

(1887) 05 CAL CK 0008
In the Calcutta High Court

The Dalhi and London Bank, Ltd.

APPELLANT

Vs

Hem Lall Dutt

RESPONDENT

Date of Decision : 25-05-1887

Acts Referred:

Limitation Act, 1871 — Section 26, 27

Citation : (1887) ILR (Cal) 839

Hon'ble Judges : Trevelyan, J

Bench : Single Bench

Judgement

Trevelyan, J.—In this suit the plaintiff Bank seeks to prevent the erection of a new building on the south side of their premises on a piece of land belonging to the defendant, and complains that the erection of such building will materially interfere with the access of light and air heretofore enjoyed by the occupants of the Bank premises.

2. The issues raised by counsel, and settled by me at the hearing, were as follows:

(1) Are the plaintiffs entitled to the use and access of light free from obstruction in the same manner as the same were enjoyed at the date of the conveyances of March 1836, mentioned in the plaint?

(2) How were such use and access of light had and enjoyed?

(3) Are the plaintiffs entitled to the use and access of air free from obstruction in the same manner as the same were enjoyed at the date of the conveyances of March 1836, mentioned in the plaint?

(4) How were such use and access of air had and enjoyed?

(5) What access of light (if any) to their premises have the plaintiffs acquired the right to by possession or prescription?

(6) What access of air (if any) to their premises have the plaintiffs acquired the

right to by possession or prescription?

(7) Has there been any actionable obstruction to the plaintiffs' rights if any?

(8) To what remedy (if any) are the plaintiffs entitled?

(9) To what damages (if any) is the defendant entitled in consequence of the ad interim injunction?

3. It was agreed at the hearing that in case I should determine this suit in favour of the defendant, I should not try the 9th issue, but should refer the question of damages to an officer of the Court.

4. It appears that prior to March 1836, the premises now belonging to the plaintiffs, and the piece of land to the south, which now belongs to the defendant, were both the property of the same person, a Mr. Fairlie.

5. On the 30th of March 1836, Robert Castle Jenkins, who was a trustee for the sale of, amongst other property, these two parcels of land,, conveyed the portion, now occupied by the Delhi Bank, to Mr. Thomas Sandes.

6. On the same day he conveyed to Mr. Ross Donnelly Mangles the other premises which are now owned by the defendant.

7. On the 28th of April 1866, Mr. Sandes conveyed to the Delhi Bank the premises now occupied by the Bank.

8. On the 30th of March 1836, Mr. Mangles executed a deed of covenant to produce title deeds. This deed recited the recent purchases by himself and Mr. Sandes.

9. In 1877 the defendant commenced to build a wall along the northern edge of his property adjoining the property of the Bank.

10. The attorneys of the Bank immediately wrote and complained of this wall. The defendant asserted his right to build, but, eventually at the instance of his own tenant, the National Bank, he desisted from completing the wall. The wall was left in an unfinished state and of different heights. It ran from the north-west corner of a long godown which filled up the eastern side of the defendant's premises up to a distance of about 28 feet 4 inches.

11. This new wall overtopped the old boundary wall, which from the plaintiffs' side was about 3 1/2 feet in height, by the following varying heights—from about 10 feet 3 inches from its east end and by about 9 feet 9 inches, and the next 3 feet 3 inches by 8 feet 9 inches, for the next 2 feet 2 inches by 7 feet 11 inches, and from the next and remaining 13 feet 10 inches by 5 feet 10 inches.

12. This wall undoubtedly must have lessened the value of the plaintiffs' premises, as it shut out the direct breath of the south breeze from the greater portion of the lower floor of the Bank's house. It also must have excluded some of the direct sunlight. This wall has played an important part in the hearing of

this suit, but, in the view which I take of this case, I think that its importance has been exaggerated. Nothing more was done until the present year, when the defendant proposed to erect the buildings now in question. Some correspondence then took place, the new buildings were commenced, and the present suit resulted. In admitting the plaint Mr. Justice Macpherson issued a rule calling upon the defendant to show cause why he should not be restrained from continuing the building during the pendency of the suit, and he also granted an ad interim injunction. For reasons which I gave at the time, I discharged the rule and the ad interim injunction. The building has been continued, and is now, as I understand it, approaching completion.

