

In the High Court of Judicature
at Bombay.

O. O. C. J.

Suit no. 627 of 1907.

Rustamji Ardesir Hiramchek... Plaintiff

vs.

Dorabji Jehangirji Ramdunia & others... Defendants

19th November 1908.

Coram: Russell J.

Judgment.— The Plaintiff
in this case is the owner of a house
situated on the South Side of Beef
Lane and the Defendants ^{are} the
owners of a house and premises si-
tuate to the South of the Plaintiff's
house

(2.)
house. Beef Lane is a street about
10 ft. wide and the Plaintiff's house
has got a sweeper's gully to the East
of it, and also a sweeper's gully to
the West of it.

The Plaint as originally
drawn set out as the cause of the
Plaintiff's complaint that the De-
fendants had obstructed the access
of light and air to the windows in
the Plaintiff's Southern wall in
such a manner as to give him legal
right to relief.

It appears that in 1892
the front portion of the Plaintiff's
house necessitated repairs and a
plan was sent in by Mr. Raghunath,
the Plaintiff's Engineer, to the Muni-
cipality which is P. C. in this case.

But

But I do not think that that tends
 much to the relief of the case, because
 that plan was drawn up with reference
 to the Northern wall of the Plaintiff's
 house and has nothing to do with
 the Southern wall, but at the same
 time Mr. Raghunath's Field Book,
 which was made up for the purposes
 of that plan in 1892, has been pro-
 duced and considerable reliance
 has been placed by the Plaintiff upon
 that Field Book with regard to the
 situation of these windows which I
 shall deal with hereafter.

In 1904, it is proved, ~~that~~
 the Plaintiff entirely re-built his
 house and his case now is that
 he has got three windows on his
 ground-floor two larger windows
 and one smaller or privy window
 which

(4.) which occupy the same area - a portion
at all events of the same area - in
the Southern wall as was occupied by
his old windows. He also alleged that
on the upper floor he has now got four
windows which now occupy the area
of the former windows in his house.
But Mrs. Baptista for the Plaintiff
very rightly abandoned any claim with
regard to access of light and air to
the upper windows, and the case, there-
fore, resolves itself into whether or not
the Plaintiff is entitled to any and
what relief upon the basis of his claim
as originally framed in respect of these
lower windows.

Now, with regard to that we
have got very great discrepancies
of evidence. In my opinion - and I ^{in this?}
do not propose to go at very great detail
into it - the Plaintiff has failed to
show

show that either the privy window or ⁽⁵⁾ the window next to it on the East occupies any portion of the area which was occupied by his old window and the conclusion I have come to is that his present East window which is marked N^o 1 on Ex. N the plan made by Raghunath, occupies a smaller portion only of the area occupied by the former old window. Mr. Raghunath says and I see no reason to doubt his statement - that those two old windows went down to the ground, ^{and one of the doors.}

I may mention in passing that he says that he remembers opening that door in 1892 but I look upon that as an hyperbolic statement which I cannot believe. It is a statement ^{which one of the men with} which is made by an expert witness ^{but which really amounts to} as one of those touches of the imagination ^{which} which I think cannot be believed by anyone. As it will appear
from

(6.)
from my judgment it is a matter of con-
siderable importance to the Plaintiff. He
succeeds with regard to so much of
the window as is shown on Ex. N. There
is no doubt that the light and air
enjoyed by the old Southern windows
of the Plaintiff's house brought them
within the legal definition of an ease-
ment because I find as a fact that
the premises of the Defendants were
in a ruinous condition for a period
of over 20 years, during which time
the windows in the Plaintiff's Southern
wall were enjoying an easement of
light and air. The Defendant says
that the Plaintiff's windows were
blocked up by the debris which
was undoubtedly lying on his pre-
mises - the debris of the old build-
ing tumbled down. That again
is a statement which I unhesi-
tatingly

tatingly disbelieve. I do not believe ⁽²⁾
that the Plaintiffs' windows ~~were~~ ^{were} blocked
by the debris as deposed to by the
Defendant. There is no doubt that
to the South of the Plaintiffs' premises
there has been ever since 1872 and
before 1872 in Loughton's Plan as
drawn up a four ft. gully to the
rear of the Plaintiffs' premises. That
gully had two cross walls one
being 16 ft. ^{from} on the Parsi Bazar Street
which is to the East of the Plaintiffs
and Defendants' premises, and the
Plaintiffs' premises must have ~~been~~
~~enjoyed~~ had a considerable enjoyment
of the air at all events over that gully.

I have so far dealt with
the case as a case for light
and air only. But when Mr. Bap-
tista was continuing his opening
he

(8.)

