APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

CHOTALAL MOHANLAL AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* LALLUBHAI SURCHAND (ORIGINAL DEFENDANT), RESPONDENT.*

1904. *January* 26. *June* 30.

Light and air—Obstruction—Occupation uncomfortable—Rule of 45°—Injunction—Decree.

In a suit for an injunction to restrain the defendant from obstructing the access of light and air to the plaintiffs' windows the first Court granted an injunction solely on the ground that the defendant's new building left the plaintiff with less than 45° of light, and dispensed with any further evidence.

On appeal the lower Appellate Court reversed the decree on the ground that no evidence had been adduced to show that there was a diminution of light.

Held that both the lower Courts were in error and that the case must be remanded for the determination of the following issues:—

(1) Has there been a diminution in the quantity of light and air which has been accustomed to enter the windows of the plaintiffs' house during the whole of the prescriptive period?

(2) If so, has there been a privation of light and air sufficient to render occupation of the house uncomfortable?

SECOND APPEAL from the decision of Lalshânkar U. T., Additional First Class Subordinate Judge of Ahmedabad with appellate powers, amending the decree of Vadilal T. Parikh, Joint Subordinate Judge.

The plaintiffs and the defendant were the owners of two houses facing each other. The distance between the houses was eight feet and their roofs were originally of the same height. The defendant began to raise the front portion of his house and by his new superstructure materially obstructed the free passage of light and air to plaintiffs' old windows. The plaintiffs, therefore, brought the present suit praying that the defendant should be compelled to pull down the new structure and to restore his house to its former position and that a perpetual injunction should be issued directing the defendant not to raise the height of his roof.

The defendant contended, *inter alia*, that there being a distance of eight feet between the two houses, there could be no ob-

* Second Appeal No. 386 of 1903.

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struction to the free passage of light and air to the plaintiffs' house and that notwithstanding the new superstructure there would be an angle of 45° for the light at the sill of the plaintiffs' windows.

The Subordinate Judge found that the raising by the defendant of his upper story to the extent of nine and a quarter feet would materially interrupt the light and air passing into the plaintiffs' house and that the defendant could not raise his roof more than eight inches without reducing the angle of light coming to the plaintiffs' windows to less than 45°. He, therefore, passed a decree directing the defendant, among other things, to remove the superstructure of his upper story so that the angle of light at the base of the plaintiffs' windows should not be less than 45°.

On appeal by the defendant the Judge reversed the decree with respect to the superstructure holding that there was no evidence in the case to show that the defendant's new superstructure materially diminished the light and air coming to the plaintiffs' house. In his judgment the Judge made following remarks:—

At the request of both the parties Court inspected the disputed place and found that the front portion has been rebuilt by defendant and the hind portion is in dilapidated condition. The existing facts are recorded in Exhibit 35. The former roof of the front part was as high as the hind roof. There is a *chok* or open space 8 feet wide. Defendant has now raised his house 9½ feet high. Plaintiff wants to remove it on the ground that it obstructs light and air coming to the upper story of his share. There is, however, no evidence to show that light and air coming to the plaintiffs' upper story are materially diminished by defendant's raising his house. No witness supports plaintiffs' deposition No. 28. Witness No. 32 is an expert to speak how an angle of 45° is formed. He does not say, though he has seen the house, that plaintiffs sustain material injury by defendant's act. The ground floor is not plaintiffs'. The upper floor is about 10 feet from the ground. There is open space 8 feet in front of plaintiffs' house. There are three windows in the front portion.

Plaintiffs preferred a second appeal.

Trikamlal R. Desai for the appellants (plaintiffs):—Both the lower Courts have approached the case from a wrong point of view. There is no rule of law that when an angle of 45° is not left there is a substantial diminution of light and air. The first

Court applied this test, and placing the burden of proof on the defendant, decided in our favour. The Judge in appeal, however, found that we had not proved our case and reversed the decree. We submit that the Judge was wrong in upholding the test applied by the first Court. In cases like the present inquiry should be directed to two points, namely, whether there has been material diminution in the light and air enjoyed by the plaintiff during the prescriptive period, and whether the diminution has been so substantial that it cannot be compensated for by damages: *Ghanasham* v. *Moroba*[1], *Dhunjibhoi* v. *Lisboa*[2], *Abdulla* v. *Beg Mahomed*[3]. Under the circumstances we are entitled to a mandatory injunction. The defendant should be called upon to remove his superstructure and reduce his house to the state in which it was before: *Home and Colonial Stores, Ld.*, v. *Colls*[4], *Warren* v. *Brown*[5].

