in O.S.No.350/2016

ORDER

Dtd: 09.11.2016