

(1968) 04 RAJ CK 0006
In the Rajasthan High Court
Case No : Second Appeal No. 71 of 1961

Syed Habib Hussain and Others

APPELLANT

Vs

Kamal Chand

RESPONDENT

Date of Decision : 24-04-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Constitution of India, 1950 — Article 19(1), 19(5)
Easements Act, 1882 — Section 18
Jaipur Easements Act, 1943 — Section 18

Citation : AIR 1969 Raj 31 : (1968) RLW 580

Hon'ble Judges : P.N. Shinghal, J

Bench : Single Bench

Advocate : K.N. Tikku, for the Appellant; D.P. Gupta, for the Respondent

Judgement

P.N. Shinghal, J.—This second appeal arises from the judgment and decree of Senior Civil Judge, Jaipur City, dated October 5, 1960.

2. The parties own properties on Mirza Ismail Road, in Jaipur City. The plaintiffs are the descendants of Hamid Hussain who, according to them, was the owner of their house under gift deed Ex. 6 dated January 1, 1931 made by Nawab Mukarram AH Khan (D. W. 2) in favour of Hamid Hussain. Adjacent to it, towards the east, is a piece of open land (AMNY) measuring 83" x 16", and the plaintiffs claim that it also belonged to them as it was a part of the gifted house. The property of the defendant is situated along the eastern boundary of this open piece of land, and the defendant claims to be the owner of that property on the basis of a purchase from the "Nawab to whom both the properties once belonged. The defendant constructed a building on the plot of land purchased by him from the Nawab, and as he opened a number of doors and windows on the ground and the first floor facing the eastern portion of the house of the plaintiffs, and also built a balcony on the first floor, the plaintiffs felt aggrieved because, according to them, this caused "bepardgi" of the persons using the open piece of land, and their house. The plaintiffs also felt aggrieved because the defendant

laid a sewer line under the aforesaid open piece of land (measuring 83" x 16"). and built four water spouts and laid some cement pipes on it.

3. The defendant denied the claim of the plaintiffs altogether. He pleaded that the house occupied by the plaintiffs did not belong to them, that the open piece of land AMNY was not their property and that it belonged to Nawab Mukarram All Khan who had given him the right to use it. He also pleaded that there was no "bepardgi" of the house of the plaintiffs by the construction of the doors and windows in his western wall, and that there was no interference with the right of privacy of the plaintiffs. It was further pleaded that the sewer line was laid with the permission of the Nawab. As regards the water spouts, it was pleaded that the defendant had every right to use them. Some other pleas were also taken in defence, but it is not necessary to refer to them.

4. Although no agreed site-plan is available on the record, it is not disputed that plan Ex. 1 (a) correctly shows the disputed open piece of land AMNY, as well as the well on its southern end, the plaintiffs' wall towards the east and their house. There is however a dispute regarding the alleged location of a dilapidated latrine, and another latrine on the northern side of the open land. I have therefore used the site-plan Ex. 1 (a), with the consent of the learned counsel for the parties, for the purpose of understanding the location and the nature of the house of the plaintiffs, the location of the property of the defendant including his Western wall which forms the eastern boundary of the open piece of land AMNY and the location of the well.

5. The trial court framed a number of issues and held that while the house of the plaintiffs belonged to them, the open piece of land AMNY was not their property although it was in their possession for a long time. It also held that there was a custom of "parda" in the family of the plaintiffs and that while the right of privacy was recognized in Jaipur City, it was not consistent with the Constitution. Besides, it held that the right could not be recognized for the further reason that the disputed constructions did not have any effect on the inner apartments in which the ladies resided. As regards the sewer line the trial court held that it had been laid with the permission of the Nawab as well as the plaintiffs and could not be removed. The claim regarding the removal of the water spouts and the pipes was also rejected for the reason that they did not discharge the dirty water. The suit of the plaintiffs was therefore dismissed on December 23, 1958.

