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absence of the father at the time was, therefore, immaterial. Mr. Justice Jardine has, however, taken a different view, and I understand that this is not a matter which can properly be referred to a third Judge. The appellant, moreover, has the right to apply directly to the Judicial Committee, and obtain their special leave to appeal on good cause shown.

Under these circumstances, I feel that this is not an occasion where, in the exercise of a discretionary jurisdiction, I should press my views any further. I accordingly join with Mr. Justice Jardine in the final order of refusal.

ORIGINAL CIVIL.

Before Mr. Justice Parsons and Mr. Justice Strachey.

1896. *February* 7, 21.

HIS HIGHNESS SULTA'N NAWA'Z JUNG, PLAINTIFF, *v.* RUSTOMJI NA'NA'BHOY BYRA'MJI JIJIBHOY, DEFENDANT.*

Easement—Light and air—Injunction or damages—Specific Relief Act (I of 1877), Sec. 54, Cl. (b)—Prescription—Agreement to prevent acquisition of easement—Not a document creating, &c., right in immoveable property—Chance of acquiring easement not immoveable property—Registration.

The chance of acquiring a right to light and air is not immoveable property within the meaning of the Registration Act, nor can a pecuniary value be put upon it. A document, therefore, which limits or extinguishes the chance of acquiring such an easement does not require registration.

Dhunjibhoy v. *Lisboa*(1) and *Ghanashám* v. *Moroba*(2) followed and approved as to the circumstances in which the Court will grant an injunction where a right to light and air is infringed.

SUIT for injunction. The plaintiff complained that the defendant was building a new house to the south of his (the plaintiff's) house in Hornby Row, Bombay, which, when completed, would obstruct the light and air to the windows of the third and fourth storeys on the south side of his said house.

He alleged that the windows in question were ancient windows, and that he and his predecessor in title had enjoyed the right

*Suit No. 536 of 1894. Appeal No. 879.

(1) I. L. R., 13 Bom., 252. (2) I. L. R., 18 Bom., 474.

which he claimed as an easement and as of right for upwards of twenty years.

The defendant denied that any easement existed. He alleged that the southern windows in the upper floor of the plaintiff's house had been originally opened and had since been permitted to exist not as of right but under an agreement originally made in 1865 between his predecessor in title and the plaintiff's predecessor in title, which was subsequently recognized and confirmed between the plaintiff and himself.

This agreement (he alleged) had been entered into shortly after an addition had been made to the plaintiff's house; and it was to the effect that, in case thereafter the defendant's house should be raised higher than the plaintiff's and the new windows in the plaintiff's south wall should be thereby obstructed, no objection should be taken.

The defendant alleged that it was under this special arrangement that the plaintiff's windows had been opened and had ever since existed, and he contended that the plaintiff could not now object to their being obstructed by the house which he (the defendant) proposed to build.

The plaintiff purchased his house in 1867. The defendant obtained his house under the will of his grandfather Byrámji Jijibhoy, C.S.I.

At the hearing, Mr. Pestonji Cáwasji, who was called by the defendant, deposed that in February, 1865, he was assistant to Byrámji Jijibhoy, and that in that year he went to see the adjoining house (now the plaintiff's), and after inspection made the following memorandum which was signed by him and his assistant:—

"As to the house situated at Kalekot (*i.e.*, in Hornby Row) in the neighbourhood of Seth Byrámji Jijibhoy's chawl in the Fort, which was formerly called Mehta's Cháwl, the third floor whereof is being taken down, we have this day gone and seen the same. And there is only one window on the said floor in the side (wall) towards the said cháwl. Bombay, the 20th of February, 1865.

"(Sd.) PESTONJI CÁWASJI.
" " KHURSHETJI NUSSERVÁNJI."

