no interest, present or future, vested or contingent, in the immoveable property which he owned at the date of the document.

I allow the claim as prayed for in the plaint. Defendants to pay the plaintiffs' costs.

Suit decreed.

Attorneys for the plaintiffs: *Messrs. Payne & Co.*

Attorneys for the defendants: *Messrs. Bhaishankar, Kanga and Girdharlal.*

G. B. R.

ORIGINAL CIVIL.

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

FRAMJI SHAPURJI PATUCK AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* FRAMJI EDULJI DAVAR (ORIGINAL DEFENDANT), RESPONDENT.*

1905. *October* 11, 12.

Indian Easements Act (V of 1882), section 28, clause (c)—Disturbance of Easements—Meaning of Disturbance—Injunction to prevent disturbance—Light and Air—Physical comfort—Substantial Damage.

The Indian Easements Act is not merely prescriptive; it defines the law relating to easements and thus differs from the English Act in its ambit.

Section 28, clause (c) of the Act provides that the extent of a prescriptive right to the passage of light and air to a certain window, door, or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used.

PER CURIAM:—"In any case I see no reason for withholding from disturbance its legal sense of an illegal obstruction, and, for the purpose of chapter IV, that only can (in my opinion) be an illegal obstruction, for which, if done, a suit would lie. Therefore I hold that for an injunction there must be a threat of something more than mere obstruction and so the plaintiffs' first contention fails."

To establish that the plaintiffs have suffered substantial damage to their rights to light and air they must show material diminution in the value of their heritage or material interference with their physical comfort.

* Appeal No. 1490, suit No. 791 of 1904.

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The expression "physical comfort" does not admit of precise definition, but it is sufficiently exact when applied as a test to a given state of things to allow the ordinary reasonable man to arrive at a practical determination. A man's physical comfort in relation to the access of light and air to his house at any particular time depends upon the conditions then actually obtaining, regardless of how these conditions came into being or when they may cease: it is a present fact uninfluenced by past history or future fate.

Therefore for the purpose of applying the test of the plaintiffs' physical comfort we must look at the state of their property as it is, not as it was, or as it may be.

APPEAL from the judgment of Chandavarkar, J.

The parties to this suit owned contiguous properties in Bombay. The plaintiffs' property prior to 1902 consisted of a large two-storied bungalow with out-houses on the east and west side thereof. On 12th January 1898 the said west out-house was partially destroyed by fire. In the southern wall of the said out-house there were until December 1902 eight honeycombed openings containing triangular apertures. In December 1902 the plaintiffs demolished the said west out-house and erected on the site thereof subject to a set-back required by the Municipality a new building consisting of a ground floor and two upper floors and in the southern wall of the said new building, and on the ground floor storey thereof the plaintiffs opened certain windows. The defendant erected a building on vacant ground immediately to the south of the plaintiffs' said new building which, the plaintiffs alleged, materially interfered with the access of light and air to the plaintiffs' said windows. The plaintiffs claimed an injunction or in the alternative damages against the defendant. The defendant by his written statement denied the existence of the plaintiffs' easement at any time, and in the alternative claimed that if any easement ever had existed the same had been destroyed when the plaintiffs demolished their said south wall. The plaintiffs' building was not a rebuilding but a new building imposing a greater burden on the servient heritage. He denied that the plaintiffs had suffered any physical discomfort or substantial damage.

Chandavarkar, J., found for the defendant and dismissed the plaintiffs' suit. The plaintiffs appealed.

Baptista (*Jardine* with him) for the appellants.

Our new south wall is in the same position as our old one except in so far as the set-back required by the Municipality is allowed for. We are using through our new windows the same light which passed through the old apertures into the old building: *Scott* v. *Pape*.[1] It is not necessary to show to an inch or two the position of the former apertures.

Our easement is not destroyed under section 45 by our out-house being partially burnt: *Ecclesiastical Commissioners for England* v. *Kino*.[2]

There has been a substantial deprivation of light: *Colls* v. *Home and Colonial Stores, Limited*,[3] but in this country you want a greater angle of light, so English cases are not of much assistance. We are bound by the Easements Act.

