1872.
July 22.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 50 *of* 1871.

SHRINIVA'S UDPIRA'V .....*Appellant.*

L. REID, DISTRICT MAGISTRATE OF DHARWAR; RANGRA'V BHIMA'JI, 1ST CLASS SUBORDINATE MAGISTRATE, AND KRISHNARA'V HANMANT .....*Respondents.*

Privacy, invasion of—Opening new windows.

Where the plaintiff opened a new window in his house at Dharwar, which rendered the defendant's house less private than before :—

Held that the plaintiff was not guilty of any tortious act, and should not be debarred from improving his own house, though the effect might be, to some extent, prejudicial to his neighbour.

To establish such an exceptional privilege, as is customary in this respect in the towns of Guzerat, evidence of the most satisfactory character is necessary.

THIS was an appeal from the decision of Baron De H. Larpent, Acting Judge of Dharwar, rejecting the plaintiff's claim.

The facts of the case are briefly these :—

The plaintiff attempted to open a window in a wall of his house, and the third defendant resisted his doing so. The defendant also laid an information before the 2nd defendant, the 1st Class Subordinate Magistrate, who visited the spot and passed an order prohibiting the plaintiff from opening the window. This order, said to have been passed under the authority of Sec. 62 of the Code of Criminal Procedure, was confirmed by the 1st defendant, the Magistrate of the District. The plaintiff brought this suit to set aside the orders, and to have the 3rd defendant's obstruction removed.

The Judge found on the evidence that it was the custom in Dharwar that a person could not make a new aperture, which might invade the privacy of his neighbour, without his permission, and that, as a matter of fact, the plaintiff's making an opening in his wall would expose to view the women of the defendant's household, when they bathed at a well in the compound. He, therefore, decided against the plaintiff.

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SHRINIVA'S UDPIRA'V v. L. REID, DISTRICT MAGISTRATE OF DHARWAR; RANGRA'V BHIMA'JI, 1ST CLASS SUBORDINATE MAGISTRATE, AND KRISHNARA'V HANMANT.

The appeal to the High Court was heard by GIBBS and LLOYD, JJ.

Rávsáheb V. N. Mandlik (with him *Ganpatráv Bháskar*) appeared for the appellant:—The law will not prevent a person from doing as he likes with his property, unless his doing so causes actionable wrong. Except in Guzerat, where, following a long course of decisions, the Court has been obliged to recognize a custom, it has been held, throughout the Presidencies of Bengal, Madras, and Bombay, that no suit will lie to have a window closed up, even though the defendant's privacy is invaded. See *Gibbon* v. *Abdur Rahim* (*a*); *Mahomed Abdur Rahim* v. *Birju Sahu* (*b*); *Dádá Valibhái* v. *Hargovan Vanmáli* (Special Appeal No. 307 of 1871 decided by MELVILL and KEMBALL, JJ., on the 15th September 1871); *Kanhu Punjá* v. *Bhaváni Dhumá* (Special Appeal No. 339 of 1871 decided by MELVILL and KEMBALL, JJ., on the 29th November 1871); and *Komáthi* v. *Gurunada Pillai* (*c*). There is, besides, in this case no evidence, such as the Hindoo law requires, to prove a usage See Cole. Dig., Vol. I., pp. 69-99, Madras (3 edn.).

Dhirajlál Mathurádás (Government Pleader), with him *Nánábhái Haridás* and *Pándurang Balibhadra* for the special respondent, referred to *Kuvarji* v. *Bai Javer* (*d*) and *Manishankar* v. *Trikam* (*e*).

LLOYD, J.:—In this case the plaintiff Shrinivásráv sued the Magistrate and 1st Class Subordinate Magistrate of Dharwar and one Krishnaráv Hanmant to have the order of the 1st and 2nd defendants, directing a window which he (plaintiff) had recently opened in his cook-room to be closed up, cancelled, and also to have the obstruction of the 3rd defendant to his (plaintiff's) opening the said window removed.

The Judge of Dharwar, in whose minute the particulars of of the case are fully set forth, decided that the order passed

(*a*) 3 Ben. Law, Rep. A. J. 411. (*b*) 5 Ibid 676.
(*c*) 3 Mad. H. C., Rep. 141. (*d*) 6 Bom. H. C., Rep. A. C. J., 143.
(*e*) 5 Ibid 42.

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by the First Class Subordinate Magistrate and confirmed by the District Magistrate was issued under legal authority, and that it did not constitute a cause of action against those officers, and with respect to the third defendant the Judge found that the plaintiff's new window interfered with his privacy, and that according to the custom of the country, no one could make a new aperture in his own wall which might invade the privacy of his neighbour without that neighbour's permission, and he, therefore, considered that the plaintiff should be restrained from building the new window and he, accordingly, threw out the claim.

The plaintiff brings this appeal against all three original defendants.

On its being intimated to the appellant's Vakil that the Court was of opinion that the Judge below was right as to the non-liability of the first and second defendants to this action, he did not press the first point raised in the appeal, so that we may pass on to the other chief points which seem to be :

Whether, in the exercise of his undoubted right to improve his own property, the plaintiff has done that to which the defendant can legally object ? and

Whether there is a local custom prevailing in Dharwar which should operate to prevent the plaintiff opening the window in question ?

It may be taken to have been correctly found by the Judge that the window complained of would, to a certain extent, render the third defendant's compound less private than heretofore, but it is within the power of the defendant to adopt some arrangement by which the inconvenience arising therefrom, if any, may be avoided; and it is more reasonable that the defendant should protect himself than that the plaintiff should be debarred from improving his own house, for, as was observed by Mr. Justice Markby in the case reported at page 676, vol. V. B. L. R., "to hold that privacy is a right and the invasion of it an injury would lead, as it appears to

me, to the most alarming consequences to the owners of house property in towns."

It has been recently held by this Court (Special Appeals Nos. 307 of 1871 and 339 of 1871) that the mere opening of a door in a person's own premises does not constitute a cause of action, and after consulting all the authorities that have been referred to, we think, unless we can coincide with the Judge that the local custom has been established, the plaintiff should succeed. With reference to this alleged custom, it must be observed that it was not set up in the written statement, and though certain witnesses depose to the effect that it was not customary to allow doors and windows to be opened without permission, if the privacy of neighbours is thereby interfered with, it appears to us that their evidence is too vague, and that to establish the point it should have been shown that the custom was approved or immemorial, or that it had been judicially recognized.

The various decisions quoted by the Judge refer solely to a custom prevailing in towns in Gujerat, and this Court, as has before been said, would be very unwilling to extend this exceptional privilege without the most satisfactory proof that it prevailed elsewhere.

We, therefore, amend the decree of the lower Court and order that the obstruction, made by the third defendant to the plaintiff's opening the window in question, be removed, and direct that the plaintiff pay the costs of the Magistrate and 1st Class Subordinate Magistrate, and that all other costs in this suit be paid by the defendant.

Decree accordingly.