any circumstances be allowed to make statements in the witness box bastardizing her own issue; but the learned counsel contended, quoting Taylor on Evidence, s. 951, that in a case of bastardy, provided that the husband's non-access has first been proved by independent evidence, the wife may in the witness box confess her adulterous connection with another person, and thus enable the order of maintenance to be made in the event of her testimony being corroborated in some important particulars. I can find no authority in the Evidence Act for laying down the order in which evidence would be led to prove the fact of non-access in accordance with s. 112. Proceedings under s. 488, Criminal Procedure Code, have been held to be of a civil nature—*Nur Mahomed* v. *Bismulla Jan* (1). By s. 120, Evidence Act, in all civil proceedings the parties to the suit shall be competent witnesses. Here Mrs. Rozario is a party and a competent witness. If she states in the witness box that her husband had no access to her at any time when the children now in question could have been begotten, her statement may be taken for what it is worth. If her evidence of this alleged fact cannot be excluded as inadmissible, then there is no provision of law determining at what stage of the proceedings her evidence may be recorded.

FULTON, J.—I concur. The wording of s. 488, Criminal Procedure Code, and s. 118 of the Evidence Act seems to me so clear as to leave no room for doubting that both the questions referred by the learned Magistrate must be answered in the affirmative.

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[474] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

GHANASHAM NILKANT NADKARNI (*Original Defendant*). *Appellant v.* MOROBA RAMCHANDRA PAI (*Original Plaintiff*), *Respondent.**
[9th, 16th and 17th February and 16th March, 1894.]

Easement—Light and air—Obstruction—Injunction or damages—Specific Relief Act I of 1877—Costs—Costs where lower Court grants an injunction and appeal Court refuses injunction, but awards damages.

The plaintiff was the owner of a house in Jambulwadi street in Bombay. The defendant owned a house to the east of it, and between the two houses was a gully three feet seven inches wide, the part of which next the defendant's house was a gutter. On the ground floor of the plaintiff's house were four windows and on the first floor two windows all looking out into the gully and all of them ancient windows. The defendant's house originally was a little higher than the plaintiff's house and consisted of a ground floor, a first floor and a loft. Shortly before suit, the defendant pulled down this house and on the same site began to build a new four-storied house with a loft. The plaintiff sued for an injunction, alleging that this new house, which would be of much greater height than the old one, would completely block up his ancient windows and cause him material damage, there being no other window in his house on the side next the defendant. The defendant in his written statement denied that his new house would cause material damage to the plaintiff. He alleged that his old house, which was higher than the plaintiff's, had a projecting cornice, so that hardly any direct light came to the plaintiff's windows, which were almost, if not entirely, lighted by the light that came from each end of the gully. He further stated that his new house would have no cornice and that he had widened the

* Suit No. 282 of 1892.

(1) 16 C. 781.

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gully, so that light to the plaintiff's windows would not be appreciably diminished, but that even if the passage had not been widened there would have been little diminution of light. He also alleged that the plaintiff had other windows and sources of light than the said six windows. While denying all damage, the defendant, however, to avoid litigation and without prejudice paid into Court Rs. 200, which he said was more than sufficient to compensate the plaintiff.

After filing the suit the plaintiff obtained a rule for an injunction at the date of which the walls of the defendant's house had been built up as far as the second floor. The rule was subsequently discharged, the defendant consenting that the case should be argued at the hearing as if the new house was then in the same condition. The defendant, however, subsequently, continued to build, and at the date of hearing it was practically complete.

The lower Court (STARLING, J.) found that prior to the building of the new house direct light came to the plaintiff's windows to the extent at all events of 5° and in addition to this a considerable amount of lateral light came to the windows over the defendant's roof. The Court held that, as the plaintiff had a right to this light by [475] prescription, he was absolutely entitled to the whole of it: that the defendant had by his new building cut off all the direct light, and that practically all the light left to the plaintiff was reflected light, the amount of which depended on the condition in which the defendant might choose to keep the walls of his house. Under these circumstances the lower Court, looking at the house, as if it was still in the condition in which it was at the time the injunction was discharged, held that the plaintiff was entitled to a mandatory injunction, and directed the defendant to remove the upper portion of the house which had been built since that time. On appeal:—

Held, that although the plaintiff's light had been sensibly diminished by the defendant's new building, there had not been such a large, material and substantial damage as to require interference by injunction, or that the plaintiff's room had been rendered unfit for the purpose for which it might reasonably be expected to be used.

The appeal Court, therefore, varied the decree of Starling, J., and refused an injunction, but ordered the defendant to pay the plaintiff Rs. 500 as damages.

On the question of costs it was argued for the defendant (appellant) that he should be given his costs of appeal, as he had succeeded in setting aside the injunction granted by the lower Court and should also get his costs of hearing in the lower Court, as the whole contest there had been as to the right to an injunction, which in appeal had been refused. The defendant had paid Rs. 200 into Court when he filed his written statement, and would have paid more if he could have obtained any indication from the plaintiff of the amount that would satisfy him. Nothing, however, would satisfy the plaintiff but an injunction, and he had failed to get it.

Held, that the plaintiff should have his costs of hearing in the lower Court and that each party should pay his costs of the appeal and of the proceedings on the rule for an injunction before the trial. The ordinary rule should be observed, and the costs should follow the event. The event in this case was that the plaintiff had proved his case against the defendant, although he had not got the precise form of relief which he wanted. If a party substantially succeeds he is entitled to his costs.