On the 11th May, 1865, the following letter of that date was written by the then owner of the plaintiff's house (Rustomji

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Jamsetji Jijibhoy) to the said Byrámji Jijibhoy, the then owner of the defendant's house :—

"The reason of (this) being written is as follows: Upon the house of Bhái Pestonji Merwánji Tobak adjoining your (house) in Hornby Row purchased from the heirs of Rustomji Mancherji Bangáli which I have purchased from Bhái Sáheb Kharsetji Furdunji I have now raised a fourth storey and have placed windows on the south side thereof. As to these windows at the time when you shall build the neighbouring house higher (than mine) I shall not raise any objection in respect of the above-mentioned windows on the south side which may be shut up. And should I raise (any), the whole is to be considered as null and void. This is the sole request. The 11th of May in the year 1865."

The plaintiff, as above stated, purchased his house in 1867.

On the 4th September, 1867, Byrámji Jijibhoy wrote the following letter to the plaintiff's agent :—

"To HÁJI ISMÁIL HÁJI HABIB, Esq.,
"Agent for the Jamádár of Hyderabad, Bombay.

"DEAR SIR,—Learning that you have purchased for the Jamádár the house No. 7 in Hornby Row from the trustees of the estate of Mr. Rustomji Jamsetji Jijibhoy, I take this opportunity of drawing your attention to the correspondence that has passed between myself and Mr. R. J. Jijibhoy respecting the windows and projected kánframes opening on the north of my property, No. 6, Hornby Row, wherein the said Mr. R. J. Jijibhoy has agreed to throw no obstacles or hindrances of any kind whenever I required the said windows and their projections to be blocked up; that writing is insufficient. I asked him in my letter dated 17th May, 1865, to send me a more particularised paper to the above effect, but owing to different circumstances of that gentleman's affairs the matter rests still incomplete.

"But as you are now the agent for the present proprietor of the said house I shall thank you to pass me agreement or writing binding the proprietor, his heirs, executors, administrators and assigns to block up the said windows and the projected kánframes any time I or my heirs, executors, administrators and assigns shall demand and require the same to be done without hindrance or delay on your part.

"In the absence of such an agreement or writing to the above effect forthcoming from you within a reasonable time, I shall be compelled to have these windows blocked up and the kánframes removed at once; although I have not the slightest intention of adopting this course, I should like to have the business done in a regular and straightforward manner, preventing thereby any unpleasantness hereafter."

On the 23rd November, 1867, Byrámji Jijibhoy's solicitors wrote the following letter to the plaintiff's agent, enclosing copies of the letters of the 11th May, 1865, and the 17th May, 1865 :—

"*Bombay, November 23rd, 1867.*

"TO HÁJI ISMÁIL HÁJI HABIB.

"SIR,—With reference to your letter to our client Mr. Byrámji Jijibhoy of the 5th September last, asking for a copy of the correspondence that took place between Mr. Rustomji Jamsetji Jijibhoy and our client, to enable you to reply to our client's letter to you of the 4th September last, with reference to the house No. 7 and the windows and kanframes opening on the north of our client's adjoining property, No. 6, Hornby Row, we are now instructed by our said client to enclose you copies of the original Gujarati letters, and to inform you that we have had instructions to prepare an agreement for your signature to secure to our client the full enjoyment of his rights so as to avoid the necessity of his blocking up the windows and removing the kanframes, which he is unwilling to do if he is sufficiently protected by an agreement. This letter as also that of our client to you of the 4th September last are written without prejudice to our client's rights."

Byrámji Jijibhoy's solicitors wrote again to the plaintiff's agent on the 26th February, 1868, as follows:—

"DEAR SIR,—Mr. Byrámji Jijibhoy has instructed us to prepare the necessary agreement relating to the windows and kanframes overlooking his property at Rampart Row to carry out the arrangement come to. Kindly let us know who is the legal owner of the property and the windows and kanframes that we may insert his name in the agreement the draft of which will be sent to you for approval."

