

therefore very rare," and Sir J. T. Coleridge referred to three cases as establishing those opinions—*In re Ames and others* (n), *Reg. v. Joykissen Mookerjee*'(o), and *The Falkland Island Company v. the Queen* (p). In the present case, there has neither been any difference of opinion amongst the Judges who compose this Court, nor any question of jurisdiction, nor has there been decided in it any other question of great or general importance, which would justify us in sending such a case as this any further. The authorities, to which we have referred, satisfy us that, if we were to grant permission to appeal to Her Majesty in Council on the present occasion, we should exceed our duty.

1873.
REG.
v.
PESTANJI
DINSHA'.

Leave to appeal refused.

[APPELLATE CIVIL JURISDICTION.]

Cross Special Appeals Nos. 175 and 223 of 1872.

No. 175.

RANCHHOD JAMNA'DA'S *Appellant.*

LALLU HARIBHA'I *Respondent.*

January 27.

No. 223.

LALLU HARIBHA'I *Appellant.*

RANCHHOD JAMNA'DA'S..... *Respondent.*

Breach of Contract—Relief—Mandatory Injunction—Damages.

Where the plaintiff and the defendant, being owners respectively of two adjoining houses and the verandahs immediately in front of those houses, agreed that they should keep the verandahs open and not build upon them or divide them by a wall :—

(n) 3 Moo. P. C. C. 409.

(o) 1 Moo. P. C. C. N, S. 272. (p) 1 Ibid 299.

1873.

RANCHHOD
JAMNA'DA'S
v.
LALLU HARI-
DA'S.

Held that the mere fact that the defendant, when re-building his house, built its new front wall in advance of the plaintiff's, thus encroaching on the defendant's own verandah in breach of the agreement, is not sufficient in itself to justify the Court in granting a mandatory injunction ordering its removal. It should also be satisfied that the new wall so materially interferes with the comfort and convenience of the plaintiff, that the consequences of the breach of agreement cannot adequately be compensated by damages. It should also satisfy itself whether the plaintiff protested against the new wall being built, whilst in course of erection, or quietly acquiesced in what the defendant was doing, and only objected when the wall was completed. In the latter case the Court should only award damages.

THESE were cross special appeals from the decision of E. Hosking, Acting Extra Assistant Judge at Ahmedabad, amending the decree of the Second Class Subordinate Judge Neriad.

The facts of the case, in so far as they are material, are shortly as follows :—

The plaintiff and the defendant were owners of two adjoining houses which had verandahs in front of them. They agreed by an instrument in writing not to build upon their verandahs or to divide them by a wall. The defendant having occasion to rebuild his house, built his front wall 18 inches in advance of the plaintiff's, so as to encroach upon a part of his verandah; and he also built a "pallee," a little ridge in the middle of the two verandahs. The plaintiff, therefore, sued the defendant to obtain an order for the removal of the front wall as well as the "pallee."

The Subordinate Judge rejected the claim for the removal of the wall, but awarded damages instead. He rejected the claim for the "pallee" altogether. Mr. Hosking amended that decree by ordering the removal of the wall.

The special appeal was heard by Sargent, Acting C.J., and Kembal, J.

Shántarám Náráyan for the original defendant.

Nagindás Tulsidás for the original plaintiff.

PER CURIAM :—The Assistant Judge has found that the defendant, in breach of his agreement with the plaintiff, has built his new wall about 18 inches in advance of the plaintiff's. This, however, is not sufficient, of itself, to justify the Court in granting a mandatory injunction ordering its removal. It should be also satisfied that the new wall so materially interferes with the comfort and convenience of the plaintiff, that the consequences of the breach of agreement cannot adequately be compensated by damages. Further, it should enquire whether the plaintiff protested against the new wall being built, whilst in course of erection, or quietly acquiesced in what the defendant was doing, and only objected when the wall was completed. In the latter case the Court should only award damages. The decree must, therefore, be confirmed so far as relates to the "pallee," and reversed so far as it orders the defendant's wall to be removed. The Judge to pass a new decree on the latter part of the plaintiff's claim, after raising the necessary issues, having regard to the above remarks. Parties to be allowed to give evidence on the fresh issues.

1873.
 RANCHHOD'
 JAMNA'DAS
 v.
 LALLU HARI-
 DA'S.

Decree reversed and case remanded.