[F., 19 A. 259 (260); 20 B. 704 (711); 9 Ind. Cas. 417=21 M.L.J. 313=9 M.L.T. 383 (386)=(1911) 1 M. W. N. 251; R., 22 M. 251 (254); 5 Bom. L. R. 446 (452); 7 Bom. L.R. 352 (362); 1 Ind. Cas. 958 (960)=3 S.L.R. 30; 3 N.L.R. 114 (122); (1900). P.L.R. 173 (176).]

SUIT for an injunction, &c. The plaintiff owned a house in Jambulwadi Street in Bombay. The defendant was the owner of a house situated to the east of it, and between the two houses was a space of about three feet seven inches, the part of which adjacent to the plaintiff's house was a passage, and that part adjacent to the defendant's house was a gutter of about eighteen inches wide. The plaintiff claimed to be the owner of the passage: he admitted the defendant to be the owner of the gutter, but claimed the right to use the gutter for the flow of refuse water from his own house, alleging that it had been so used for more than fifty years.

On the ground floor of the plaintiff's house were four windows and on the first floor two windows. The plaintiff alleged that [476] these six windows were ancient windows through which he and his predecessors had enjoyed light and air without any obstruction, except that caused by the old house of the defendant, which consisted only of a ground floor, a first floor and a loft and was of about the same height as the plaintiff's house.

The plaintiff complained that the defendant had recently pulled down his old house and had begun to build a new four-storied house with a loft on the site of his old house: that in doing so he had wrongfully placed scaffolding on the aforesaid passage of the plaintiff and had blocked it up: that he had also threatened to alter the position of the aforesaid gutter so as to prevent the plaintiff using it. He further complained that, if the defendant completed his new house, which would be of much greater height than the old one, he would completely block up the ancient windows of the plaintiff's house and cause material damage to the said owner, as there was no other window therein on the side next the defendant. The plaintiff prayed for a declaration that the passage was his, subject to the defendant's right to use it, and that the plaintiff was entitled to use the gutter to carry off refuse water, and for an injunction against the threatened obstruction to the plaintiff's windows. He also prayed that the defendant should be ordered to pull down so much of his new house as interfered with his said rights, and for damages.

The defendant denied the plaintiff's ownership of the passage and his right of user of the gutter. He complained that the plaintiff had known of his intention to build, but delayed taking proceedings until a large quantity of materials had been collected, and had then, just before the vacation, obtained an *interim*-injunction which was afterwards discharged, but by reason of which he (the defendant) had suffered severe loss. He denied that the erection of his new house would cause material damage to the plaintiff. He alleged that his old house was higher than the plaintiff's and had a projecting cornice, so that hardly any direct light came to the defendant's windows, which were almost, if not entirely, lighted by the light that came from each end of the gully. He stated that his new house would have no cornice, and that he had widened the passage, so that the light [477] to the plaintiff's windows would not be appreciably diminished; but that even if the passage had not been widened, there would have been little diminution of light. He also alleged that the plaintiff's rooms had other windows and sources of light besides the six windows mentioned.

The defendant's written statement contained the following paragraph:—

"8. Although the defendant believes that no damage has been done to the plaintiff's light, and that he is not entitled to any sum whatever as damages, the defendant, for the sake of peace, and to avoid litigation, and without prejudice to his contention, brings into Court the sum of Rs. 200, and is willing that the plaintiff should receive the same; and the defendant says that such sum is more than sufficient to compensate the plaintiff for any injury done to the plaintiff in consequence of the defendant's new building."

The case was heard on the 12th December, 1892, and following days by Starling, J.

Anderson and *Scott*, for plaintiff.

Lang (Advocate-General), *Inverarity* and *Jardine*, for the defendant.

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Counsel referred to *Dhunjibhoy Cowasji Umirgar* v. *Lisboa* (1); *Manekial* v. *Narbheram* (2); *Aynsley* v. *Glover* (3).

16th January, 1893. STARLING, J.—[Upon the evidence His Lordship found that the defendant had trespassed upon the plaintiff's passage, but that the plaintiff had not suffered damage from such trespass. He awarded the plaintiff Re. 1 as nominal damages. He also held that the plaintiff was entitled to drain the refuse water from his house into the defendant's gutter. On the question of light and air his judgment was as follows :—]

The last point to be considered is that of light and air. I do not propose to consider each window separately, but shall deal with number 5 only; as, if the plaintiff can establish his right with regard to that, he will get all he is entitled to with regard to the others. Now, according to the defendant's surveyors, direct light came to that window over the defendant's cornice to the outer edge of the sill of that window in a line, making an angle of 10 or 11 degrees with the wall of the plaintiff's [478] house; the plaintiff's surveyor makes the angle 16. A portion of that light was intercepted by the plaintiff's own roof, but that does not prevent him from being entitled to the remainder, which the defendant puts at 5 and the plaintiff at 11. Besides this, it must be borne in mind that this window was on the south side of the highest point of the defendant's larger roof. Consequently over the sloping portion of that roof and the smaller roof, a considerable amount of lateral light would come to that window. As the plaintiff claims this light by prescription, he is absolutely entitled to the whole of it. See *Birmingham, &c., Banking Co.* v. *Ross* (4), and, further, he would be entitled to it even if acts had been done to other buildings or to other parts of the same building by which he got additional light from other points—*Dyres Co.* v. *King*(5). Now it is admitted that by his present building the defendant has cut off from this window the whole of the direct light which hitherto came to it, but he says that no damage has been done to the plaintiff, and that substantially his rooms are as comfortable and as well adapted for occupation as in times past. He also says that no portion of the light which came over his house ever passed directly into the room itself, because of the smallness of the angle and the thickness of the wall in which the window was fixed. Possibly this may have been so, but the photograph (Ex. D), shows that at a certain time in the day the sun shone directly on the wall in which the window was, and the effect of having a beam of sunlight passing directly in front of the window, although it might not actually enter it, must have caused a large amount of sunlight to be diffused through the window and very much increased the comfort of the room, and it must be remembered that it is light, not direct sunbeams, which is claimed.

