IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended

Telephix Technologies (Pvt) Ltd,
185, Peradeniya Road, Kandy
Plaintiff

SC Appeal 239/2014

SC/HCCA/LA No.27/2014
HCCA No: CP/HCCA/KAN/61/2011(LA)
DC Kandy No: DSP 00334/11

Vs

R.M. Jinasena,
No.47, Sri Dhamma Siddhi Mawatha,
Asgiriya, Kandy.
Defendant

AND

Telephix Technologies (Pvt) Ltd,
185, Peradeniya Road, Kandy
Plaintiff-Petitioner

Vs

R.M. Jinasena,
No.47, Sri Dhamma Siddhi Mawatha,
Asgiriya, Kandy.
Defendant-Respondent

NOW BETWEEN

R.M. Jinasena,
No.47, Sri Dhamma Siddhi Mawatha,
Asgiriya, Kandy.
Defendant-Respondent-Appellant

Vs

Telephix Technologies (Pvt) Ltd,
185, Peradeniya Road, Kandy
Plaintiff-Petitioner-Respondent

Before : Eva Wanasundera PC J
Buwaneka Aluwihare PC J
Sisira J De Abrew J

Counsel : Amarasiri Panditharatne for the Defendant-Respondent-Appellant
Nuwan Bopage for the Plaintiff-Petitioner-Respondent

Argued on : 2.2.2016
Written Submissions
tendered on : By the Defendant-Respondent-Appellant on 16.1.2015
By the Plaintiff-Petitioner-Respondent on 16.3.2015

Decided on : 31.3.2016

Sisira J De Abrew J.

Plaintiff-Petitioner-Respondent (hereinafter referred to as the Plaintiff-Respondent) instituted action in the District Court of Kandy against the Defendant-Respondent-Appellant (hereinafter referred to as the Defendant-Appellant) seeking inter alia the following reliefs:

1. For a declaration that the Plaintiff-Respondent is entitled to a right of servitude of light and air for its building.
2. For an interim injunction and permanent injunction preventing him (the Defendant-Appellant) from obstructing servitude of light and air for the building of the Plaintiff-Respondent and from constructing a building on the South-Western boundary of the land in the 1st schedule to the plaint.

The learned District Judge by his order dated 2.11.2011, refused to issue an interim injunction prayed for by the Plaintiff-Respondent. Being aggrieved by the said order of the learned District Judge, the Plaintiff-Respondent appealed to the Civil Appellate High Court and the said High Court by its

order dated 10.12.2013 set aside the order of the learned District Judge and directed the learned District Judge to issue an interim injunction. Being aggrieved by the said judgment of the Civil Appellate High Court the Defendant-Appellant has appealed to this court. This court by its order dated 4.12.2014, granted leave to appeal on the questions of law set out in paragraph 6(i) to (iv) of the petition dated 16.1.2014 which are set out below.

1. Did the Provincial High Court of Civil Appeals err in law in holding that the Respondent (the Plaintiff-Respondent) has set out a prima facie case since it had enjoyed servitude of light and air without any obstacle?
2. Did the Provincial High Court of Civil Appeals err in law in holding that there is a triable issue before the District Court *i.e* whether the enjoyment of light and air by the Plaintiff-Respondent has been obstructed by the Defendant-Appellant?
3. Has the Provincial High Court of Civil Appeals fallen into grave error of law by recognizing a servitude of light and air *i.e. ne luminibus officiator* where such servitude has been derecognized under our law and as such no legally enforceable right has been obstructed by the Defendant-Appellant?
4. Did the Provincial High Court of Civil Appeals err in law in considering the irrelevances namely, whether the permit issued to the Defendant-Appellant to construct on his land has been lapsed or not when it is manifestly clear that the said permit to construct has been renewed or extended?

5. Did the Provincial High Court of Civil Appeals err in law in by not considering the culpability of the Plaintiff-Respondent who has encroached upon the canal and also the land of the Defendant-Appellant and effected illegal constructions over the canal and as such equity does not favour the Plaintiff-Respondent in granting equitable relief?
6. Did the Provincial High Court of Civil Appeals err in law in failing to consider that path of light and air if at all has been obstructed by the Plaintiff-Respondent by its own volition namely by encroaching upon the municipal canal and constructing over it?