6. The plaintiffs preferred an appeal, which has been disposed of by the impugned judgment of the Senior Civil Judge referred to above. That judge also held that the open piece of land AMNY did not belong to the plaintiffs and that even though a part of the verandah and the courtyard of the house of the plaintiffs were visible from the windows of the defendant, and the balcony of the defendant overlooked the plaintiffs' courtyard and verandah, that was not sufficient to constitute an actionable claim because there was no interference with the privacy of any of the rooms of the plaintiffs. He also held that the claim of the plaintiffs was repugnant to the Constitution, and went on to observe that

since the defendant had given an offer to raise the wall of the plaintiffs at his own cost and ,the plaintiffs had refused that offer, there was no justification for the exercise of the court's discretion in their favour. Further, the learned Judge observed that even though the plaintiffs had cited a judgment showing that the custom of privacy existed in Jaipur town, they did not plead or prove that it continued to remain in force after the commencement of the Easements Act.

7. It may be mentioned that as it was not quite clear from the pleadings of the parties, or the issues, whether the plaintiffs claimed the right of privacy merely on a customary right, or whether they based it on the provisions of Section 18 of the Easements Act the learned counsel for the appellants submitted that the case really fell within the purview of Section 18 and requested that it may be decided only on that basis. Mr. Gupta, learned counsel for the defendant-respondent, did not raise any objection to this request. I shall therefore proceed to examine the case with reference to the said Section 18.

8. It is not disputed In this court that the house occupied by the plaintiff is their property for purposes of the present suit, and I need not go into the merits of the earlier controversy on that point. There is however a dispute regarding the ownership and possession of the open piece of land AMNY measuring 83" x 16" and this part of issue No. I will therefore be considered first of all.

(After considering evidence the judgment proceeded, Prs. 9 to 14).

15. It would thus appear that there "is no reason to disagree with the concurrent finding of fact of the two courts below that the plaintiffs had not succeeded in proving that the disputed land AMNY was their property.

16. I shall now proceed to consider the claim regarding the easement. The plaintiffs felt aggrieved because of the opening of doors and windows on the ground floor, and the opening of the windows on the first floor as well as the construction of the balcony, and the claim has been based on Section 18 of the Easements Act. It has however not been pressed before us in regard to the doors and windows on the ground floor and the question is whether it has rightly been disallowed for the windows on the first floor and the balcony?

17. It has been argued by Mr. Gupta that the plaintiffs should not be heard to say that they had any such customary right of privacy because they did not plead it did not join issue in regard to it, and did not prove it by evidence. The learned counsel has therefore argued that it would prejudice the defendant if the plea is seriously considered in this second appeal and that the courts below also erred in considering it.

18. I have examined the entire record for the purpose of considering this submission of Mr. Gupta. I find that the plaintiffs have used the word "bepardgi" four times in the plaint, and the context leaves no room for doubt that by using that word they really claimed a right of privacy. Thus the statement in the plaint that the new windows caused "bepardgi", was really meant to convey the plea

that they invaded the right of privacy of the plaintiffs. Even the word "privacy" has been used in the plaint in specific terms. Moreover a perusal of the written statement shows that the defendant understood, in fact and substance, that by using the word "bepardgi" the plaintiffs were really claiming the right of privacy. It would be sufficient in this respect to refer to those parts of paragraphs 2 and 3 of the written statement in which the defendant clearly took the defence that there was no "bepardgi" by the impugned constructions and that they did not interfere with the right of "privacy" of the plaintiffs. Besides, the plaintiffs have also pleaded that the custom of "parda" was prevalent in Jaipur, and in India the right of privacy can be said to be based largely on that custom. It is therefore futile to argue that the plaintiffs have not taken the plea that the windows and the balcony were Invasions on their right of privacy in the house. In almost similar circumstances, this court took the view in *Gokalchand V. Brijnarain*. 1954 Raj LW 710 that the use of the word "bepardgi" in the plaint was sufficient to sustain the plea of right of privacy. I am in respectful agreement with this view.