The defendant further says that he has done no substantial damage to the plaintiff, as there is still ample light in the room, and I was taken down to view the premises in order to satisfy myself as to the amount of light. In this room I could read a book which was presented to me for that purpose. It was a book clearly printed in good type, and I could read it when the face of the page was turned towards the window, and when I stood in front of the [479] window or just a little on one side. I should not, however, have cared to read the book within that space for half an hour

(1) 13 B. 252. (2) P.J., 1891, p. 302. (3) L. R. 18 Eq. 544.
(4) 38 Ch. D. 295, (313, 314). (5) L. R. 9 Eq. 438.

continuously, except perhaps quite close to the window. The rest of the room was very deficient in light, and this was about 10 A. M. on a bright day. The room was pretty fairly lighted, as far as native rooms of that description are concerned, within the cone of light coming through the window, but I should not consider it was well lighted.

In order, however, to consider what the effect of the defendant's acts may be, it is necessary to consider what the light which does come in consists of. In the first place, there is a very large proportion of reflected light thrown off from the freshly whitened surface of the defendant's wall and a very small proportion of horizontal light which comes in from the ends of the gully, which, I think, need not be seriously taken into account, as, according to the evidence of the defendant's surveyor, none of that can go directly into the room. Consequently the light which the plaintiff now gets in this room is practically all reflected light, and the amount of that light depends upon the whiteness of the defendant's wall. There is no means by which the defendant can be made to keep his wall well whitewashed, or even to prevent him painting it a dark colour, in which case there would be but a very small amount of light reflected, and the Courts have always refused to take into account suggestions of this kind —see *Dent* v. *Auction Mort Co.* (1); besides which, in order that the plaintiff may continue to enjoy the amount of reflected light which he now does, assuming that the defendant keeps the wall of his house well whitewashed, the plaintiff must keep his house at the same height it is now, and thus would be deprived of his undoubted right to build his house higher. Consequently I must regard the plaintiff as in the present enjoyment of but a very small amount of the light to which he can legally enforce a claim, and I am of opinion that the defendant by shutting off all the direct light which came to this window, although the quantity was not large, has done to the plaintiff material and substantial damage. That being so, **[480]** it is no excuse for the defendant to say to the plaintiff, if you open windows in your west wall, and keep the western doors of the rooms open, you will get ample light. He is entitled to his ancient lights, and is not to be forced to adopt other ways of meeting the wrong done to him by the defendant. The fact, too, that in the northern wall of the room lit by No. 5 there is an opening, ordinarily closed by a shutter, which looks into the room to the north opposite a window which opens directly into the street, does not lessen the defendant's liability, because it is evident that that shutter is intended to be opened or closed at the occupant's pleasure, and ought not to have to be kept always open to make up for the result of the defendant's wrong-doing. Besides this, as a matter of fact, the amount of light which enters the room when the shutter and the opposite window are both open is by no means large, and does very little else than make darkness visible.

What relief, then, am I to give to the plaintiff? The defendant relying on *Lisboa's case* (2) says that damages only ought to be given, and asserts that the Rs. 200 paid into Court are sufficient. But this case differs from *Lisboa's case* in that here the defendant has cut off the whole of the plaintiff's direct light and left him a very small portion of light from other sources, the enjoyment of which he can enforce. In *Lisboa's case* although the light was diminished, there was still some direct light left. This, I think, would of itself point to the fact that an injunction is the proper remedy. Further, the defendant admitted in his

(1) L. R. 2 Eq. 238 (251). (2) 13 B. 252.

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cross-examination that he had all along been aware that the building of his house would do damage to the plaintiff, although in the letter of his attorney's (Ex. L) he denies the plaintiff's rights, and asserts that his new house would cut off no more light than the old one; but he thought that *Lisboa's case* would protect him, and under that impression he doubtless consented that this case should be argued at the hearing as if his house was in the condition in which it was on the day the injunction was discharged, *i.e.*, with the walls on the plaintiff's side built up no higher than the second floor. I look at his house, therefore, at the present time as if it had not risen above the second floor, and taking into account that any substantial increase above that will cut off all **[481]** the plaintiff's direct light, I must prevent him continuing his house above that line. All that he has built above that has been built at his own risk, not merely by reason of notice of the plaintiff's claim, but at his own risk solemnly taken upon himself at the time the rule was discharged. The case otherwise is very much like that of *Lawrence* v. *Horton* (1). I must, therefore, grant a mandatory injunction for the removal of the upper portion of the defendant's house, as I shall hereafter set it out in the decree. Defendant must pay the costs of the suit and the costs of, and incidental to, the rule.

The defendant appealed. The appeal came on for hearing before SARGENT, C. J., and FARRAN, J.

Lang (Advocate-General) and *Jardine*, for appellant (defendant).

Scott and *Robertson*, for respondent (plaintiff).

The following cases were cited :—

Dhunjibhoy Cowasji v. *Lisboa* (2); *Kadarbhai* v. *Rahimbhai* (3); *Ratanji H. Bottlewalla* v. *Edulji H. Bottlewalla* (4); *Aynsley* v. *Glover* (5); *Dicker* v. *Popham Radford & Co.* (6); Limitation Act (XV of 1877), s. 26; Specific Relief Act (I of 1877), s. 54; *Martin* v. *Price* (7); *Dreyfus* v. *Peruvian Guano Company* (8); *Lawrence* v. *Horton* (1); *Krehl* v. *Burrell* (9).

