

(1919) 01 BOM CK 0001
In the Bombay High Court

Bai Kurvarbai and Others

APPELLANT

Vs

Jamsedji Rustamji Daruvala and Others

RESPONDENT

Date of Decision : 15-01-1919

Acts Referred:

Easements Act, 1882 — Section 15

Citation : AIR 1918 Bom 94 : 49 Ind. Cas. 963

Hon'ble Judges : Basil Scott, C.J.;Hayward, J

Bench : Division Bench

Judgement

Basil Scott, C.J.—This suit was filed by the plaintiffs for a mandatory injunction directing the defendants to remove the screen erected by them against certain Jalis and windows in the western wall of the plaintiffs' house and to the west of the terrace on the second story, and for a permanent injunction restraining them from obstructing the passage of light and air to the Jalis, windows and terrace in future.

2. The lower Courts have held that the plaintiffs are entitled to a mandatory injunction for removing the screen except as to the terrace, and that they are not entitled to a permanent injunction restraining the defendants from obstructing the passage of light and air to the Jalis and windows.

3. The appeal has been preferred by the defendants against the mandatory injunction, and cross-objections have been preferred by the plaintiffs on the ground that a permanent injunction should have been granted. The claim for permanent injunction has not been pressed, and is clearly untenable in the circumstances as they exist at present.

4. The only question remaining, therefore, is whether the defendants should succeed in their appeal with regard to the mandatory injunction. The screen was erected more than 20 years after the Jalis and windows came into existence and the access of light and air through the Jalis and windows has been uninterrupted, so far as physical interruption goes, for upwards of 20 years. The easement,

therefore, claim-ed by the plaintiff has prima facie been acquired. But it is argued that the access and use of light and air have not been "peaceably enjoyed" according to the meaning of those words in Section 15 of the Easements Act.

5. It is contended that the enjoyment has not been peaceable, as in 1895 and again in 1911 notices were given objecting to the maintenance of the windows and Jalis. It is contended by the learned Pleader that, according to the English authorities, it cannot be said that there has been peaceable enjoyment if there has been protest, and a passage from the judgment of Mr. Justice Brown in advising (he House of Lords in Dalton v. Angus (1881) 6 A.C. 740 : 50 L.J.Q.B. 689 : 44 L.T. 844 : 30 W.R. 191 : 41 J.P. 132 was referred to, in which the learned Judge threw out some suggestions as to the weight to, be attributed to protest while an easement is in the course of acquisition; In the ruling judgments which are to be found recorded in that case, Lord Justice Brown's is the only judgment which suggests that protests can have any effect, and Mr. Justice Lindley in advising the House said that he could find no trace of any authority in support of the provision that a protest would be effective to prevent the acquisition of an easement;. No support for the provision contended for is to be found in the judgments of their Lordships of the House of Lords in that case.

6. Then Sturges v. Bridgman 1879 11 Ch. D. 852 : 18 L.J.Ch 785 : 41 L.T. 219 : 28 W.R. 200 was referred to, in which it was said that the enjoyment would not be peaceable if a servient owner contested and endeavoured to interrupt the enjoyment. It is not merely contesting but it is contesting combined with endeavours to interrupt, which the Court thought might interfere with the acquisition of an easement.

7. In Eaton v. Swansea Waterworks Company (1851) 17 Q.B. 267 : 20 L.J.Q.B. 482 : 15 Jur. 675 : 117 E.R. 1282 : 85 R.R. 455 it was held that a conviction before a Magistrate not appealed against might be an acknowledgment that the occupation was not as of right. It is to be observed, however, that the Basements Act, Section 15, where it deals with the easement of light and air for a building, does not make enjoyment as of right one of the conditions for the successful acquisition of such an easement.

8. The learned Pleader for the respondent has referred the Court to the Tagore Law Lectures delivered by Mr. Peacock (pages 360 and 361), who deduces from the cases that "peaceable enjoyment" means "enjoyment without interruption or opposition of the servient owner sufficient to defeat the enjoyment", and again "that obstruction or opposition to enjoyment must find expression in something done 6n the servient tenement or the legal proceedings." The reference to legal proceedings is no doubt a reference to the judgment in Eaton v. Swansea, Waterworks Company (1851) 17 Q.B. 267 : 20 L.J.Q.B. 482 : 15 Jur. 675 : 117 E.R. 1282 : 85 R.R. 455, to which I have already attended. It does not appear to me that the true effect of the authorities can be put more concisely or accurately than in the statement in Peacock's Lectures. I, therefore, find that there has not

been any interruption of the peaceable enjoyment of the easement claimed during the 20 years necessary for its acquisition.

9. Then it is argued that upon the findings of the Court as to the effects of the interference a mandatory injunction ought not to have been granted; But the Court finds that the defendants have completely looked up the Jalis and windows in the western wall, which are the only apertures in that wall, by erecting the screen close to the wall and have completely cut off plaintiffs from access of air from the west and as to the Jalis on the first floor the light and air in the rooms are insufficient, and that is admitted by one of the defendants. Whether or not plaintiffs could get on without access, of light and air through the Jalis and windows in the 2nd and 3rd storeys is a question which we have not got to decide, but the defendants clearly cannot maintain their obstruction against the Jalis and windows in the 1st floor, They must, therefore, take down the whole screen. For these reasons it appears to me that the judgment appealed from was right and this appeal should be dismissed with costs. The cross objections are also dismissed with costs.

Hatward, J.

10. I concur.