19. It is true that the issues do not in terms, refer to the right of privacy and issue No. 3 (a) no doubt deals with the question whether there was a custom of "parda" in the plaintiffs' family. While issue No. 3 (b) appears to relate to the question whether such a custom of "parda" was established and well recognized in Jaipur City. But a perusal of issue No. 3 (c) shows that the real point asked by issues Nos. 3 (b) and 3(c) was that relating to the existence of the right of privacy in Jaipur City, for there could really be no question of the constitutional invalidity of the private custom of "parda" amongst the ladies. The fact, therefore, that issue No. 3 (c) relates to the question of invalidity of the custom referred to in issue No. 3(b), shows that both those issues relate only to the question of the right of privacy, and not the personal right of observing "parda" by the women-folk residing in Individual families or localities. This is further clear from the fact that the issue No. 4 clearly raises the question whether the disputed constructions infringe the right of privacy in the plaintiffs' house? By itself, this is quite sufficient to negative the argument that the plaintiffs had not pleaded or joined issue on the question of the right of privacy. Besides, the defendant undoubtedly knew that it was this point which was the real and substantial point of controversy with the plaintiffs, and plaintiff Mumtaz Hussain P. W. 5 was therefore cross-examined about it. It is therefore futile to argue that a new case was made up during the course of the arguments in the two courts below, to the prejudice of the defendant. The parties went to the trial with the knowledge that the question of the existence of the right of privacy was in issue between them, and they had ample opportunity to lead their evidence in regard to it. As a matter of fact, in a case where a well-known custom exists, it is not very necessary that the plaintiffs should set up the existence of such a custom in any great detail or with any particular emphasis.

20. I shall therefore proceed to consider the question whether a right of privacy, of the nature claimed by the plaintiffs, existed in the locality but, before doing so, I may as well refer to the nature of such a customary easement. It is

different from a mere customary right, or a right arising by custom, but unappurtenant to a dominant tenement. The reason is that, as 1 had occasion to observe in *Ramchandra Singh v. Pratap Singh*. 1LR (1965) Raj 948 : AIR 1965 Raj 2171 while it is no doubt true that custom gives rise to a customary right as well as a customary easement, there is a vital difference between the two as Section 2(b) of the Easements Act makes it quite clear that the Act does not deal with a customary right. The reason is that customary rights are rights arising by custom, but unappurtenant to a dominant tenement, while a customary easement can exist only for the beneficial enjoyment of other land and it is appurtenant to the dominant heritage and cannot exist in gross. All the same, where a customary easement is claimed by virtue of Section 18, the essential characteristics of a custom bearing on it have to be established. The courts, however, j recognized the customary right of pri-vacy even before the commencement of; the Easements Act, in States or localities where it was found to exist, and it was only later that it was recognized as an easement u/s 18 of the Easements Act.

21. A case like the present falls under illustration (b) of Section 18, but even so the right is different from a prescriptive easement which comes into existence by user over the prescribed length of time. There is no such requirement in the case of a customary easement because nobody really knows when it first came into existence. The right is not, however, personal to any individual or society, and is attached to land for its beneficial enjoyment, as has been held in *Bhagwan Das and Others Vs. Zamurrad Husain and Another*, ; *Nihal Chand v. Mt. Bhagwan Dei*. : AIR 1934 All 527 and its appellate judgment in *B. Nihal Chand and Another Vs. Mt. Bhagwan Dei*, , *Mt. Daroupadi Debi and Another Vs. S.K. Dutt and Another*, . *Mt. Subhaga v. Mt. Janki* AIR 1926 Oudh 541, *Shridhar v. Rajabhau* AIR 1928 Nag 39 (2), *Laduram v. Sheodev* 1959 RLW 273 and ILR (1965) Raj 948 : AIR 1965 Raj 217.