JUDGMENT.

16*th March*, 1894. SARGENT, C.J.—The most important question in this case is as to the extent of the obstruction, by the defendant's new house, of the light and air hitherto enjoyed by the plaintiff's ancient windows, and the nature of the relief (if any) he is entitled to. The Judge of the Division Court came to the conclusion that, having regard to the diminution of light in the room to which the window No. 5 in the upper floor belongs, the plaintiff was entitled to a mandatory injunction, which would practically serve the plaintiff's purpose as regards all the windows in question, and, therefore, render it unnecessary to consider the case of the other windows.

[482] The houses are separated by a gully or passage three feet nine inches wide runing north and south. The defendant's original house, like the plaintiff's, was a house with a pole running west and east and eaves sloping towards the north and south parallel to the eastern face of the plaintiff's house. It was higher than the plaintiff's house, the roof running south being seven feet above the top of window No. 5. The light from the sky found its way over the eaves of defendant's roof into the gully, but

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(1) 62 L. Times 749. (2) 13 B. 252. (3) 13 B. 674.
(4) 8 B. H.C.R. O.C.J. 181 (191). (5) L. R. 18 Eq. 544. (6) 63 L. Times 379.
(7) L.R. (1894) 1 Ch. 276. (8) 43 Ch. D. 316.
(9) 7 Ch. D. 551=11. Ch. D. 146.

owing to the cornice and weather-boards of defendant's roof and windows and the overhanging eaves of the plaintiff's roof, the angle of the cone of lateral light actually entering the gully was much diminished, and it was not disputed at the hearing before us that it could not have been more than five or six degrees. At the time of the trial by the Division Court this fact was not clearly made out. The learned Judge who visited the premises seems to have thought it highly probable, as stated by defendant, that this lateral light owing to the smallness of the angle and thickness of the wall only struck the sill of the window, and that very little, if any, entered directly into the window. Having visited the premises ourselves, I cannot doubt that this must have been the case. The gully was, of course, also lighted by the sky vertically above it and by the light which found its way into it at both ends, and, lastly, by the light reflected from the walls of the two houses.

Such being the sources of light with which the room was supplied, it is plain, I think, that it was substantially a gully room, in the sense I mean of deriving its light almost, if not entirely, from the light in the gully, and must always have been a dark room even according to native ideas.

Since the defendant's house has been raised, there can be no doubt that the light which now finds its way into the gully is sensibly diminished, although not by any means so much as might be expected owing to the cornices and weather-boards of the plaintiff's house, which used to obstruct the light, having been removed and also owing to the larger area of the western wall of defendant's new house, which has increased the reflected light, which must always have been an important part of the light with which the room was lighted, especially in the afternoon.

[483] Mr. Justice Starling, who visited the room in the morning, says: "The room was fairly lighted as far as native rooms of that description are concerned, but I should not consider it well lighted." We ourselves found on visiting the room that, although a dark room according to the European ideas, it was light enough to enable us to read small print two or three feet from the window. Mr. Justice Starling, however, considered that all the light the window now gets, with the exception of the light coming into the gully vertically and at the end, is practically reflected light, which depends on the whiteness of the walls, and as to the former, thought it of little importance as not entering the room. But I have already stated (and this Mr. Justice Starling appears to have overlooked or not to have fully appreciated, as the matter was represented to him) that the room must, having regard to the small angle of light, have been substantially lighted by the light in the gully, and have had very little (if any) other light. Moreover, the light which entered the gully at the ends, and which is practically unaltered owing to the gully being only 30 feet long and open at both ends (there being an open space between the front and rear bungalows), must always have contributed very considerably to the light in the gully.

At this stage, it will be convenient, I think, to consider the authorities bearing on this class of questions. The English cases were discussed at length in *Dhunjibhoy Cowasji* v. *Lisboa* (1), and the conclusions arrived at is that the view taken by Pearson, J., (in *Holland* v. *Worley*(2) when discussing Lord Cairn's Act), "if applied with caution is suited to the circumstances of this city, which, from its nature, can in most parts of it only extend itself vertically upwards, and, we think, therefore, that

(1) 13 B. 252. (2) 26 Ch. D. 578.

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it ought to be considered as the general practice of this Court, although doubtless one to be administered with much care and with due regard to the special circumstances of each case." Mr. Justice Pearson in his judgment in the above case (see p. 587), after referring to *Smith* v. *Smith* (1), where Jessel, M. R., discusses the application of the above Act, which enabled the Court of Chancery to [484] give damages in a case in which an injunction would otherwise have been given, draws the conclusion that "where the property may still remain the plaintiff's (*i.e.*, as distinguished from the case where the only fair compensation would virtually be to make the plaintiff to sell his property to the defendant) and be substantially useful to him as it was before," the injury is one which can in that case be properly compensated by money.