On the 28th February, 1868, the plaintiff's agent sent the following reply through his solicitor:—

"In reply to your letter of the 26th instant to the address of our client Háji Ismáil Háji Hubib, we beg to inform you that the legal owner of the house referred to in your letter is Jamádár Awad bin Umar, who is now in Arabia, and our client has no power to execute any such agreement as is referred to in your letter, but our client will, if you wish it, give your client a Gujaráti note, in the form your client has obtained from Rustomji Jamsetji Jijibhoy, until the return of Jamádár Awad, when the arrangement your client wishes to be made will probably be carried out."

On the 17th March, 1868, the plaintiff's agent wrote to Byrámji Jijibhoy as follows:—

"TO PÁRSI BYRÁMJI JIJIBHOY.

"Written by Háji Ismáil Háji Habib. To wit. As to your one house bearing No. 6, situated in Hornby Row, which has been purchased from Párai Dádábhoy Rustomji Nowroji Bangáli, on the east side thereof is Jamádár Awad Bin Umar's house, which said house the said party has purchased from Seth Rustomji Jamsetji Jijibhoy. And the windows and the kanframe (weather board) of the said house open towards your side; you have a right to shut up the said windows and kanframe (weather board). And whenever you may build your house, I am not to raise any objection whatever to your shutting up the same."

Early in 1870 Byrámji Jijibhoy again wrote to the plaintiff's agent to have the agreement respecting the windows of the

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plaintiff's house, which opened on his property, prepared and to furnish him with a draft for approval. In reply, he was informed that the agent had not authority to sign any such agreement, but that the plaintiff was expected to come to Bombay in a short time, and might then be applied to.

On the 31st March, 1870, Byrámji Jijibhoy wrote the following letter to the plaintiff's agent:—

"I request your earliest attention to my letter dated 23rd instant, which remains unreplied. Please urge Jamádár Awad bin Umar to complete this long-standing matter as soon as possible. If he is to remain away longer from Bombay kindly ask him to empower you to execute the requisite writing. It is because of our personal friendship that I have allowed this matter to stand over for such a long time, or I would have otherwise blocked up the windows and removed the kanframes ere this."

In reply to this, Byrámji Jijibhoy was referred to Háji Adam Isak, who had then become the plaintiff's agent.

The correspondence was then continued with him, but nothing was done. On the 2nd November, 1871, Byrámji Jijibhoy wrote to him as follows:—

"*Bombay, dated 2nd November 1871.*

"SETH HÁJI ADAM ISAK,

"Jamádár Awad bin Umar's Agent, Bombay.

"To wit. In the course of nearly a year and a half that has now elapsed, I have often written to you to the effect as follows:—There is the property of the said Jamádár in the vicinity of my house situate in Hornby Row, and the windows on the south (side) thereof have been made to open projecting over my property (which was not at all the case before). I asked for a writing from you making arrangements in the matter, but you have not as yet sent any satisfactory answer in respect thereof, and you often wrote and you often communicated to me verbally the same answer to the effect that the Jamádár was to come and that you would settle the same when he comes, but nothing has been done in the matter. I, therefore, by this give you final notice that should you fail to come to a satisfactory arrangement as regards me (in the matter of these windows) within fifteen days from this date, I will, without delay, by legal steps, at once close your windows and 'kanframes' (3 weather boards), and as to whatever expenses may be incurred by me in the matter thereof you are responsible for the whole of the same and you are bound to be answerable for the same. I, therefore, think that now you will not make the least delay in the matter. Relying upon your word, I waited for so many months, but it cannot be done hereafter. Do you please note the same. Please reply to this letter immediately. This is the sole representation."

On the 17th July, 1872, Byrámji Jijibhoy again wrote as follows:—

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"*Bombay, dated the 17th of July 1872.*

"SETH HÁJI ÁDAM ISÁK,

"Jamádár Awad bin Umar's Agent.