22. Having referred to the nature of a customary easement of privacy, I may as well deal here with the questions off its proof. By its very nature, the origin; of a custom is lost in antiquity, but the evidence has. nonetheless, to be such as to prove that the custom was consciously followed or recognized as governing the locality for which it is claimed, and one of the modes of proof is to establish the particular instances, referred to in Section 13(b) of the Evidence Act in which it was claimed, recognized or exercised. In that context, judgments not Inter partes will also be relevant if they relate to the custom, even though they may not be conclusive proof thereof. It is also well established that in the case of a customary easement, the court can take judicial notice of a well-established custom, and I may in this connection refer to the decision in *Baqridi v. Rahim Bux* AIR 1926 Oudh 352 for the view that this can be done by virtue of Section 57 of the Evidence Act which is not exhaustive. In fact in the leading case of *Gokul Prasad v. Radho* ILR (1887) All 358 their Lordships based their decision on a consideration of all the reported and unreported decisions bearing on the point, and gave judicial recognition to the customary right of privacy in what were then

known as the B. Nihal Chand and Another Vs. Mt. Bhagwan Dei, it has been held that it is open to a court to take judicial notice of a custom and it is not necessary that there should be evidence in each case to establish it. In the present case, I have no hesitation in taking judicial notice of the custom as recognised in Jaipur, in the cases which have been cited at the Bar, for the purpose of holding that a customary right or easement of privacy was well established in Jaipur City. I may refer here to the decisions in Kesarlal v. Malilal, 19241 JLR 3 ; Khair Uddin v. Jagannath 1925 1 JLR 11 and Kanhaiya v. Sedhu 1940 13 JLR 86. Two of these judgments were noticed in 1954 RLW 710 and it was held by Sharma J. in his abovementioned judgment that even though the plaintiffs had not led any evidence to prove that the custom of privacy prevailed in the Jaipur City, the judgments of the Jaipur Chief Court fully proved that there was such a custom. It was therefore held by him that, "it may be taken that the custom of privacy has become so notorious in the city of Jaipur that the courts can take even a judicial notice of it". Following this view, I have no hesitation in taking judicial notice of the aforesaid judgments and in holding, in the absence of any evidence to the contrary, that a customary right of privacy existed in Jaipur for such a length of time as to suggest that it became the customary law of the locality so as to become a customary easement within the meaning of Section 18 of the Jaipur Easements Act, 1943 (Act No. VI of 1943), or Section 18 of the Indian Easements Act of 1882.

23. But it is necessary for a customary easement that it should not only be ancient and certain, but that it should also be reasonable, because this is another essential requirement of a valid custom. A custom will not therefore have the sanction of Section 18 of the Easements Act if it is not reasonable, but wherever the claim has been found to be reasonable, it has been upheld by courts of law, A number of decisions have been rendered on the point and I may refer to the well-known decision of Edge C. J. in ILR (1887) All 358 which was followed by him in Abdul Rahman v. D. Emile ILR (1894) All 69 . Those two decisions were given before the commencement of the Indian Easements Act in the North-Western Provinces, but they have been followed thereafter in Jamiluddin and Others Vs. Hafiz Abdul Majid , Chhedi Ram v. GokulChand, AIR 1928 All 717; : AIR 1934 All 527 and its appellate judgment B. Nihal Chand and Another Vs. Mt. Bhagwan Dei, and Bhulan Lal and Others Vs. Altaf Husain, . The same view has been taken in Fazal Haq Vs. Fazal Haq, , Mt. Jarao Vs. Sri Nath Byas, and Mt. Daroupadi Debi and Another Vs. S.K. Dutt and Another, . So far as the other High Courts are concerned, I may refer to the decisions in AIR 1926 Oudh 352 : AIR 1926 Oudh 541 : AIR 1928 Nag 39 (2), Gulabchand Gappalal Sarawgi Vs. Manikchand Gulabchand Sarawgi, and Keshab Sahu Vs. Dasaratha Sahu and Others, . So far as the decisions of this court are concerned, I have already referred to 1954 RLW 710 and 1959 RLW 273. In paragraphs 8 and 9 of Laduram"s case 1959 RLW 273 it has been observed that