13. A great many cases have been cited to me by both sides. On a consideration of those cases I do not think that there is any doubt about the law in this case. Mr. Stokoe insists that the tendency of recent decisions is to show an expansion or development of the law in a direction favourable to the owner of the dominant tenement. I do not agree with this contention, as it appears to me on an examination of the cases that the right has not been in reality extended at all. Most, if not all, of the cases referred to are cases in which there has been an alteration in the dominant tenement, and it was necessary to compare the opening in the old and the new buildings and the amount of light and air gaining access to each over the servant tenement. But even if there were in these cases observations tending to show that the law had altered in the way suggested, I think I am bound by the case of *Bagram v. Khettranath Karformah* 3 B.L.R.O.C. 18 in which the law at that time was authoritatively laid down by a Division Bench of this Court hearing an appeal from the original side. This decision, it seems to me, concludes any question, as far as a Judge sitting on the original side of this Court is concerned, as to what was the law before the passing of the Limitation Act of 1871.

14. As to how the present Acts have altered the law, which existed before the passing of the Act of 1871, I will hereafter consider.

15. Apart from any question under the Limitation Act, and apart from an express grant, it seems to me that easements of light and air, however acquired, do not vary so far as their extent and operation are concerned.

16. There is no doubt that where a person grants a portion of his land, reserving a portion to himself, he grants with it all the easements and quasi-easements which had been formerly used over the part reserved by the part granted, and which were necessary thereto. There is also no doubt that where contemporaneously an owner, as was done here, grants two portions of his land to each of two persons, each having notice of the grant to the other, the easements and quasi-easements are also granted. For the first proposition the case of *Wheeldon v. Barrows* L.R. 12 Ch. D. 31 is an authority, and for the second the case of *Allen v. Taylor* L.R. 16 Ch. D. 355.

17. These cases do not show that the easements of light and air, which are

impliedly granted under these circumstances, are in their extent any greater than easements acquired by prescription.

18. The case of *Leech v. Schweder* L.R. 9 Ch. D. 472 is an authority for the contrary proposition, and holds that a person who acquires an easement by the disposition of the owner of two tenements only acquires it to the same extent as if he had acquired it by prescription.

19. Apart from any question as to the effect of the Limitation Acts of 1871 and 1877, it is clear what the rights to light and air are. The right to air was before the passing of the first of those Acts as Mr. Justice Norman put it in *Bagram v. Khettranath Karformah* 8 B.L.R. O.C. 45: "To give a right of action (in a case where there is no express contract on the subject) for an interference with the access of air to dwelling-houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house; in other words, to render the house unfit for the ordinary purposes of habitation or business." There are numbers of authorities for this proposition both in England and in this country.

20. I think there can be no doubt that at any rate before the passing of Act IX of 1871, there was no right to the south, or any other, wind as such. In *Bagram v. Khettranath Karformah* at page 47, Sir Barnes Peacock, the then Chief Justice, says: "I am of opinion that by the use of the south window uninterruptedly for upwards of 20 years, the plaintiff did not acquire a right to enjoy the south breeze without obstruction. Such a right may be acquired by express grant, but it cannot be acquired merely by prescription arising from user, whether the presumption is a presumption of prescription or not," and this alleged right to the south wind is also repudiated by Mr. Justice Peterson in the case of *Barrow v. Archer* 2 Hyde 125 (129).

21. The right to light is in *Bagram's* case at page 46 put by Sir Barnes Peacock as follows: "But the only amount of light for a dwelling-house which in my opinion can be claimed by prescription, or by length of enjoyment without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house."