"To wit: I am extremely sorry to write that although you are a respectable man and merchant the promise that you very often gave to the effect that you would write to the Jamádár in the matter of the house belonging to Jamádár Awad bin Umar situate in the vicinity of my house in the Fort, and the windows and kanframes (weather boards) whereof open over my property, and get (him) to come to an arrangement with me. But as to the same you have not up to this day fulfilled your promise, and I took you to be a respectable man and put up with the same for nearly two years. But now I have at length got tired and am obliged to write this strong letter. The whole blame in respect thereof is on you. Now I have written this last letter, and hope that without the slightest further delay you will at once pass in writing and deliver (to me) the instrument which is required (to be passed) in the matter of the windows of your house, and should you perhaps fail to do so within fifteen days, I will take such steps as may be proper according to law and recover from you all the loss and costs, &c., in respect of the same.

"Even now I again request that you will surely get the work done, and I hope do it in a way which will not give rise to any lengthy dispute between you and me. Please reply to this letter immediately. This is the sole representation.

"Written by (your) servant Byrámji Jijibhoy, whose salutations you will be pleased to read."

The plaintiff filed this suit on the 12th October, 1894, praying for a declaration that he was entitled to free and uninterrupted access of light and air to the windows to the south and west side of his house, save in so far as the same was obstructed by the defendant's old house, and for an injunction, &c.

The suit was heard by Farran, J., who found that the arrangement evidenced by the letter of the 11th May, 1865, and the 17th March, 1868, was a temporary arrangement which was terminated by the defendant's letters of the 2nd November, 1871, and 17th July, 1872. He, therefore, held that the plaintiff had acquired a prescriptive right to light and air through the windows in the south wall of his house.

He, however, held that following the rule in *Lisboa's case*[1] he ought not to grant an injunction, but he awarded Rs. 4,500 as damages to the plaintiff.

The plaintiff appealed, contending that he was entitled to an injunction, or that, if not, the damages were inadequate and should be increased.

(1) I. L. R., 13 Bom., 252.

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The defendant filed cross-objections to the decree, contending that the plaintiff had not acquired any prescriptive right or easement to the light and air which he claimed; that the agreement of the 11th May, 1865, continued in full force, and was a good answer to the suit, and that the suit ought to have been dismissed with costs.

Lang (Advocate General) (*Scott* with him) for appellant (plaintiff):—The Court below ought to have granted an injunction. It followed the ruling in *Dhunjibhoy* v. *Lisboa*[1]. We contend that case is wrong and ought not to be followed. The law in India with reference to rights to light and air is the same as in England. We rely on *Greenwood* v. *Hornsey*[2]; *Shelfer* v. *City of London Electric Lighting Company*[3]; *Martin* v. *Price*[4]; *Ghanashám Nilkant* v. *Morcha*[5]; *Dent* v. *Auction Mart Company*[6]; *Aynsley* v. *Glover*[7]; Specific Relief Act (I of 1877), sec. 54, cl. (*b*). The damage done to the plaintiff's building is so great as to justify an injunction.

Inverarity (with him *Macpherson* and *Lowndes*) for the respondent (defendant):—We have filed cross-objections to the lower Court's decree, for we contend that the plaintiff never acquired any right to light and air, and ought neither to get an injunction or damages. We contend that our right to build was always reserved to us, and that the agreement to this effect was never put an end to. The plaintiff had notice of the agreement and was bound by it—*Bewley* v. *Atkinson*[8]. But in any event this is no case for an injunction. The rule in *Dhunjibhoy* v. *Lisboa*[1] applies.

Lang, in reply:—There was no completed agreement that the defendant should have a right to build on his land so as to block up the plaintiff's windows. If there was, the documents evidencing it are inadmissible, as they were not registered. This objection was taken in the Court below.