"A person is not entitled to a customary easement right of privacy merely on the ground that a custom of "Parda" is observed in his family. A customary easement

right of privacy is not a personal right of an individual but is a right attached to property and that although the right cannot be stretched to oppressive lengths, an actionable case can only arise when there is substantial interference with the privacy of those parts of the house which are used by pardanashin women."

It would thus appear that in all the cases mentioned above, the right of easement has been upheld wherever it was found to be reasonable.

24. Mr. Gupta, learned counsel for the respondent, has cited four cases for a contrary submission, but I find that all of them are easily distinguishable. In *Bhagwan Das and Others Vs. Zamurrad Husain and Another*, the claim was disallowed for the reason that the plaintiffs made no effort of any sort whatever to prove, and had not even alleged, that a customary right of privacy existed in the particular neighbourhood in which they were living, and that was the reason why their Lordships did not uphold the claim. It may be observed, with all respect to the learned Judges who decided the case, that they did not take notice of the numerous other decisions, besides the case of *Gokal Prashad ILR (1887) All 358* in which the Allahabad High Court had taken the view that the customary right of privacy was well established in the United Provinces and that it was not really necessary that the existence of that customary easement should have been proved in respect of the particular locality for which it was claimed when it had been held to have existed all over the Provinces. In fact another Bench of the same High Court in *B. Nihal Chand and Another Vs. Mt. Bhagwan Dei*, did not approve of that judgment and disposed of it by observing that the attention of the learned Judges was not drawn to the fact that there had been numerous cases of that court subsequent to *Gokal Prasad's* case *ILR (1887) All 358* in which such a right of privacy had been recognized even without strict proof of the existence of a custom in the particular locality. *Jivraj Virjee v. Keshavji Lakhamshi AIR 1952 Kutch 22* does not seem to benefit the respondent because, far from rejecting a claim for a customary right of privacy u/s 18 of the Easements Act, it has been held therein that privacy could be claimed in respect of premises or those parts of premises which are secluded from observation. It is true that there is a further observation to the effect that privacy could not be claimed in respect of a garden, a courtyard or a verandah, but this has expressly been stated to be so if they are not intended to be secluded from observation. The decision therefore cannot avail the respondent. The decision in *Kanbi Deva Karsan v. Kanbi Bava Punja AIR 1953 Sau 67* was based on *AIR 1952 Kutch 22* and the right of privacy was upheld by custom for those portions of the house which could be considered as private. That judgment also cannot be said to be of any help to the respondent. Of course, *Basai Vs. Hasan Raza Khan and Others*, is a case in which some observations have been made against the view taken in *Gokal Prashad's* case *ILR (1887) All 358* but, with all respect to the learned Judge who decided it, it appears to me that his remarks are in the nature of obiter dicta and they cannot, at any rate, be said to express the considered view of this court which has, in fact, been stated in the numerous cases to which I have made a reference already.

25. Mr. Gupta has however raised another argument, with reference to issue No. 3 (c), that the easement of privacy claimed by the plaintiffs is unconstitutional. He has argued that Article 19(1)(f) of the Constitution guarantees the fundamental right to all citizens "to acquire, hold and dispose of property," and that the defendant's right to hold his property is an absolute right and the plaintiffs could not make a grievance if he exercised it by constructing a house in which there were windows or balconies overlooking any portion of the house of the plaintiffs. The learned counsel has argued with reference to *Iswari Prosad and Others Vs. N.R. Sen and Another*, that the right to hold the property guaranteed by the Constitution includes the right to enjoy the same and that where a person's enjoyment of property is restricted, his right to hold the property is also thereby restricted. So also the learned counsel has relied on *K. Ramchandran v. Commr. Hyderabad Municipal Corporation*, AIR 1960 Andh Pra 603 for the submission that a person is entitled under Article 19(1)(f) to acquire property by raising a building upon his own land and no restriction, not statutorily authorised, can be imposed upon the exercise of that right.