This view of Lord Cairn's Act is spoken of by Kekewich, J., in *Dicker* v. *Popham Radford & Co.* (2) as not laying down any new rule, and as amounting to no more than that (as had already been said in several cases), where there is a discretion exerciseable, the Court is bound to look at all the circumstances of the case. In this country the jurisdiction of the Civil Court in granting relief by injunction is given by the Specific Relief Act (I of 1877). Section 54 of the Act provides that it may be granted in certain cases, one of which is where pecuniary compensation would not afford adequate relief. No doubt the jurisdiction of the Court of Chancery in question of relief by injunction, &c., as stated by Lord Eldon in *Attorney-General* v. *Nichol* (3), and explained by V. C. Wood in *Dent* v. *Auction Mart Co.* and by Sir G. Jessel in *Aynsley* v. *Glover* (4), is treated as existing where substantial damages would be given by a Court of law. But this Court has the jurisdiction, both of a Court of Law and Equity, and in the exercise of the discretion will regard the "materiality" of the injury in the sense in which that expression was used by Sir G. Jessel in *Smith* v. *Smith* (1), and which, as pointed out by Fry, J., in *National Provincial Plate Insurance Company* v. *Prudential Insurance Company* (5), means something more than is sufficient to give the Court jurisdiction to grant an injunction and may depend on all the circumstances of the case.

In the present case, as we have already expressd the opinion that little or no light found its way directly into the room, and that the room was always, for all practical purposes, a gully room receiving its light from the light in the gully, the question for consideration is, whether that light has been so diminished as to [485] render the room,—having regard to the habits of the people who occupy rooms so situated,—unfit for the purpose to which it might reasonably be applied, which purpose would be sleeping and living in during the day. That the light which came into the gully laterally has been sensibly diminished, there can be little, if any, doubt; but the light coming in vertically and at the ends remains substantially unaltered, and must always, as we have stated, have played an important part in lighting the gully from which the room derived almost all, if not entirely, its light. Again, the light from the increased area of the defendant's west wall, as I have already pointed out, ought not to be altogether disregarded. Mr. Justice Starling refers to the remarks of Lord Hatherley in *Dent* v. *Auction Mart Co.* (6) as showing that the plaintiff cannot be expected to trust to the consideration of the defendant. But in that case

(1) L. R. 20 Eq. 500.
(2) 63 L. Times 381.
(3) 16 Ves., 342.
(4) L.R. 18 Eq. 544.
(5) 6 Ch. D. 768.
(6) L.R. 2 Eq. 238 (251).

the defendant had offered to have his roof tiled with glazed tiles to remove the plaintiff's objection, continuance of which it was said the plaintiff could not be sure of or enforce; but here the only possibility is that the defendant may not whitewash his house as often as the plaintiff might wish.

On the whole I do not think, although the light has been sensibly diminished, that there has been such a "large, material and substantial damage," to use the language of Sir G. Jessel in *Aynsley* v. *Glover* (1), as to require interference by injunction, or that the room, although the light has been sensibly diminished, has been rendered unfit for the purpose for which it may reasonably be expected to be used. The above remarks apply with even greater force to the other windows. As to the amount of damages, we do not think the Rs. 200 paid in by defendant is sufficient, and that, having regard to the evidence in the case, they should not be less than Rs. 500.

As to the ownership of the gully, the Division Court has found it belongs to the plaintiff up to the middle line between the two houses, relying on the plans annexed to the conveyance to the plaintiff's and defendant's predecessor, Shantaram Narayan.

An examination of those maps, however, clearly shows that the plaintiff's ownership is, in fact, confined to the west of a line **[486]** which is the continuation of the wall of the rear bungalow. Mr. Scott contended that Mr. Inverarity had admitted that the plaintiff's ownership extended to the middle line of the passage, but he did this on the condition that he would give up the right to have the water from his house run down the passage, which was refused.

It remains to consider the right claimed by plaintiff to drain his refuse water from the *nanis* in his house into the gully. As to this the evidence is very conflicting, and embarrassing and, looking at the probabilities as stated by Mr. Justice Starling, we do not think we ought to disturb the conclusion he has arrived at.

As to the damage done to the plaintiff's portion of the passage by the defendant's scaffolding and building materials, as the Division Court has only awarded one rupee, it is not necessary to consider it, as it cannot affect the question of costs.

The defendant's claim for damages by reason of the granting of the injunction must be rejected.

FARRAN, J.—The defendant's building at the time the suit was commenced had reached the top of its first floor, and had obstructed the light which used to pass over the sloping roof of the defendant's old house and strike the plane, in which the plaintiff's windows are set, in an oblique direction. Since the dissolution of the injunction the defendant has added two more stories and a loft to his building after having given an undertaking to argue the case at the hearing as if the building had been left in the state in which it was when the rule was discharged. Under these circumstances we ought, I think, to consider the case as if at the hearing the defendant's house had reached only the height at which it stood when the suit was brought and the injunction was applied for. On that footing the Division Court has held that the plaintiff was entitled to an injunction in the terms of its decree.

The facts of the case are very similar to those which the Court had to deal with in *Dhunjibhoy Cowasji* v. *Lisboa* (2) so **[487]** much so that

(1) L.R. 18 Eq. 544. (2) 13 B. 252.

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it is quite impossible, to my mind, to draw any substantial distinction between them; and were I sitting in the Court of first instance, I should be satisfied to say that I considered myself bound by the decision of the appellate Court in that case. But, as the judgment of the Division Court by necessary implication and the argument of counsel before us directly impugned the basis upon which that decision rests, I propose to state my views of the law applicable to the case.

When the Specific Relief Act was passed in 1877 the law in England on the subject of injunctions—I speak more particularly in reference to injunctions restraining the obstruction of ancient lights—was this. A plaintiff who had sustained, or who was likely to sustain, material injury entitling him to substantial damages by reason of the obstruction or proposed obstruction of his ancient lights by the defendant's buildings, was, in the absence of special circumstances, entitled to an injunction, according to the established principles of Courts of Equity—*Martin* v. *Price*. (1). Lord Cairn's Act had, however, conferred upon Courts of Equity the power to award damages to the party injured, either in addition to, or in substitution for, an injunction, in cases in which those Courts had jurisdiction to entertain an application for an injunction. That power was a discretionary one, but the law as to the circumstances under which the Courts would exercise that discretion was in an unsettled state, and no clear rules for the guidance of the Court had been established by the decisions—*Holland* v. *Worley* (2). Even now it is an open question whether damages in lieu of an injunction can be awarded by way of compensation for an injury not yet committed, but only threatened and intended—*Martin* v. *Price* (1). Section 33 of the Easements Act, 1882, lays down for us the law as to the case in which damages or compensation can be awarded, and sets that question at rest.