22. For this proposition there is an abundance of English authorities, and there is also the case of *Modhoosoodun Dey v. Bissonauth Dey* 15 B.L.R. 361.

23. Now as to the Limitation Acts. The first Act which has any bearing on this subject is Act IX of 1871. The preamble to that Act recites that it is expedient to provide rules for acquiring ownership by possession. The recital in the Act of 1877, the easement section (26) of which is identical with the easement section (27) of the Act of 1871, recites that it is expedient to provide rules for acquiring by possession the ownership of easements and other property.

24. Section 27 of Act IX of 1871 is as follows: "Where the access and use of light or air to and from any building has been peaceably enjoyed therewith, as an

easement, and as of right, without interruption and for twenty years,...the right to such access and use of light or air...shall be absolute and indefeasible." I agree with Mr. Stokoe that the Indian Act, unlike the English Act, places light and air upon the same footing, and if the English cases show that the effect of these words (which are similar to the words in the English Prescription Act) is to enlarge the right of the dominant tenement as far as light is concerned, it follows that they also extend the right of air.

25. But I do not think that this is the real effect of the English cases. The object of the Prescription Act and of these provisions in the Limitation Act was not to enlarge the extent and operation of the easement, but to provide another and more convenient mode of acquiring such easements-a mode independent of any legal fiction and capable of easy proof in a Court of Law. In *Kelk v. Pearson* L.R. 6 Ch. 809 Lord Justice James distinctly holds that the Prescription Act has in no degree whatever altered the pre-existing law as to the nature and extent of the right, and Lord Justice Mellish said that he entirely agreed with the opinion expressed by Lord Justice James that the Prescription Act 2 and 3, William IV, c. 71, has not altered the nature of the right to light and air.

26. I am not aware that this decision has ever been dissented from, and I do not think that there is anything in any subsequent case which in any way reduces the value of this decision. In the case of the *City of London Brewery Co. v. Tennant* L.R. 9 Ch. Ap. 212 Lord Selborne expressly approved of this decision, and Lord Selborne's decision was approved of by Hall, V.C. in *Lady Stanley of Alderley v. The Earl of Shrewsbury* L.R. 19 616. The case of *Leech v. Schweder*, to which I have before referred, is also an authority for this same proposition. Mr. Stokoe has relied upon expressions seeming to show that the owner of the dominant tenement is entitled to the whole amount of light which, for the prescribed time, has passed to him over the servant tenement, but these expressions are most of them to be found in cases where the only question for decision simply necessitated a comparison between the light passing through an old aperture and that passing through a recently erected aperture. Besides, these expressions are, I think, to be taken with the qualification which, as it expresses the legal right, must be taken as being always understood, namely, that the owner was only entitled to so much of the light as is reasonably necessary for the comfortable habitation of the dominant tenement. All these expressions show that the owner of the dominant tenement is entitled to every portion of the light to which he has acquired a legal right, even though he may have altered the apertures through which the light comes to him.

27. I may here, before I go on to examine the evidence and to decide whether there has been any actionable obstruction, make some observations with reference to the wall of 1877. In the view which I take of the law and of the evidence, the existence of this wall is not material, but so far as the Bank has acquired an easement by lapse of time or by virtue of the Statute, this wall limits such right, as the Bank cannot have acquired a greater right to light and air than

it has enjoyed since the building of that wall. The wall may also in one aspect of the case have affected the rights which the Bank obtained by implied grant, on the principle of the cases of *Weldon v. Burrows* and *Allen v. Taylor*.

28. The wall has been in existence for nine years, and I do not think that a Court would compel the defendant to pull it down or would restrain him from erecting a building which would not obstruct more light and air than was obstructed by the wall of 1877.

29. Under the circumstances I think that the Bank may be taken to have acquiesced in the existence of that wall, and that even if the wall be taken to be a continuing injury, no specific relief would be granted in respect of it. [See Specific Relief Act of 1877, Section 56, Clause (b)].