I will now consider the facts of this case. The Plaintiff-Respondent and the Defendant-Appellant are owners of the adjoining premises but there is a common canal in between the two premises. Vide paragraph 7 and 8 of the plaint and the statement made to the police by the Managing Director of the Plaintiff-Respondent. Learned counsel for the Plaintiff-Respondent contended that the Defendant-Appellant was not entitled to construct a building on his land and also encroaching on to the common canal because it would deprive (the Plaintiff-Respondent) of the light and air to the building. Learned counsel for the Plaintiff-Respondent further contended that the Defendant-Appellant's building permit issued by the Municipal Council for the construction of the building had lapsed and that therefore the Defendant-Appellant was not entitled to the construction of its building. It is noteworthy to state that the Municipal Council has not instituted any legal proceedings against the Defendant-Appellant in the Magistrate Court for unauthorized constructions. Learned counsel for the Plaintiff-Respondent also contended that the Defendant-Appellant started constructing the

building after the Plaintiff-Respondent completed its building and that therefore the Defendant-Appellant has no right to obstruct light and air that its building has been receiving all this time. He contended that Plaintiff-Respondent had a right of servitude of light and air to its building and that the Defendant-Appellant has no right to obstruct the said right of servitude.

I now advert to the submission made by both parties. The building permit (V7) issued by the Municipal Council on 20.3.2010 to the Plaintiff-Respondent for the construction of the building has been extended by the document dated 1.7.2009 marked V8 for another one year from 20.3.2009. By document marked V9 the period of this permit has again been extended for another one year from 20.3.2010. Thus building permit would be valid till 20.3.2011. Therefore it is seen that when the period stated in the permit is lapsed, the Municipal council has extended it. Further the Defendant-Appellant has subsequently obtained another permit dated 29.6.2011 valid for one year marked V 10 to construct a bridge relating the said building. V10 contains a clause that the validity of the permit could be extended by another two years if the Defendant-Appellant could not complete the construction of the bridge. If the building that the Defendant-Appellant is going to construct is an unauthorized building or the previous permit has not been extended, the Municipal Council would not have issued the permit marked V10. When I consider all the aforementioned matters, I am unable to accept the contention of learned counsel for the Plaintiff-Respondent and I reject it. It is difficult to conclude on the material placed before court that the Defendant-Appellant has started constructing his building on the common canal.

The main question that must be decided in this case is whether the Plaintiff-Respondent is entitled to a right of servitude of light and air to its building over the adjoining land and whether the Defendant-Appellant is entitled to construct his building approved by the Municipal Council on his land obstructing the light and air that the Plaintiff-Respondent's building is receiving. I now advert to this question. In considering this question I would like to consider certain judicial decisions. In Neate Vs de Abrew (1883) 5 SCC 126 it was held that where a plaintiff had for ten years enjoyed an undisturbed flow of light and air through a window, he acquires a servitude *ne luminibus officiator.* This judgment was followed in the cases of Goonewardene Vs Mohideen Koya & Co. (13 NLR 264) and Pillai Vs Fernando (14 NLR 138). But Basanayake CJ and Abeywardene J in W Perera Vs C Ranatunga 66NLR 337 did not follow the above judicial decisions. They in the said case observed the following facts.

> *"The plaintiff and the defendants were owners of adjoining premises. The plaintiff asserted that the defendant was not entitled to erect a multi-storeyed building on his land because it would deprive him of the light and air which his own building had received through certain windows which overlooked the defendant's land. The trial judge held that the plaintiff had by 'prescription obtained the servitude ne luminibus officiator"*. Basnayake CJ (with whom Abeywardene J agreeing) held *"that a right of servitude of light and air cannot be acquired by prescription by mere enjoyment. i.e., by the mere fact that neighbor has not built on his land for any length of time."* The Supreme Court in the said case did not follow the judicial decisions in

Neate Vs de Abrew (supra), Goonewardene Vs Mohideen Koya & Co (supra) and Pillai Vs Fernando (supra).

Later in 1967 a bench of five judges of this court in Musajee Vs Carolis Silva 70 NLR 217 considered this question and held as follows:

"Under the law of Ceylon mere enjoyment, for ten years, of the free access of light and air through a window of a building does not entitle the owner to the servitude ne luminibus officiator, i.e., the right to prohibit a neighbour from obstructing the window light by erecting a higher building on his land. This servitude cannot be acquired by the mere fact that the neighbour has not built on his land for a long period so as to cause such obstruction of light and air."

