APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice West.

NANDKISHOR BALGOVAN (ORIGINAL DEFENDANT), APPELLANT, *v.* BHAGUBHAI PRA'NVALABHDA'S (ORIGINAL PLAINTIFF), RESPONDENT.*

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September 6.

Light and air—Obstruction—Substantial injury—Injunction—Damages—Acquiescence.

Any act by which the control of light and air are taken out of the hands of the person entitled to them or by which the access of light and air to the window of a dwelling house is interfered with is *primâ facie* an injury of a serious character.

Where the defendant, without leave or license, took possession of the plaintiff's window as completely as if he had blocked it up altogether.

Held that no precedent warranted the substitution of damages for an injunction in such a case against the plaintiff's will.

The defendant's building which obstructed the access of light and air to the plaintiff's window began in May and the plaintiff instituted his suit in July.

Held that *primâ facie* the plaintiff was entitled to the remova of the obstruction and that it was for the defendant to show that the right had been lost by acquiescence.

THIS was a second appeal from the decision of S. Hammick, Acting Assistant Judge at Broach, affirming the decree of E. N. Modi, Second Class Subordinate Judge at Jambusar.

The plaintiff Bhagubhai sued for an injunction against the defendants, directing them to remove a portion of their shop which obstructed the access of light and air to a window of the plaintiff's house.

The plaintiff's house and the defendant's shop were adjacent to each other, the fronts of both facing in the same direction. There was a wall between the two houses which was the common property of the plaintiff and defendant. The plaintiff's house was higher than the defendant's shop and had a side window in the common wall above the roof of the defendant's shop. The defendant in May 1876 raised the outer wall of his shop and thereby enclosed the plaintiff's window. The plaint was filed in the following July. The defendant answered *inter alia* that the plaintiff had no right to the light and air and that he had not received any substantial injury from the obstruction complained of.

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The Subordinate Judge held that the plaintiff had acquired by prescription a right to the light and air and that they were obstructed by the defendant's building. He, accordingly, ordered the removal of the obstruction. In appeal, the Assistant Judge upheld the decree of the lower Court.

The defendant appealed to the High Court.

Inverarity (with *Gokuldas Kahándás*) for the appellant:—The defendant's building did no substantial injury to the plaintiff's window. The lower Courts were wrong in ordering the removal of the building itself, instead of awarding damages. The injury, if any, is one which would have been sufficiently compensated by a decree for damages. The lower Courts omitted to raise and decide whether the plaintiff had not been guilty of delay in bringing his suit and whether he had not thereby lost his right to an injunction.

The Hon. J. Marriott (*Adv. Gen.*) with *Jefferson, Bhaishankar* and *Dinshaw* for the respondent:—Both the lower Courts have found as a fact that the plaintiff has suffered material injury. The finding is conclusive and binding upon this Court. The injury could not have been sufficiently compensated by damages. The defendant himself did not, in the lower Courts, ask an issue on the point, whether the plaintiff by his conduct or otherwise had acquiesced in the obstruction.

The following cases were cited in the course of argument, in addition to those mentioned in the judgment of the Court:—*Isenberg* v. *The East India House Company*(1); *Curriers' Company v. Corbett*(2); *Durell* v. *Pritchard*(3); *Robson* v. *Whittingham*(4); *Lady Stanley of Alderley* v. *Earl of Shrewsbury*(5); *Kino* v. *Rudkin*(6); *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company*(7); *Hemchand Virchand* v. *Pitámbar Amichand*(8); *Vishnu Lakshman* v. *Bálkrishna Vithal*(9); *Govind Vishnu* v. *Ganesh Bápuji*(10); *Ranchhod Jamnádás* v. *Lallu Haribhái*(11).

(1) 3 Dr. G. J. and S. 263.
(2) 2 Dr. and Sm. 355.
(3) L. R. 1 Ch. Ap. 244.
(4) *Ibid.* 442.
(5) L. R. 19 Eq. 616.
(6) L. R. 6 Ch. Div. 160.
(7) *Ibid.* 757.
(8) Printed Judgments for 1875, p. 266.
(9) Printed Judgments for 1876, p. 89.
(10) Printed Judgments for 1882, p. 63.
(11) 10 Bom. H. C. Rep., 95.

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WEST, J:—The contentions on behalf of the appellant in this case are (1) that no substantial injury has been caused to the plaintiff; (2) that if any injury has been caused, it is of a nature to be fully compensated by damages; and (3) that however the case might have been, had the remedy been sought promptly, yet the plaintiff by his delay has deprived himself of any right to an injunction, and must accept such compensation in money as the Court may award.

On the first point thus raised the findings of fact by the Courts below are conclusive, and it cannot be said there is no evidence to support them. An interference with the access of light and air to a window of a dwelling house is *primâ facie* an injury of a serious character. Here the defendant has enclosed the plaintiff's window in a room of his own house. That room, it is said, is well lighted, but while the room exists and is occupied, the amount of light that will reach the plaintiff's window must depend entirely on the good will of the tenants of the apartment. The access of air is in this country of hardly less importance than that of light. It must be taken as a matter of common knowledge that a material interference with it is injurious, not only to the comfort but to the health of the inmates of house thus affected. Now, in the present instance, the defendant having enclosed the plaintiff's window within his own house has forced on him the alternative either of closing the window or taking such air through it as the defendant may choose to supply to him. By a judicious diffusion of bad odours the defendant might at any time compel the plaintiff to close the widow in self-defence. To take the control of air and light in this way out of the hands of the person entitled is a material injury giving a claim to relief by the Civil Court.

Relief by mere damages would amount to a forced sale of the plaintiff's easement. An injunction can be granted wherever substantial damages could be awarded under the English Law: *Dent* v. *Auction Mart Company*[1]; *Aynsley* v. *Glover*[2]. It is not easy to reconcile all the English cases on the question of injunction as opposed to damages; the question is one of degree, and the

(1) L. R., 2 Eq., 238. (2) L. R., 18 Eq., 544; L. R. 10 Ch. Ap, 283.

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whole of the circumstances are seldom or never stated. This, however, is clear that a wilful and impudent assumption of mastery over another man's property, or the use of it in reliance on mere money, will not be tolerated. Here, as in the case of *Smith* v. *Smith*[1] or even more than in that case, the defendant must have known that he was injuring the plaintiff seriously. He, without leave or license, took possession of the plaintiff's window as completely as if he had blocked it up altogether. No precedent warrants our substituting damages for an injunction in such a case against the will of the party injured.

On the third question now raised no issue was taken in the Court of first instance. Had the point been taken, it seems quite unlikely that there should not have been evidence of remonstrance and notice as soon as the plaintiff became aware of the intended injury. The building began in May, and the suit was instituted in July. *Primâ facie* the plaintiff is entitled to the removal of the obstruction; it was for the defendant to raise the defence that this right had been lost by acquiescence. As no such defence was raised, it must be supposed the defendant knew it would not bear investigation. On the issues raised the plaintiff is entitled to the relief sought, and we confirm the decree of the District Court with costs, allowing to the defendant two months for compliance with the injunction.

Decrees confirmed.

(1) L. R., 20 Eq., 500.