30. Now as to the obstruction: There is no doubt whatever that the complaint that the new building injures the top floor of the Delhi Bank is purely fanciful, and that the injury (if any) is not such that the law can remedy.

31. The new building in no way affects the amount of light, or of air, or even of south breeze, which comes to the top floor of the Bank's premises. There may be a little glare, and as the air will pass over heated masonry when the wind is from the south, the breeze will be a little heated when it reaches the premises of the Bank, but this is not an injury which can be remedied by the law. So long as he does not interfere with any easement acquired by the Bank, the defendant is entitled to use his land in a lawful and proper way, and to erect a building thereon.

32. As to the middle floor there is also very little difficulty. There can be no doubt that there is no interference with the light of the middle floor. Mr. Osmond, the chief witness for the plaintiff Bank, says that he does not think that, as regards light, the higher portion of the new building would interfere with the plaintiffs' light. He is there speaking of the lower floor of the Bank. A fortiori, the higher portion of the new building would not affect the light of the middle floor. As the top of the lower portion of the new building is lower than the floor of the middle story of the Bank, it follows that the lower portion of the new building cannot affect the light of the middle storey of the Bank.

33. Now as to the air of the middle floor. There is no doubt that the south breeze cannot now find its way directly to the middle floor to the same extent as it did before the erection of the new buildings; but as I have pointed out before, the cases prevent me from giving effect to any asserted right to a south breeze as such. The higher part of the new building is some way off the middle floor, and there is no doubt that there is ample free room for an abundant supply of air to come to the middle floor of the Bank's premises. A glance at the models and plans put in in this case will immediately show that the new buildings do not interfere with the access of air to the middle floor in the sense that access of air is used in the cases. The access of wind is interfered with, it is true, but it is impossible for me to hold that the middle floor has been rendered unfit for the

ordinary purposes of habitation or business. The chief contest in this case has been with reference to the lower floor. I am assuming throughout in dealing with this case that the plaintiffs have acquired a right to access of light and air, whatever the extent of that right may be. There is no doubt, I think, that under the conveyance of 1836 they acquired this easement, and that they have also acquired rights by prescription. As to this there is evidence as to the time that the windows have existed, and there is no doubt that with the exception of Matthew-son's godown there was no building on that portion of the defendant's land, which lies to the south of the Bank premises. They have, I find, acquired rights of light and air, but not to the extent which they pretend. Has there been an actionable interference with the plaintiffs' right to light to the lower floor of the plaintiffs' premises ? I think not.

34. There is no doubt here that 45' of sky are unobstructed. In *Beadel v. Perry* L.R. 3 Eq. 465 which was, as far as I know, the first case in which what is known as the 45' rule was enunciated, the Vice-Chancellor, Sir John Stuart, says this: "It seems to me that where, opposite to ancient lights, a wall is built not higher than the distance between that wall and the ancient lights, there cannot, under ordinary circumstances, be such a material obstruction of the ancient lights as to make it necessary for this Court to interfere by way of injunction."

35. This is, it is true, not a positive rule of law, but it is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory. Of course where lights are closed up by high buildings at the sides, this rule may not be applicable, but here there is no circumstance of that kind.

36. The plaintiffs' evidence on this head is of two descriptions : first, evidence that it is now necessary to light candles about half an hour earlier than before; and, secondly, evidence as to an experiment which was conducted by Mr. Apjohn, Mr. Mills, and others. This experiment was not sufficiently carefully made to make it of much value. The persons who have given evidence with regard to it are those who remained inside. No one who actually saw what was being done with the tarpaulins while the experiment was in progress has been called. It is impossible to be certain that the tarpaulins were kept at the right height throughout the time that the experiment was being made.

37. The evidence as to the candles does not come to very much. Mr. Ward, who is the only witness who speaks to the actual use of candles, has had to use them on two cloudy evenings. He would probably have had to use candles on those evenings even if the new buildings had not been put up.