His Lordship Justice HNG Fernando in the said judgment at page 226 observed thus:

"In our congested cities and towns, adequate work and living space will have to be provided by the erection of tall modern buildings, which may be in quite close proximity to each other. It is unthinkable that such necessary development of available ground-space should be impeded by the mere fact of the existence on a neighbouring land of a building which has hitherto enjoyed the access of light and air in fact only, and not as of right. The civic authorities have by statute sufficient powers to control development in the interest of public health and other similar grounds."

The Supreme Court in the said case did not follow the judicial decisions in Neate Vs de Abrew (supra), Goonewardene Vs Mohideen Koya & Co (supra) and Pillai Vs Fernando (supra).

Considering the above legal literature set out in W Perera Vs C Ranatunga (supra) and Musajee Vs Carolis Silva (supra) I hold that when two persons become owners of adjoining premises one cannot acquire a right of servitude of light and air by prescription over the other's land by mere enjoyment of light and air for a long period and that mere fact that the neighbour has not constructed a building on his land for any length of time does not give a right to the owner of the other land to acquire a right of servitude of light and air. I further hold that the owner of the adjoining premises who has so far not constructed a building on his land has a right to construct a building approved by the Local Authority/Urban Development Authority on his land which may obstruct the light and air that the adjoining building has been receiving.

For the aforementioned reasons, I hold that the Plaintiff-Respondent in this case has not established that he is entitled to a right of servitude of light and air to its building over the Defendant-Appellant's land. Therefore it is seen that there is no serious question to be tried and the claim of the Plaintiff-Respondent is frivolous. What is meant by a prima facie case? In finding an answer to this question, I would like to consider a passage from the book titled 'Law of Injunctions' by G S Gupta 7th edition page 168 wherein it says thus:

> *"Prima facie case really means that there is a serious question to be tried and that the claim of the plaintiff is not frivolous or vexatious."*

Considering the above legal literature and the facts of this case, I hold that the Plaintiff-Respondent has failed to establish a prima facie case to move for an interim injunction.

If a Plaintiff in an application for an interim injunction has not established a prima facie case, he is not entitled to an interim injunction and in such a situation court should refuse to issue interim injunctions. This view is supported by the following judicial decisions. In Felix Dias Bandaranayake Vs The State Film corporation and Another [1981] 2 SLR 287 at page 302 His Lordship Justice Soza remarked thus:

> *"In Sri Lanka we start off with a prima facie case. That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning."*

In this regard I would like to consider a passage from the book titled 'Law of Injunctions' by G S Gupta 7th edition page 169 wherein it says thus:

> *"Though, the saying is that 'you cannot have the cake and eat it too', a plaintiff who obtains a temporary injunction against the defendant eats the cake even before getting it. Therefore a temporary injunction would be justified only if it was based on a good prima facie case made out by the plaintiff showing that in all probability that he is entitled to get the permanent injunction sought after before going through the evidence depending on the pleadings and documents placed before the Court. Normally, it is in the discretion of the Court to assess whether there is a good prima facie case or not. Granting of an injunction is a very serious matter-it restrains the other party from performing an act or exercising his rights; the Court will not grant an injunction unless it is thoroughly satisfied that there is a prima facie case in favour of the petitioner.*

For the above reasons, I hold that the Plaintiff-Respondent is not entitled to an interim injunction. The learned Judges of the Civil Appellate High Court have failed to consider the above matters.

In view of the above conclusion reached by me, I answer the questions of law Nos. 1to 4 in the affirmative. The questions of law Nos. 5 and 6 do not arise for consideration.

For the aforementioned reasons, I set aside the judgment of the Civil Appellate High Court dated 10.12.2013 and affirm the order of the learned District Judge dated 2.11.2011. I allow the appeal with costs. The Defendant-Appellant is entitled to costs in lower courts as well.

Appeal allowed.

Judge of the Supreme Court.

Eva Wanasundera PC, J

I agree.

Judge of the Supreme Court.

Buwaneka Aluwihare PC, J

I agree.

Judge of the Supreme Court.