PARSONS, J.:—As indicated by us during the hearing of this appeal, we see no reason to differ from the ruling of this Court in

(1) I. L. R., 13 Bom., 252.
(2) 33 Ch. D., 471.
(3) (1895) 1 Ch., 287, 322.
(4) (1894) 1 Ch., 276.
(5) I. L. R., 18 Bom., 474.
(6) L. R., 2 Eq., 246.
(7) L. R., 18 Eq., 544, 552.
(8) 13 Ch. D., 283.

Lisboa's case[1] which was followed in the case of *Ghanashám Nilkant* v. *Moroba Rámchandra*[2]. We consider that the principle enunciated in those cases, *viz.*, that an injunction will only be granted where the invasion of the right or enjoyment is such that pecuniary compensation would not afford adequate relief, is a correct interpretation of section 54 of the Specific Relief Act (I of 1877), which lays down the law binding on the Courts in this country. To Courts subject to that Act the English decisions cited have no application. We have, therefore, only to see whether the present case is one in which adequate relief can be afforded by pecuniary compensation. On this point we agree with the learned Judge who tried the case that it is. No very serious damage has been done to the plaintiff's house. No room has been rendered uninhabitable. Two rooms have been made somewhat darker and hotter than they were. The result has been that the letting value, and, therefore, the market value of the property, has been somewhat reduced. The learned Judge has taken the loss of rent to be about Rs. 20 a month, and this seems quite correct. He has awarded damages on that footing, capitalizing the amount at twenty years' purchase. This, we think, is too little. We think the period of twenty-five years should be taken, or rather that such a sum ought to be awarded as would, if invested in Government paper, produce Rs. 240 a year. We think the damages should have been Rs. 7,000.

Turning now to the only other point at issue, we have to see whether the plaintiff has been rightly found to have gained by prescription the easement of light and air that he claims. His enjoyment is admitted. It is contended only that he enjoyed by agreement, with permission, and on sufferance.

The evidence on this point is purely documentary and must be set out at length. The first document is the Ex. 1 and is a letter written on the 11th May, 1865, by the plaintiff to the defendant (I say plaintiff and defendant for sake of brevity, the real parties to it being their predecessors in title): In it the plaintiff says that he has purchased a house next the house of the defendant, and has raised a fourth storey and placed windows on the south side of it,

(1) I. L. R., 13 Bom., 252. (2) I. L. R., 18 Bom., 474.

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and he promises to raise no objection to these windows being shut (blocked) up when the defendant builds his house higher. The learned Judge wrote no judgment, but we are informed that in his oral judgment he treated this as an agreement between the parties which would prevent the plaintiff acquiring any easement of light and air so long as it continued in force.

This view is not contested by the plaintiff's counsel, who, however, has argued that the document relates to the windows on the fourth storey only, and that under it there has been no bar to the acquisition of an easement in respect of the windows on the third storey. We cannot assent to this argument. There has been in the case a confusion throughout between what is a floor and what is a storey, arising from the use of these words as if they were synonymous. The house of the plaintiff consists of five floors, that is, of a ground floor and four storeys. The fourth storey mentioned in this document is really the fourth storey or the fifth floor. In future we shall use the word floor in speaking of the house.

In this document, then, the building of the fifth floor is mentioned. There was only one window on the fourth floor before the fifth floor was added. (See the memo.[1] Ex. 1 at p. 119 where floor is used for and instead of storey.) It is not shown that any easement had been acquired in respect of it. The other windows that are now on the fourth floor were added at this time, the fourth floor being practically rebuilt. As we construe the document, the words "in the south side thereof" relate to the south side of the house and not merely to the south side of the fifth floor. This is clearer in the vernacular original than in the translation. The true translation is "on it (*i.e.*, the house) I have raised a fourth storey and on the south side of it I have placed windows." Thus the document covers all the windows on the south side of the house, whether on the fourth or the fifth floor. In any case, it must be so; for as the result of blocking up the windows on the fifth floor would of necessity be the blocking up the windows on the fourth floor below them, the power given by this document to block up the windows on the fifth floor must include the power to block up those on the fourth floor also.

