

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinkey.

1878.
July 16.

SARUBA'I KOM JITMA'L (ORIGINAL DEFENDANT), APPELLANT, v. BA'PU
NA'RHA'R SOHONI (ORIGINAL PLAINTIFF), RESPONDENT.*

Easement—Light and air.

The plaintiff and defendant being owners of two adjoining houses with a common party wall between them, the former placed a window frame in an aperture in an upward extension of his part of the wall which he had erected eight years before suit, and the latter thereupon raised the wall on her side so as to cut off the supply of light and air which the plaintiff used to receive before and after the placing of the window frame.

Held that there had been no appropriation of the light and air by the plaintiff for the statutory period (twenty years) creating in him a right of easement, and entitling him to relief against the inconvenience sustained by him.

THIS was a second appeal against the decision of N. Daniell Judge of Ahmednagar, reversing the decree of the Subordinate Judge of that place.

The facts of the case as well as the view, taken by the District Judge, of the litigation between the parties are stated in the following passage from his judgment:—

“ The plaintiff’s and defendant’s houses in Nagar town are contiguous: the wall on the north side of plaintiff’s house forms the wall on the south side of the defendant’s house. Formerly there was an opening in the wall on the upper story, into which the plaintiff introduced a window frame: the defendant on the 25th March 1877 erected a rough brick wall on which the window frame rests, and so closed the aperture. The plaintiff sues for a removal of the block to his easement, and for an injunction to the defendant for the future.

* * * * *

“ The plaintiff states that an aperture has existed *since* he raised two portions of wall on the top of the parapet of the old lower wall, seven or eight years ago; the space between these two portions of the wall is the aperture in question. He has recently done no more than to introduce a window frame, and convert the aperture into a window. The counsel further represents that through

* Second Appeal No. 136 of 1878.

the window his client obtained light and air for the upper apartment of the house. Before the two portions of wall were erected on the parapet, seven or eight years ago, no building existed above the parapet.

1878.

SARUBAI KUM
JIJMAL
2.
BA'PU NA'R-
HA'R SOHONI.

"The defendant's case is that one portion of the upper wall was erected by the plaintiff seven or eight years ago, and that the other, the eastern portion, was built one and a half or two years ago, and that the aperture has only existed for one and a half or two years. Before that the space was open.

"The easement (if the conditions of the place can be said to afford anything of the sort to the plaintiff) in the matter of air and light existed before the portions of wall were erected, and the diminution of the easement to the dimensions of the aperture or window cannot have been an encroachment on the privacy of the defendant.

"The defendant admits that the wall is joint property. For the moment assuming so much in her favour, she has no right to interfere with the course of air and light which the plaintiff has admittedly enjoyed for an indefinite period.

"I find that the defendant has, by constructing the wall immediately in front of and against the plaintiff's window, unlawfully deprived the plaintiff of the air and light he is entitled to enjoy in his residence.

"If the defendant has been injured in any way by the structure recently raised by the plaintiff, she is at liberty to prove the injury and to obtain her remedy. She has failed to show that she suffers in consequence of the alterations in the plaintiff's building."

Pándurang Balibhadra for the appellant:—No easement could commence to exist until the building itself, in respect of which it is claimed, came into existence. There was no appropriation of the light and air by the plaintiff till eight years ago, and he had, consequently, acquired no right of easement.

Shivshankar Govindrám for the respondent:—The plaintiff has always been enjoying the same quantity of light and air through the aperture where he has placed a window, which has made no alteration in the building.

1878.

SARUBAIKUM
JITMAL
v.
BA'PU NA'R-
HAR SOHONI.

The judgment of the Court was delivered by
WEST, J. :—The District Judge says that “the easement.....
in the matter of air and light existed before the portions of the
wall were erected,” *i. e.*, the portions between which is the window
which the defendant’s new structure has closed up. The light and
air were there, no doubt, before the wall was built, but there was
no appropriation of them, nothing done in reliance on their con-
tinued access, in accordance with the provisions of the law, which
in such cases allows a right to be created by user and enjoyment
as conducive to the general convenience and improvement. The
appropriation began no earlier than the wall was built, which was
eight years ago at most; and, until the lapse of time should convert
the plaintiff’s actual enjoyment into a right to its continuance, the
defendant had an actual right to build on a space that belonged to
her. This she has done. The plaintiff in consequence sustains an
inconvenience, but one of which he took the risk when he made his
window without an agreement as to the defendant’s use of her
contiguous property. The defendant had so far the same right as
the plaintiff, and could not be prevented from exercising that
right to build, by the mere circumstance that the plaintiff had
built first.

We must, therefore, reverse the decree of the District Judge
and reject the plaintiff’s claim, with costs throughout on the res-
pondent.

Decree reversed.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinkey,

July 15.

S. B. SHRINGARPURE (ORIGINAL PLAINTIFF), APPELLANT, v. S. B. PETHE
(ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Registration—Sale—Possession—Priority.

A registered mortgage without possession has priority over a subsequent regis-
tered sale and conveyance with possession.

By a duly registered deed, D mortgaged land to the plaintiff with power of
sale. On default made by D the plaintiff brought a suit for a sale of the mort-
gaged land; but pending the suit D sold the land to the defendant, who regis-
tered his conveyance and entered into possession. The plaintiff subsequently
obtained a decree, and at the execution sale became himself the purchaser. In the
present suit he sought to recover possession from the defendant.

* Second Appeal No. 132 of 1878.