The Specific Relief Act (I of 1877), s. 54, enacts that when the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property, the Court *may* grant a perpetual injunction in the following case:—(*c*) when the invasion is such [488] that pecuniary compensation would not afford adequate relief. (I omit cls. (*a*), (*b*), (*d*) and (*e*) as not specially applicable to the present circumstances.) The Court has under that section jurisdiction to grant an injunction only in those cases where pecuniary compensation would not afford adequate relief. The expression "adequate relief" is not defined, but it is probably used in the sense in which Kindersley, V. C., uses it in *Wood* v. *Sutcliffe* (3) as meaning "such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before." If that be the correct meaning of the phrase, it is, I think, difficult to predicate of any material obstruction to ancient light that pecuniary compensation for it would in effect place the plaintiff in the same position as before, and more particularly so where the light is obstructed in a house in which a man is himself residing.

It does not, however, follow that in such cases a plaintiff is entitled as of right to an injunction. Under the Specific Relief Act the Courts are given a discretion to grant or withhold an injunction, as in England they have a discretionary power to award damages in lieu of an injunction. In this view of the law, the Court has to consider in each case not merely whether the plaintiff's legal right has been infringed, or even materially

(1) L. R. (1894) 1. Ch. 276. (2) 26 Ch. D. 578 (587). (3) 21 L. J. (Ch.) 255.

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infringed, but also whether under all the circumstances of the case he ought to be granted an injunction as the proper and appropriate remedy for such infringement.

Two principles are, I think, deducible from the English cases, which may be deemed binding upon our Courts (1): that Courts ought not to interfere by way of injunction when obstruction of light is very slight and where the injury sustained is trifling, except in rare and exceptional cases —*Dent* v. *Auction Mart Co.* (1); *Herz* v. *Union Bank of London* (2); Goddard on Easements, p. 438; and (2) that where "the defendant is doing an act which will render the plaintiff's property absolutely useless to him unless it is stopped, in such a case, inasmuch as the only compensation, which could be given to the plaintiff, would be to compel the defendant to purchase his property out and out, the Court will not, [489] in the exercise of its discretion, compel the plaintiff to sell his property to the defendant" by refusing to grant him an injunction and awarding him damages on that basis (see *Holland* v. *Worley* (3)). Between these two extremes, where the injury to the plaintiff would be less serious, where the Court considers the property may still remain with the plaintiff and be substantially useful to him as it was before, and where the injury is one of a nature that can be compensated by money, the Courts are vested with a discretion to withhold or grant an injunction, having regard to all the circumstances of the particular case before them, including the fact that the premises are situated in a city, like this, where land suitable for building is limited and very valuable, and where property owners should, so far as is possible consistently with the existing rights of their neighbours be allowed to utilize it to the utmost extent.

Mr. Scott for the respondent contended that the present was a case for an injunction, because it fulfilled the conditions of s. 54, sub-cl. (*b*), in as much as there was no standard for ascertaining the actual damage caused or likely to be caused by the invasion. I think, however, that this sub-clause has rather application to such cases as are referred to in the illustrations (*h*) and (*i*) to the section where there is no possible standard with reference to which the contemplated injury can be compensated, than to a case of injury to property like a house occupied by its owner in danger of being deprived of its ancient light. Juries have never experienced any insuperable difficulty in cases of the latter kind. In earlier times, before the passing of Lord Cairn's Act, Courts of Common law, rather than Courts of Chancery, were resorted to in cases of obstruction of ancient lights: Goddard (3rd Ed.), p. 423—the aid of the Court of Chancery being invoked in later times on account of damages being an inadequate remedy or inappropriate to the circumstances of the case.

I proceed to a consideration of the facts of the case before us. The plaintiff had six ancient lights in the east wall of his house. They all opened upon a gully about 3 feet 9 inches wide, opposite to them being the wall of the defendant's old house about 30 feet [490] high at the apex of the roof and sloping down at each side to a height of about 20 feet. These windows admitted light to four rooms on the ground floor and two rooms on the upper floor. The lower floor was usually let to tenants, the upper floor was occupied by the plaintiff and his family. We are not, I think, embarrassed in this case by such considerations as weighed with Kekewich, J., in *Dicker* v. *Popham Radford* &

(1) L. R. 2 Eq. 238. (2) 2 Giff. 686. (3) 26 Ch. D. 578.

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Co. (1) arising from the damage likely to accrue to the plaintiff within some reasonable time by reason of a probable change in the nature of the occupation of his premises. The house has always been used as a dwelling-house, and, as far as one can judge, will never be used for any other purpose. The mode of occupying it may be altered. The *divankhana* may be used as a bedroom, and room No. 5 may be occupied as a *divankhana*, or let separately to a tenant, or other changes in the use of the rooms may take place. These may fairly be contemplated and should be taken into account—*Moore* v. *Hall* (2), *Dicker* v. *Popham Radford & Co.* (1); but having regard to the small amount of light formerly admitted by the windows, 2, 3, 4 and 5 it is almost impossible to conceive the rooms lighted by these windows being used for purposes of delicate handicraft or indeed otherwise than for residential purposes.