(1) *Ante* p. 705.

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So far, therefore, as this document is concerned, its meaning is obvious and the case is clear. It constitutes a contract or agreement between the parties, in pursuance of which the plaintiff is allowed to enjoy the access of light and air through the windows on the south side of his house, in return for which he promises that he will not raise any objection to those windows being blocked up when the defendant should rebuild and raise his house. So long, therefore, as that promise remained in force the plaintiff could acquire no easement in respect of these windows as against the defendant whenever the latter chose to raise his house.

The question then arises, was the promise ever put an end to, and if so, when. It is not contended that the plaintiff ever withdrew his promise. It is only argued that the defendant himself put an end to the agreement by his own conduct, and this, we are informed, was the view adopted by the learned Judge who tried the case. It is difficult to see how the defendant alone could put an end to the agreement. He could, of course, tell the plaintiff that he no longer held him bound by his promise and proceed to break his own part of the agreement, but anything short of that could hardly absolve the plaintiff from the performance of his promise at the specified time, still less convert the plaintiff's enjoyment of the light and air that he had obtained by the agreement on the strength of his promise into an enjoyment of it as an easement.

In order, however, to see what actually took place, the facts must be set out. The plaintiff bought the house in 1867. On the 4th September, 1867, the defendant writes to the plaintiff's agent the letter Ex. 11 (*ante* p. 706.) In it he says that the writing of the 11th May, 1865, is insufficient, and asks the agent to pass "an agreement binding the proprietor, his heirs, executors, administrators and assigns to block up the said windows and the projected kanframes any time I or my heirs, executors, administrators and assigns shall demand and require the same to be done without hindrance or delay on your part." No doubt the writing of 11th May, 1865, was insufficient if the defendant was right in saying that R. J. Jijibhoy had agreed to throw no obstacle or hindrance of any kind whenever he required the windows to be

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blocked up, because the promise of 11th May, 1865, related only to the event of the defendant's raising his house. That promise the defendant had got. By this letter he shows no intention of giving it up: on the contrary he keeps it and asks for something more. That is, we think, the effect of this letter.

In the Ex. 6, on the 5th September plaintiff's agent asks for copies of the correspondence between the defendant and Jijibhoy. These are sent on the 23rd November, 1867, (Ex. 12). On the 26th February, 1868, defendant asks of plaintiff's agent the name of the owner of the property for insertion in the agreement he is having prepared to carry out the arrangement come to relating to the windows and kanframes overlooking his property (Ex. 13). On the 28th February plaintiff's agent informs the defendant of the name of the legal owner, says that he as agent has no power to execute such an agreement as defendant mentions, but expresses his willingness to give a Gujaráti note, in the form the defendant has obtained from R. J. Jijibhoy, till the return of the plaintiff, when the arrangement defendant wishes to be made will probably be carried out (Ex 14).

On the 17th March, 1868, plaintiff's agent signs the Gujaráti note, which is as follows:—

(His Lordship read the note which is given above[1] and continued.)

It will be observed that this agreement goes much further than the Ex. 1; for, in addition to the promise of not objecting to having the windows blocked up whenever defendant raises his house, it contains an admission of defendant's right to shut up the windows and frame that open towards the side of the defendant's house whenever he likes. It thus contains the original promise of 1865 and the additional promise demanded by defendant in 1867. This agreement has never been repudiated by the plaintiff, and it has not been shown that his agent had not full power to pass it.

The only contention raised in this Court in respect of it is that it was wrongly admitted in evidence, not being registered. That contention is not, in our opinion, a sound one. An easement of

(1) *Ante* p. 707.

light and air, no doubt, is immoveable property within the meaning of the Indian Registration Act, 1866, but it must be an easement, an acquired right, not the chance of acquiring one that is meant. Here no easement existed, for none had been acquired at the time. The document, therefore, does not create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in immoveable property. Its effect may be to prevent such a right being acquired, but it does not of itself limit or extinguish any such right. Neither can it be said that because the right, when acquired, was worth more than Rs. 100, the chance of acquiring that right was also worth more than Rs. 100. We are, therefore, of opinion that the document was rightly admitted in evidence.