G. S. Rao for the respondent (defendant):—There is nothing in the case to show that the first Court relying on the rule of 45° called upon us to prove that our superstructure caused no damage to the plaintiffs' house. Further, the Judge in appeal, on evidence and personal inspection, came to the conclusion that the appellants' house has not suffered any substantial damage. The question is purely one of facts and it cannot be interfered with in second appeal. The cases relied on have no application.

Desai, in reply:—The judgment of the first Court clearly shows that no evidence was recorded on our side. Admitting that the finding of the Judge is a finding of fact still we contend that it is not such a finding as would be binding in second appeal.

JENKINS, C. J.:—Two points arise on this appeal. First, it is said that the lower appellate Court was wrong in not giving the plaintiffs relief for the wrong done to them by the raising of the plinth of the defendant's house, secondly, that it was in error in not giving the plaintiffs relief in respect of the diminution of the access of light to their premises.

(1) (1894) 18 Bom. 474.
(2) (1888) 13 Bom. 252.
(3) (1903) 5 Bom. L. R. 446.
(4) (1902) 1 Ch. 302.
(5) (1900) 2 Q. B. 722.

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The first point has been settled before us, because the defendant's pleader has intimated to us that his client is prepared to construct steps into the plinth of the house which will enable the plaintiffs and members of their family to use these steps and the plinth as a passage out into the street.

The steps will be six inches each in height and of sufficient width and depth to allow of reasonable passage.

The defendant himself is not now present, but it is intimated to us that he will give an undertaking to that effect, and accordingly we dispose of that part of the case on that basis.

Then there is the claim in respect of diminished light.

A model has been produced before us, as to the correctness of which no question has been raised, and it is difficult to suppose that the raising of the defendant's house has not resulted in substantial diminution of light to the plaintiffs' premises. But the lower appellate Court has not awarded the plaintiffs any relief in respect of this part of the case, on the ground apparently that no evidence was produced to show that there was a diminution of light.

We are told, and we think that can be the only reasonable explanation of what occurred, that the Subordinate Judge was under the impression, it followed as a matter of course from the fact that the defendant's building has a greater angular elevation than 45°, that the plaintiffs had a right of suit, and on that ground he did not require evidence.

Under these circumstances we think the Judge of the lower appellate Court was wrong in disposing of the case in the way he did, when he saw the error into which the Subordinate Judge had fallen, without giving the plaintiffs an opportunity of adducing such evidence as might be necessary to support their claim, and we now send back the case for the determination of the following issues :—

1. Has there been a diminution in the quantity of the light and air which has been accustomed to enter the windows of the plaintiffs' house during the whole of the prescriptive period ?

2. If so, has there been a privation of light and air sufficient to render occupation of the house uncomfortable ?

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Parties will be at liberty to adduce evidence and the return must be within three months.

Both the lower Courts having found both the issues in the affirmative,

Desai, for the appellants (plaintiffs), in support of the findings.

Rao, for the respondent (defendant), against the findings:—The findings are against us. This is not a fit case for an injunction as suggested. The ruling in *Colls.* v. *Home and Colonial Stores, Limited*,(1) is in point.

On hearing arguments the Court granted an injunction restraining the defendant from permitting the buildings raised by him to remain so as to cause such a privation of light or air to the plaintiffs' house as renders the occupation of the same uncomfortable, and gave the parties liberty to apply to the District Court for the appointment of a Commissioner to decide the extent to which the buildings should be removed or altered so as to give effect to this injunction.

G. B. R. *Decree reversed.*

(1) (1904) A. C., 179.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

THE COLLECTOR OF KAIRA, APPLICANT, *v.* CHUNILAL HARILAL AND OTHERS, OPPONENTS.*

1904. *July 12.*

Court-fees Act (VII of 1870), section 19 D—Court-fees Amendment Act (XI of 1899), section 19 I—Letters of administration—Limited grant—Trust property—Exemption from probate duty.

One Harilal died possessed of certain shares in Joint Stock Companies and in the Bank of Bombay valued at Rs. 11,980 standing in his name as their registered holder. He left three sons. The sons applied for letters of administration limited to one share only valued at Rs. 275 and their application was granted. Subsequently they applied for letters of administration with respect to all the shares except the one for which limited letters of administration had already

* Application under extraordinary jurisdiction No. 196 of 1903.