The upper floor consists of a *divankhana*, a living room behind it, and behind that a kitchen. The *divankhana* is amply lighted by two windows looking into the public street to the north. The light admitted into this room by the gully window No. 5 cannot at any time have added appreciably to the light of the room. According to the plaintiff, only five degrees of vertical light reached the outer sill of this window, and according to the defendant's experts none at all. In neither view did any actually penetrate into the room. The window always looked into a narrow gully where the eye met a wall, and it does so still. In my view no appreciable injury has been caused to this room by the raising of the defendant's western wall.

I pass over for the present the room behind the *divankhana* lighted by window No. 5 and consider the ground-floor rooms. The kitchen on the upper floor is not lighted from the gully.

[491] On the ground floor are a living room next the street, not lighted from the gully, two rooms behind it each having a window opening into the gully, and behind them a kitchen lighted from the south, but having a small aperture resembling a smoke hole, which looks out into the gully. The kitchen is not, I think, in the smallest degree affected by the defendant's new building being higher than his old one. The two other rooms on the ground floor must always have been badly lighted. The plaintiff's surveyors give an angle of direct light of 4° to window No. 4 opening into the more northern of the two rooms and of 6° to window No. 3 lighting the more southern room. These angles are measured to the outer sills of these windows. The defendant's surveyors give the angles of 1° and 3° respectively measured in the same way. The difference is owing to the different measurement of the projecting cornice of the defendant's old house and of the eaves of the plaintiff's house. The measurement of the cornice of the defendant's house taken by Mr. Stevens appears to be the more correct, while he has a little minimised the plaintiff's eaves. Taking the mean, the angles of the direct light to the sills can never have exceeded 2° and 4° respectively. Owing to the thickness of the wall, which is 18 inches, the direct light cannot, except in a very small degree, have penetrated into these two rooms. They must have been always lighted principally from the light in the gully diffusing itself and being reflected into them. The light in the gully when the defendant's old house was standing was, I doubt not, somewhat better in the forenoon than it is now owing to the sun shining over the southern slope to the defendant's old house and

(1) 63 Law Times, 379. (2) 3 Q. B. D. 178.

striking the western wall of the plaintiff's house obliquely. In the afternoon, on the other hand, and at noon, the gully is now probably better lighted than of old owing to the removal of the defendant's weather boards. I cannot, therefore, think, in respect of the several windows which I have been hitherto considering, that there has been any marked or substantial diminution of light to the plaintiff's rooms. I think that as to them there is no case for an injunction.

It remains to consider the room lighted by window No. 5. The Division Court, having regard to that room only, has granted an injunction requiring the defendant to pull down and set back [492] the west wall of his new house above the second floor. The injunction does not interfere with the wall till it reaches the height of the second floor, which is nearly level with the apex of the defendant's old house. This injunction, as far as I can judge, will not materially benefit the room in which window No. 5 is situated or restore to it its former *quantum* of light, in as much as it principal source of direct light formerly was over the sloping roof of the defendant's old house reaching the window obliquely. The plaintiff has accordingly appealed from that portion of the decree as not affording him sufficient relief. This wall was, as I have said, built to the height of the top of the first floor, when the suit was brought. The lowering of it to the height of the old sloping roof would be an exercise of the mandatory powers of the Court, and out of the scope of the defendant's undertaking. Section 55 of the Specific Relief Act in express terms makes this exercise of our mandatory power discretionary. The plaintiff complained of the defenant's buildings as soon as the latter began to build: but though he could readily have seen the defendant's building plans, took no legal steps to restrain his building until the ground and first floors had been completed. Prompt action is very essential in these cases. if an injunction is the desired remedy.

The direct light which reached the sill of window No. 5 was 11° according to the plaintiff's case and 5° according to the defendant's, or, taking the mean as before, between 7° and 8° and, besides this there was the oblique light from the sky which passed over the sloping roof. We cannot doubt that some portion of this light penetrated into the room lighted by window No. 5. From near the floor of the room the eye could see a small portion of the sky towards the east and south-east, but not when standing or sitting on a chair. For purposes of habitation it was essentially a gully room, though it enjoyed the amount of direct light which I have indicated. The defendant's building, as it at present stands, has cut off all direct light from the sill of the window and from the room. The building when it reached the second floor had cut off all the oblique light, but had left the direct vertical light as before. In addition to the vertical light, which never could have been much, the room was [493] lighted by the gully light diffusing itself inwards and the light reflected from the defendant's wall. These must always have been the principal sources of light. These sources of light it still retains. The gully light is probably, as I have said, less bright in the morning hours than formerly, but in the afternoon must be nearly the same as it always has been. We visited the room about 11 A.M. and it was then fairly well lighted. One could read easily in most parts of it. The room from its position behind the *divankhana* would naturally be used as a sleeping room. There is a *nani* in it, and the household gods are said to have been kept there. There is a window opening into it from the *divankhana* which

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can be opened or closed at pleasure. It is a question of degree. All questions of discretion usually are. I think that it is not a case in which we should grant a mandatory injunction as to the wall built before suit; and as to the part subsequently built I think it would inflict serious damage upon the defendant to remove it without restoring the plaintiff to the position in which he originally stood, or doing him any real practical good. Damages will, I think, afford more suitable compensation in his case.

We will hear counsel on the question of costs.