Counsel also quoted *Hackett* v. *Baiss*,[4] *Modhoosoodun Dey* v. *Bissonauth Dey*,[5] *Kine* v. *Jolly*,[6] *Higgins* v. *Betts*[7].

Scott, Advocate-General (*Raikes* with him) for respondent.

The question is whether we are reducing the price of the plaintiffs' property.

Both the dominant and servient tenements are to be considered according to *Colls' case*[3]. We have left him more than we were bound to leave. We have committed no legal wrong. Our strict legal rights as regards plaintiffs' new bungalow are that the plaintiffs have no easement. They cannot define or show on their windows the corresponding portions on their old apertures: *Pendarves* v. *Monro*[8]. They must show that the house is made substantially less fit for occupation: *Gaunt* v. *Fynney*,[9] *Theed* v. *Debenham*[10], *City of London Brewery Company* v. *Tennant*.[11]

Baptista in reply.

JENKINS, C. J.—The parties to this suit are the owners of contiguous properties in Bombay. The complaint at the insti-

(1) (1886) 31 Ch. D. 554.
(2) (1880) 14 Ch. D. 213.
(3) [1904] A. C. 179.
(4) (1875) L. R. 20 Eq. 494.
(5) (1875) 15 B. L. R. 361.
(6) [1905] 1 Ch. 480.
(7) [1905] 2 Ch. 210.
(8) [1892] 1 Ch. 611.
(9) (1872) L. R. 8 Ch. 8.
(10) (1876) 2 Ch. D. 165.
(11) (1873) L. R. 9 Ch. 212.

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tution of the suit was the disturbance or threatened disturbance by the defendant of a prescriptive right to the access and use of light and air to and for a building on their property, claimed by the plaintiffs. The defendant's threatened acts have now been performed, and the worst is known.

By the prayer in this plaint the plaintiffs sought an injunction and compensation. The injunction was refused, and the only compensation awarded was Rs. 100 in respect of one of the several disturbances alleged. From this decree the plaintiffs have preferred this appeal.

Before the first Court the plaintiffs complained of disturbance to their prescriptive rights in respect of three buildings, distinguished as the Old Buildings, the New Buildings, and the Privies.

Before us the contest has been limited to the first and last of these: nothing has been said as to the New Buildings.

With respect to the prescriptive right claimed for the old buildings three points only have been urged, (*a*) that even if substantial damage was not proved, an injunction should have been granted, (*b*) that in estimating the extent of the disturbance, it was wrong to have regard to other sources of light, and (*c*) that the effect of the smoke from the defendant's cookroom was not taken into consideration.

As to the privies it is urged the defendant's completed work shows that the award of Rs. 100 as damages was an inadequate relief.

The contention that an injunction should have been granted, though substantial damage in the opinion of the learned Judge was not proved, rests on the words of section 35 of the Indian Easements Act, 1882. To understand and deal with the argument, however, it is necessary to examine its other sections. The Act is not merely prescriptive: it defines the law relating to Easements and thus differs from the English Act in its ambit. In the first section it is declared that an easement is a right, which the owner or occupier of certain land—an expression which includes things permanently attached to the earth—possesses as such for the beneficial enjoyment of that land to do and continue to do something, or to prevent and continue to

prevent something being done in or upon or in respect of certain land not his own. Easements are restrictions, on the rights of others (section 7), and where, as here, a prescriptive right of light or air is the easement, it is a restriction on the exclusive right of an owner of land in a town to build on such land: it includes the right to prevent the owner from building on his land that which will disturb the prescriptive right, contrary to the terms of the Act.

The 15th section describes the conditions requisite to the acquisition of an easement of light or air by prescription, and on the happening of those conditions the right to access and use of the light or air shall be absolute.

The extent of this prescriptive right is defined in section 28, which in clause (*c*) provides that the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used.