The defendant, however, was still not satisfied, and he writes another letter to the plaintiff's agent on the 14th February, 1870. This letter is not on the record, but it is answered by the letter of the 24th February (Ex. 14), in which the plaintiff's agent says that his power is insufficient to enable him to sign the formal agreement asked for, but that he will let the defendant know when the plaintiff comes to Bombay, and that he can then arrange with him. On the 31st March the defendant writes to the plaintiff's agent again asking him to urge on the plaintiff to complete the matter. He ends his letter in these words: "It is because of our personal friendship that I have allowed this matter to stand over for such a long time, or I would have otherwise blocked up the windows and removed the kanframes ere this." (Ex. 15.) A change of agency then took place (Exs. 5, 16 and 17).

On the 16th of May, 1870, plaintiff's agent writes to the defendant as follows:—

"I have received two notes from (you), respected Sir, the first dated the 2nd of April and the second dated the 30th of April. On a perusal thereof I have noted the particulars. It was written that an agreement according to what you write should be made in respect of the Jamádár's house, bearing No. 7, which is situated in Hornby Row. But as I had no 'power' to make an agreement in accordance therewith, I wrote to Jamádár Awad at Hyderabad. He has sent a reply to me as follows:—'I am to come to Bombay; when (I come), on personally seeing (the premises) I will make the same myself.' Jamádár Awad, the owner of the said house, has written a reply agreeably to this. And when he will come I shall let you know. Do you be pleased to make such arrangement as you may wish to make with him." (Ex. 7.)

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Further correspondence ensues which need not be set out (Exs. 18, 19, 8, 20, 21, 9). On the 2nd November, 1871, the defendant writes to the plaintiff's agent as follows:—

"I, therefore, by this give you final notice that should you fail to come to a satisfactory arrangement as regards me (in the matter of these windows) within fifteen days from this date, I will, without delay, by legal steps at once close your windows and 'kanframes' (three weather boards), and as to whatever expenses may be incurred by me in the matter thereof you are responsible for the whole of the same. I, therefore, think that now you will not make the least delay in the matter." (Ex. 22.)

Nothing, however, was done on this letter. On the 17th July, 1872, the defendant writes again to plaintiff's agent in these words:—

"Now I have written this last letter and hope that without the slightest further delay you will at once pass in writing and deliver (to me) the instrument which is required (to be passed) in the matter of the windows of your house, and should you perhaps fail to do so within fifteen days I will take such steps as may be proper according to law, and recover from you all the loss and costs, &c., in respect of the same."

To this plaintiff's agent replies on the 19th July, 1872. He says, as before, that he has no authority to make the agreement himself, he explains that the plaintiff owing to business had not been able to come to Bombay as he had intended, and he suggests that the defendant should write direct to the plaintiff.

We have no more correspondence put in, so that apparently the defendant did not write to the plaintiff, but was content to leave matters where they were, and to remain satisfied with the agreement of the 11th May, 1865, and of the 17th March, 1868.

We are, however, asked to come to the conclusion that, by reason of these letters, and more especially of the threats used by the defendant in these letters, he had absolved the plaintiff from the performance of the promises that he had made, and that the agreements between the parties had come to an end; and that the plaintiff had gained the easement he claims by peaceable enjoyment of the light and air since 1872. We are of opinion that the facts do not justify such a conclusion. We consider that the promise of 1865 is as binding on the plaintiff now as it was on the day it was made. In our opinion, the defendant has never absolved the plaintiff from the performance of that promise or put an end to that agreement; on the contrary while treating it as in force he has always been demanding something more. "It

is true," he says to the plaintiff, "you have promised not to object to my blocking your windows when I raise my house, but that is not sufficient. I want you to agree to block those windows up whenever I ask you to do so." He succeeded in getting such an agreement from the plaintiff's agent, but not from the plaintiff himself. He nowhere, however, releases the plaintiff from the performance of his promise, and the plaintiff never denies his liability to perform it, or refuses to pass the agreement demanded by the defendant.