Jardine for the defendant (appellant):—The appellant (defendant) should have his costs of appeal. He has succeeded in setting aside the decree of the lower Court which gave the plaintiff an injunction. He should also have his costs of the hearing in the lower Court, for there the whole contest was as to the plaintiff's right to an injunction, which has now been refused to him. The defendant was willing to compensate the plaintiff for the injury which he alleged he had suffered, and he paid into Court Rs. 200 when he filed his written statement. He would, no doubt, have been willing to pay more, but the plaintiff would give no indication of the amount which would satisfy him. In fact, it was not damages he wanted, but an injunction, and it was for an injunction he has fought all through. Pending the hearing he got a *rule nisi* for an injunction against us. The suit has entailed large costs in consequence of the plaintiff's persistent demand for an injunction. In his plaint he does not ask for damages as an alternative. The **[494]** single remedy he asked for he has failed to obtain. He should, therefore, pay the costs.

Scott, for plaintiff (respondent) *contra*:—The plaint prays for damages, and although it is not put as an alternative, that slight informality in the pleading will not affect the decree of the Court. There is also a prayer "for such further and other relief as the nature and circumstances of the case may require." The Court is thus asked to exercise its discretion as to the remedy, although the plaintiff states his preference for a particular remedy. He succeeds if he obtains any relief from the Court, and is entitled to his costs. The cases of *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (1) and *Holland* v. *Worley* (2) were referred to.

JUDGMENT (*Continued*).

SARGENT, C.J.—We think that the ordinary rule should be observed and that costs should follow the event. What is the event in this case? It is obviously this, that the plaintiff has succeeded in proving his allegation. He has established his case against the defendant, although, no doubt, he has not got the precise form of relief which he desired. It is true that in his plaint he does not ask for damages as an alternative to an injunction. But he alleges that he has suffered an injury from the defendant, and he comes to the Court for redress. He has proved the injury. He has proved that he is entitled to some relief, and that being so I cannot see why he should be refused his costs, because, in the opinion of the Court, the extent of the injury proved may be sufficiently redressed by giving him damages rather than an injunction. A man may sue for Rs. 5,000 in damages for an alleged wrong, and only be awarded Rs. 3000, but that is not considered a ground for depriving him of his costs.

It is to be observed that the defendant throughout has denied that the plaintiff has suffered any injury and has thus compelled him to prove

(1) 6 Ch. D. 769. (2) 26 Ch. D. 578.

his case. It is true that he paid Rs. 200 into Court; but in his written statement he says expressly that he believes that no damage has been done: that the plaintiff is not entitled to any damages whatever, and that the Rs. 200 are paid [495] into Court merely for the sake of pleas and to avoid litigation. Thus the defendant has put the plaintiff to prove his case, and the plaintiff has done so. I think if a party substantially succeeds he is entitled to his costs. The plaintiff must have his costs of the hearing in the Court below, and each party must pay his own costs of this appeal and of the proceedings on the rule for an injunction obtained before trial.

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Attorney for the plaintiff :—Mr. *Khanderao Moroji.*

Attorneys for the defendant :—Messrs. *Chitnis, Motital and Malvi.*

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Before Mr. Justice Starling.

AHMED BIN SHAIK ESSA KHALIFFA AND OTHERS (*Plaintiffs*), v. SHAIK ESSA BIN KHALIFFA AND OTHERS (*Defendants*).*
[23rd June, 1894.]

Civ. Pro. Code, (XIV of 1882). s. 244—Decree—Execution—Questions arising in execution between the parties—Decree incapable of execution by reason of events subsequent to decree—Decree giving an option to the parties—Practice—Procedure.

A partition suit brought by a son against his father was referred to arbitration. On the 9th January, 1890, the award was published, and on the 27th March, 1890, the defendants moved for and obtained a decree in terms of the award. By this decree it was ordered that in satisfaction of the plaintiff's claim the defendant should pay to him Rs. 1,05,000 in the manner therein stated, viz., Rs. 40 000 to be paid forthwith and the balance of Rs. 65,000 to be paid "upon the plaintiff's delivering to the defendant certain specified property, which included two vessels or buglows, called respectively the 'Nasri' and 'Sambuk'." In no event was defendant to be required to pay the Rs. 65,000 before the 15th November, 1890. At the date of the decree the vessel "Sambuk" was at sea on a voyage, and on the 18th June, 1890, while still on the voyage, she was lost. On the 15th November, 1890, the plaintiff's attorneys demanded payment of the balance of Rs. 65,000. They offered to deliver the other properties specified in the decree, but stated that the vessel "Sambuk" had been lost. They offered to pay its value, which they estimated at Rs. 1,000. The defendants, however, demanded the delivery of the buglow, which they stated to be worth a very large sum. The defendant having, under the circumstances, refused to pay the Rs. 65,000, the plaintiff applied for execution of the decree, which was refused. He then obtained a rule calling on the defendant to show cause why the decree of the 27th March should not be amended or rectified by stating [496] therein the amount of money to be paid to the defendant as an alternative of its delivery of the vessal "Sambuk" could not be made, such delivery having become impossible.

That rule was discharged. The plaintiffs then took out a summons calling on the defendant to show cause why an order should not be made, under s. 244 of the Civil Procedure Code, directing the plaintiffs to pay to the first defendant, in lieu of the delivery of the vessel "Sambuk," such sum of money as might be fixed by the Court as the value of or compensation for the loss of the vessel "Sambuk" in the decree mentioned, and why an order should not be made that on payment of such sum and delivery of the other properties mentioned in the decree which the plaintiffs were to deliver under the decree to the first defendant on payment by the latter to them of Rs. 65,000, the first defendant should pay to the plaintiffs Rs. 65,000 and interest thereon from the 15th day of November 1890, mentioned in the said decree, and in the event of its being held that the

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* Suit No. 383 of 1886.