26. The argument seems, however, to be based on a misconception of the scope of Article 19(1)(f) of the Constitution and the decisions of the Calcutta and the Andhra Pradesh High Courts just referred. Clause (5) of the article reads as follows,---

"(5). Nothing in Sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

It is therefore an integral part of the fundamental right to hold the property, enshrined in Clause (1) of article 19, that it should be subject to the operation of any law imposing reasonable restrictions on the exercise of that right; and the question is whether any restriction, nothing to say of an unreasonable restriction, has at all been imposed by S, 18 of the Easements Act in so far as it relates to the easement of privacy.

27. The said Section 18 and illustration (b) thereof are to the following effect,--

"18. Customary Easements. An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Illustrations.

(a) ..

(b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy, A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation and B

acquires a like easement with respect to A's house."

It would thus appear that there is really no restriction on B's right in favour of A's house because, as has been made amply clear in the illustration, B also acquires a like easement with respect to A's house, so that the right really exists for the benefit of both the properties in an equal manner and on a completely equal footing. If there is a restriction on B's right on account of the right of privacy for A's house, there is an countervailing advantage, in equal measure, in favour of B's house. In such a case therefore, it is futile to argue that anybody's right to property is adversely affected or restricted and this by itself is sufficient to foreclose the argument of Mr. Gupta to the contrary.

28. It is true that the fundamental right to hold one's property guaranteed by the Constitution is a right to enjoy all the benefits attached to the ownership of the property, and if such an enjoyment is restricted, the restriction would undoubtedly affect the right adversely. But human life is very complex, and an unfettered fundamental right of even such a nature may, in a given state of circumstances, adversely affect a similar right of another person. And it is for the purpose of harmonizing the exercise of the right to property of every member of the society that the Constitution has made it clear in Clause (5) that the right mentioned in Sub-clause (f) of Clause (1) shall be subject to the reasonable restrictions imposed by the law in the interest of the general public.

29. The test of reasonableness of any such restriction has been stated by their Lordships of the Supreme Court in *Chintaman Rao Vs. The State of Madhya Pradesh*, by observing that the restriction should not be arbitrary or of excessive nature, beyond what is required in the interest of the public, so that the restricting legislation can be held to be reasonable if it strikes a proper balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by the restriction contemplated in its subsequent clause. A similar point arose for consideration in the *State of Madras Vs. V.G. Row*, and their Lordships laid down the test of the reasonableness of the restriction by saying that it should be decided with reference to the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing conditions at the time. The reason is that, as has been observed in *Hatisingh Mfg. Co. Ltd. and Another Vs. Union of India (UOI) and Others*, , the object is to achieve social justice in the interest of the general public. In other words, the court has to take into account the evil that was sought to be remedied by such law and the ratio of the harm caused "to individual citizens, by the proposed remedy, to the beneficial effect reasonably expected to result to the general public. *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, .

30. It has therefore to be seen whether the customary easement of privacy of the nature claimed by the plaintiffs is reasonable so as to be recognized u/s 18 of the Easements Act. As the right is based on custom which, as has been stated,

has to fulfil the requirement of reasonableness before it can claim its recognition in a court of law, the question of the reasonableness is the sine qua non of the claim. It is therefore for the court to decide whether this requirement has been fulfilled, and to uphold only that claim which is reasonable and substantial. If therefore it is found that the intrusion on one's privacy is of a substantial nature or, in other words, as has been stated in illustration (b) of Section, 18 of the Easements Act, if the offending new window of B's house invades the privacy of those portions of A's house which are ordinarily excluded from observation, there is no reason why A should not succeed in his claim for their closure.