To put the plaintiff's case at its highest, if he had resisted the additional demand, he might now be entitled to keep his windows open against any other contingency than that of the defendant's raising his house, but against that contingency he would be bound by his agreement. As a matter of fact, however, the plaintiff has never resisted the demand of the defendant. Nowhere does it appear that he has ever denied his liability to perform his promise or asserted any right of his own in contravention of that promise. He was fully informed by his agent of all that was being done (Ex. 8). He repudiates none of his acts; on the contrary he consents, when he comes to Bombay, to make the agreement that the plaintiff asks for (Ex. 7). Of course, had there been anything for the plaintiff to do in the performance of his promise, and had he in consequence of the threats of the defendant or otherwise ceased to do that thing, the case might be different—*Bewley* v. *Atkinson* [1]. But here he had nothing to do. It behoved him, therefore, if he wished to avoid the performance of his promise, to repudiate the agreement distinctly and openly. No mere lying by would under the circumstances have any such effect. His final silence to the final threat of the defendant does not show that he in any way repudiated the agreement. At the most, it shows that he would not do more than he had already promised to do, while the forbearance of the defendant to carry out his threats only shows that he was content to leave matters where they were, and that he had decided not to persist in his demand for a further and more sufficient agreement.

Upon the facts, therefore, we are of opinion that the suit of the plaintiff fails and ought to have been dismissed, and reversing the

(1) 13 Ch. D., 283.

1896.

SULTÁN NAWÁZ JUNG v. RUSTOMJI NÁNÁBHOY.

decree of the lower Court we order that the plaintiff's suit be dismissed with costs throughout.

Suit dismissed with costs.

Attorneys for the plaintiff:—Messrs. *Crawford, Burder & Co.*

Attorneys for the defendant:—Messrs. *Craigie, Lynch and Owen.*

ORIGINAL CIVIL.

Before Mr. Justice Parsons and Mr. Justice Strachey.

1896. *February* 21.

KARAMSI MADHOWJI (ORIGINAL DEFENDANT), APPELLANT, *v.* KARSANDAS NATHA (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Adoption—Adoption directed by will—Will—Bequest—Bequest to the boy named for adoption—Conditional gift on adoption—Adoption a condition precedent to such boy taking under the will.

Where a Hindu testator directed that a boy should be taken in adoption, and added "to this boy, all the things mentioned in my will having been done, I give the residue of my estate as his inheritance and I appoint him as my heir,"

Held, that adoption was a condition precedent, and that the boy not having been adopted could not take under the will.

Bireswar v. *Ardhu Chunder*(1) distinguished.

Shámávahoo's case(2) followed.

APPEAL from Farran, J.

Suit for the construction of a will. The testator Kessowji Jádhowji, a Hindu inhabitant of Bombay, died on the 9th February, 1886, leaving a will, dated the 8th February, 1886, of which he appointed the plaintiff his executor. He left a daughter-in-law, named Ladkávahu, who was the widow of his predeceased son Liládhar Kessowji, and by his will he directed that she should adopt the appellant Karamsi Mádhowji, who was his nephew's son, and he gave the residue of his estate "to this lad as his inheritance."

The will directed large sums to be expended in charities, and made provision for his grand-daughter Kesarbái. It will be found

* Suit No. 185 of 1887. Appeal No. 880.

(1) L. R., 19 Ind. Ap., 101. (2) I. L. R., 12 Bom., 202.

(3) See I. L. R., 12 Bom., 186.