38. Some witnesses speak to the probable diminution of light, but their evidence is practically of no use to me in determining this question. There may have been some trifling diminution of light, but I do not think it amounts to a material diminution. I think that enough is still left for the convenient and comfortable habitation of the lower floor of the house.

39. On this question the observations of Lord Cranworth in the case of *Clarke v. Clark* L.R. 1 Ch. 16 which was followed in the case of *Bobson v. Whittingham* at page 442 of the same volume, are of value. *Yates v. Jack* at page 295 of the same volume, which was much relied upon by Mr. Stokoe, does not affect either of these decisions.

40. The evidence does not to my mind show any substantial diminution of the light, and I think that I can fairly apply the 45 degree principle to this case. To use the words of Sir Barnes Peacock in the case I have referred to, I am of opinion that the plaintiff Bank will have, even after the complete erection of the new buildings, such an amount of light as is reasonably necessary for the convenient and comfortable habitation of the lower floor of the house.

41. Now as to the air on the lower floor. The doctors have differed a good deal as to this. They are equally divided, but I think that, on seeing what amount of open space there is in front of the verandah of the Bank, it is not difficult to come to a conclusion on this question.

42. As I have pointed out before, I can give the plaintiff relief in this respect. I must find that the obstruction is such as to render the house unfit for the ordinary purposes of habitation or business. There is a good deal of evidence to show that the south wind has been shut out from the lower floor. This question is one which Sir Barnes Peacock's decision prevents me from entering into. Mr. Justice Peterson in *Barrow v. Archer* 2 Hyde 129 says: "The right of air is co-extensive with the right to-light, and I am of opinion that where there is sufficient adit for light, it will be presumed there will be sufficient adit for air."

43. As I have found that there is sufficient adit for light, this decision would conclude the case ; but apart from this, I think it clear that there is ample space round the ground floor of the Bank, and there being this-space, I cannot find the lower floor of the Bank has been rendered unfit for the ordinary purposes of habitation or business.

44. The plaintiffs' witnesses seem to ignore every mode of ventilation except the direct breeze. This, I think, is clearly wrong. There are other means of ventilation of which probably the principal one in this case is aspiration, as there will be a breeze over the new building and also up Fancy Lane. During the limited time in the year when the south breeze is blowing the lower floor may not be so pleasant a habitation as a room into which the south breeze is blowing directly, but this consideration is far removed from the present question.

45. Except that it has kept out the south breeze, I do not think that the new building has made any difference in the air. When the wind is not from the south I do not think the new building will make any difference at all in the atmosphere of the ground floor or will make it a less comfortable habitation.

46. The whole case for the plaintiffs is that they are entitled to the south breeze. Failing in this practically they fail in the rest of the case so far as the air is

concerned.

47. There has been a good deal of evidence given on both sides with reference to the trees in the plot of land to the south of the Bank. In the view which I take of the case, I need not consider that evidence.

48. My finding on the issues is as follows : On the first and second issues I find that the plaintiffs are entitled to so much of the use and access of light over the defendant's premises as is reasonably necessary for the comfortable habitation of their premises.

49. On the third and fourth issues I find that the plaintiffs are entitled to-so much of the use and access of air over the defendants' premises as may be necessary to prevent those premises being rendered unfit for habitation or business.

50. On the fifth issue I find that the plaintiffs have acquired by prescription the access of the amount of light mentioned in my answer to the first and second issues.

51. On the sixth issue I find that the plaintiffs have acquired by prescription the access of the amount of air mentioned in my answer to the third and fourth issues.

52. On the seventh issue I find that there has been no actionable obstruction to the plaintiff's rights, and accordingly I find in answer to the eighth issue that the plaintiffs are entitled to no remedy.

53. The ninth issue will be referred to the Registrar. The suit must be dismissed with costs.