31. What is substantial invasion on the neighbour's privacy, is a matter to be examined with reference to a number of factors like the climatic condition, the, habits of the people, and the conditions of domestic life in the locality. For instance, in a city like Jaipur, the climatic conditions are such that for several months in the year the ladies are compelled to sit in the verandahs or in the open in the evenings and to sleep there during the nights. The habits of people are also such that the women, particularly Muslim women of middle class society, observe "parda", and the conditions of the domestic life confine their activities to the inner parts of the houses. It is true that in changing society these factors undergo changes from time to time, and notions about invasion on one's right of privacy also undergo a consequential change, The pace of the change depends largely on the state of social work and literacy in the area but, by its very nature the process is quite tardy As it is. there is no evidence to show that the customary easement of privacy has been given up in Jaipur City. On the other hand, as has been stated, it was found to exist in 1954 and it has not been contended that it has ceased to exist thereafter So it remains for the courts to decide what really amounts to a substantial invasion on the neighbour's right of privacy, and this duty has to be discharged with a greater sense of responsibility wherever changed circumstances of social life are shown to exist-In the present case, however, no such change has been pleaded or proved,

32. It is in this background that it has to be decided whether it could be said that the plaintiffs' easement of privacy has been adversely affected by the construction of the windows and the balcony on the first floor.

33. In order to arrive at a decision, I have looked into the plan of the plaintiffs' house Ex. 1 (a). It shows that there is a row of four rooms, with a running tin-shed towards the north and a courtyard thereafter. It is therefore unavoidable for the women of the house to use the tin-shed as and when necessary, and to sit and sleep in the courtyard in the evenings and the nights during the summer. The plaintiffs have proved that the women of their house observe "parda" and that the courtyard is clearly visible from the defendant's windows on the first floor so much so they have to set up a "parda" or screen before the women can go to sleep. The defendant has admitted that the ladies of the house of the plaintiffs must be sitting outside the rooms in the tin-shed and the courtyard and must be sleeping in, the courtyard. He has also admitted that the courtyard is

visible from his windows and that a person sitting in the tin-shed is visible from the balcony. Further he has admitted that the ladies go about in "parda". Then there is the inspection note of the Munsiff which has been read in evidence with the consent of the learned counsel for the parties, and it also shows that the courtyard and portion of the verandah are visible from the windows on the first floor and a major portion of the verandah is visible from the balcony. This has in fact not been disputed in this court, and the very fact that the defendant offered to raise the wall of the plaintiffs at his own expense, shows that he realised that his windows and balcony on the first floor invaded the privacy of the plaintiffs' house. The invasion of the right of privacy is therefore substantial and it is quite reasonable that the offending windows should be walled up, or covered with permanent "Jalis" known locally as "akashi patali Jalis" for, this is also considered sufficient by the learned counsel for the appellants. So far as the balcony is concerned, it has either to be removed or so enclosed to make it impossible for any one to look into the tin-shed or the courtyard of the house of the plaintiffs.

34. In the result, I allow the appeal in part and set aside the judgment of the lower appellate court to the extent of decreeing the suit by directing that the windows in the western wall of the house of the defendant, on the first floor, shall be walled up or covered with permanent "Jalis" known locally as "akashi patali jalis", and the balcony removed or so enclosed as to make it impossible for any one to look into the courtyard or tin-shed of the plaintiffs. Further, it is decreed that the defendant shall be restrained from opening any such offending window or building any such balcony in the future. The appeal fails with regard to the claim for the closure of the door and the windows on the ground floor. Besides, as the open piece of land AMNY is not the property of the plaintiffs, the appeal is dismissed in regard to the rest of the claim also. The parties will be entitled to costs in proportion to their success or failure throughout.