~~He~~ he felt himself - and rightly -
compelled to ask for a very import-
ant amendment to the Plaintiff, and
although I fear I may be harping
on a somewhat well-worn string, I
have again to point out and draw
~~the~~ attention to the fact of the
very great danger to my mind all
suits in these Courts run if they
trust their pleadings in important-
cases to their attorneys without
the assistance of the other branch
of the profession, because it
will hardly be believed but when
you read this Plaintiff the most
important cause of action on the
part of the Plaintiff and in one sense
the cause of action with regard to
which it may be said he has entirely
succeeded

(9)
succeeded in this case is wholly
omitted from the Plaintiff. There is
not a word about it.

Again, I ought to have
mentioned before when speaking
of the privy window, that there is
in the Plaintiff the astonishing state-
ment that there had been no privy
window in the old house. That throws
the greatest doubt upon the pre-
existence of the privy window and
that weighed with me in the conclusion
I have come to.

The amendment to the
Plaintiff is necessary, because, it
appears, that the Defendant has
built his present ~~for~~ house
right on ^{to} the Southern wall of
the Plaintiff's and he has trespassed
upon the off-set to the Plaintiff's
house

(10.) ^{bill} house and he has actually filled
in with bricks and mortar the various
windows of the Plaintiff's wall; and
I do not hesitate to say that this
is the only case I have come across
of this kind. Perhaps there was another
similar case which I tried some-
time ago and was confirmed by
the Court of Appeal. I think it
was the Parson Fine Temple case.

As regards the trespass by the
Defendant, there can be no ques-
tion whatever. I refer to the
Encyclopaedia of English Law, Vol.
I, page 80, article on Private
Nuisances. (I read it).

Now, there can be to my
mind no ~~doubt~~ question whatever
that the obstruction to the ^{East window of} Plaintiff's
premises amounts to a nuisance. ^{not a} ^{Plan N}

It is a nuisance as well as trespass.

(11)

To my mind it is a substantial interference with the light and air which was formerly enjoyed by so much of the old window as is embraced by this new window. In the case reported in 7 Bom. L.R., page 73, tried originally by Mr. Justice Chandawarkar and afterwards affirmed in the Court of Appeal, it was held - and I entirely agree with it - that in India a man who has enjoyed a right to air more or less pure and free ought to be reasonably protected against any interference; and Mr. Justice Chandawarkar, who of course is intimately acquainted with the condition of things in this country, there points out - that in India air may be considered to be of greater importance than light.

That being so the question is what remedy is the Plaintiff entitled

(12.)
entitled to. This is a matter which
I have fully considered from every point of view
has given me a very great deal of
concern so as to arrive at the
right conclusion.

There is no doubt there
has been this nuisance of the
air enjoyed by that window.
There has been no interference
with the access of light to the
Plaintiff's premises in my opinion,
because I and the Counsel in
the case and the Engineers visited
the premises and there has been
no substantial interference with
the light. It may be said of course
that if the Plaintiff chose to put
up a partition on the ground-floor
looking at the obstruction to this
window by the Defendant, there
would be a total absence of
light in the back part of it.
But

(13.)

But having regard to the position of things and particularly to the evidence of Mr. Oberwajji, I have come to the conclusion that I should be wrong if I were to grant an injunction in this case. That is obvious.

As I have said there was no doubt this open gully at the rear of the Plaintiff's premises. The Plaintiff endeavoured to show that this gully was used in common by him and the Defendant. On that point, in my opinion, there is no evidence worth the name, and as pointed out by Mr. Jardine any new exercises by the Plaintiff were not proved to be done openly by him. Therefore, I can't say that he has proved anything like

(14.) An assessment in the shape of a wall
like a cross over the gully. That being
so I should have difficulty in di-
recting the Defendant to move his
whole wall because I don't know
how far it should be moved. Mr.
Maerwanji said that it would re-
quire at least one foot. He also
points out that that space would
lead to rain-water falling in between
the two houses which would render
them damp and damage them.
The Plaintiff also endeavoured to
show that he was entitled ~~to~~
to open the window ^{his} ~~over~~ that gully.
In that respect also I think he
has failed. I cannot help thinking
if the Plaintiff's case had been
lodged in a different way with
a due regard to the relief which
the person drawing the Plaintiff ought
to have known he was entitled to,
the

the Plaintiff would have a far better ^{had in diff. with (15.)}
^{in the way of complete}
chance of success. ^{himself}

With regard to the caves of the Plaintiff I do not think the Plaintiff ^{at all} has any right. Those caves were there on the present passage from 1894 and no real objection was taken to them.

I find on the issues as follows:—

(1.) Whether the Plaintiff is the owner of his property and entitled to sue in respect thereof for the relief prayed.

I find this in the affirmative. The Plaintiff is the owner of his property. That was conceded.

(2.) Whether in the Southern wall of Plaintiff's old house there were more than one window on the ground-floor and any windows in the upper floors.

I find that there was one old

(16.)
old window, part of the area of which
is now included in the area of the
Plaintiff's Easternmost window. ^{Not}

(3.) Whether any shutters in
Plaintiff's old Southern wall opened
outwards so as to overhang the De-
fendant's property.

I find that not proved.

(The next issue is framed
in the way I do not think issues
ought to be framed.)

(4.) Whether the allegations
in para. 3 of Plaintiff save as ad-
mitted by para. 3 of Written State-
ment are correct.

They are substantially
correct so far as they are con-
sistent with my judgment.

(5.) Whether the allegations
in para. 4 of Plaintiff save as ad-
mitted in para. 4 of Written State-
ment

ment are correct.

(17.)

They are correct so far as they agree with this judgment.

(6.) Whether the Plaintiff is entitled to access of light and air to any of the present windows in the Southern wall of his house.

I find that in the affirmative so far as regards the Eastern most window.

(7.) Whether the Plaintiff has acquired any right to project any of his shutters or the Southern eaves of his house over the Defendants' property.

He has acquired the right to project his eaves over the Defendants' premises as they are at present.

(8.) Whether in any event the Plaintiff has not been guilty of laches in filing this suit so as to preclude him

(18.) him from any relief by way of injunction herein.

In the negative.

(9.) General issue.

(10.) Whether having regard to the

position of the old windows Plaintiff must not be taken to have abandoned any easement to which he may have been entitled when he pulled down his old house.

In the negative

(11.) Whether the Defendant has trespassed or encroached upon Plaintiff's property as alleged in para. 12 of amended Plaintiff.

In the affirmative.

(12.) Whether the piece of land described as a gully in para. 13 of Plaintiff was enjoyed

in

in common by Plaintiff and Defendant⁽¹⁹⁾ as alleged in the said para.
In the negative.

(13.) Whether the Defendant is entitled to any and what relief as claimed in his counter-claim.

He is entitled to relief with regard to the shutters but not with regard to the eaves in the Plaintiffs' house.

On the general issue, I first of all order the Defendant to remove all bricks, mortar and other materials which may be within any of the window-frames or windows or openings in the Southern wall of the Plaintiffs' house, that is to say he has to clear all these windows and openings.

(20.)
openings. But that is all he has
to do with regard to that wall.
For the reasons that I have pointed
out, I do not think it is desirable
that I should direct this wall
to be pulled down and to be
put further South. Therefore,
with the exception that I have
mentioned the wall will con-
tinue. remain as it

With regard to the off-
sets the wall should remain
as it is. If I direct the off-
sets to be cleared, it will
simply mean ^{but will} a sort of friction
between these two neighbours
and cause further difficulties.
I think the wall is not doing
any real damage to the Plaintiff's
premises

(21.)

premises although there is a
trespass. This, in my opinion, I
do not think is obligatory upon
him although having regard to
dele my ~~judgment~~ finding I would
be justified in directing the De-
fendant to take down so much
of the wall as would be obstructive
to the access of light and air to the
Eastern window.

Therefore, the conclusion
I have come to is that this
is a case which will be adequately
met by damages.

Mr. Jardine said there
was no measure of damages found
in this case.

In my opinion I think

This

(22.)

This Court sitting as a jury is en-
titled to give what sum it thinks
is a measure of damages to the
Plaintiff's house. In my opinion
the Defendant has acted in the
most unneighbourly manner and
in the most despotic manner
towards the Plaintiff. With re-
gard to the adjoining house, known
as Katriak's house, he entered into
a private agreement whereby he
was paid a certain sum of money
and let the gully remain open.
On the other hand ^{in this case} with your
leave or by your leave he builds
his wall right on the face
of the Plaintiff's wall. Taking all
these circumstances into consi-
deration, therefore, in my opinion I

I must decree that the Defendants do pay to the Plaintiff the sum of Rs. 1000 as damages.

I will now hear Counsel as to the costs.

[Counsel address the Court.]

The argument as to the costs which I have just listened to illustrates the importance to my mind of my finding on the question of this Eastern window, and I need ~~not~~ hardly say that I have while considering my judgment given a considerable thought to this question of costs. There can be no doubt whatever that if my finding is correct the Defendant committed a wanton and serious damage

(24.)
damage to the Plaintiff's house by
blocking the Plaintiff's ^{windows} premises with
bricks and mortar, where he had
no right to do so, and therefore
the Plaintiff was bound to
come to this Court, and I do
not think the Courts ought
to be astute to save from the
penalty of paying costs De-
fendants who in the city of
Bombay do acts of that kind.

It seems to me that the
proper order of costs in this suit
will be: Each party ~~to~~ do
bear their own costs of the
suit down to and inclusive
of the 16th September 1908, but
after that date the Defendant
to

(25)
to bear all costs of the suit ex-
cept of the amendment, ^{which have been awarded to him} and any
other costs specifically awarded.

The damages and costs above
decreed to be set off one against
the other.

A. S. Souza,
Shorthand Writer,
High Court, O. J.

27-11-08.