Provision is made against the infringement of these rights in Chapter IV of the Act. The owner or occupier of the dominant heritage is entitled to enjoy the easement without *disturbance* by any other person.

The remedies for disturbance are prescribed by sections 33 and 35. Thereby the owner of any interest in the dominant heritage or the occupier of such heritage may institute a suit for compensation for the disturbance of the easement provided that the disturbance has actually caused substantial damage to the plaintiff (section 33).

And subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement—

(*a*) if the easement is actually disturbed—when compensation for such disturbance might be recovered under Chapter IV of the Act:

(*b*) if the disturbance is only threatened or intended—when the act threatened or intended must necessarily, if performed, disturb the easement.

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The argument of the appellant put briefly is this: when the case was in the lower Court the disturbance was only threatened or intended: an injunction can in such case be granted under section 35, when the act must necessarily, if performed, disturb the easement: the condition that the disturbance should cause substantial damage is not imported.

It comes to this that there is a cause of action for an act apprehended, even where there is no cause of action for the same act done.

This is opposed to the principle on which *quia timet* remedies rest, and the unreasonableness of the conclusion suggests a further examination of the premises.

The Act is obviously the work of English lawyers, and regard must be had to the sense in English law of the expressions used.

The 4th Chapter is headed "The Disturbance of Easements," and that which gives rise to a suit is described as a disturbance.

Disturbance is a word possessing a special legal significance in English Law. In Blackstone's Commentaries it is stated, "The last species of injuries to real property—which, in some instances, amounts also to the injury of nuisance of which we have already treated—is that of *disturbance*: which is the wrongful obstruction of the owner of an incorporeal hereditament in its exercise or enjoyment." And in Gale on Easements[1], 6th Edition, page 552, it is said, "It is not every interference with the full enjoyment of an easement that amounts in law to a disturbance; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total obstruction of the easement. The injury complained of must be of a substantial nature, in the ordinary apprehension of mankind, and not arising from the caprice or peculiar physical constitution of the party aggrieved."

The language of the Act too points to the use of the expressions *disturb* and *disturbance* in their specialized legal sense, for it is difficult to suppose that the right given in express words

(1) pp. 535, 536 (7th Edn.).

by section 32 was not intended to be protected in its entirety by the remedies prescribed in the succeeding sections.

It would almost seem that what is stated in section 32 as a proviso, is in fact the inherent meaning of the expression throughout the chapter.

In any case I see no reason for withholding from disturbance its legal sense of an illegal obstruction, and, for the purpose of Chapter IV, that only can (in my opinion) be an illegal obstruction, for which, if done, a suit would lie. Therefore I hold that for an injunction there must be a threat of something more than mere obstruction and so the plaintiffs' first contention fails.

For another reason too it cannot be sustained. The granting of an injunction is at most discretionary: if a suit to prevent the disturbance of an easement of light or air be grounded on nuisance then section 56 (*g*) of the Specific Relief Act affords a complete answer to the plaintiffs' contention: if it be grounded on the Easement Act, then the analogy of section 56 (*g*) affords a reason for the Court's refusing the injunction in the exercise of its discretion.

I now come to the objection that substantial damage has been caused.

To establish this the plaintiffs must in the circumstances of this case show material diminution in the value of their heritage; or material interference with their physical comfort (see explanations to s. 33).

The argument before us has been limited to the second of these points.

The defendant's building is completed and as Mr. Justice Batty and I have viewed the premises, it will be convenient to speak of things as they are, and to discuss the whole question from that standpoint, and to express my conclusions in the concrete.

The expression *physical comfort* does not admit of precise definition, but it is sufficiently exact when applied as a test to a given state of things to allow the ordinary reasonable man to arrive at a practical determination. A man's physical comfort in relation to the access of light and air to his house at any particular time depends upon the conditions then actually obtaining, regardless of how those conditions came into being or

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when they may cease: it is a present fact uninfluenced by past history or future fate. If an obstruction to the access of light darkens my room, that darkness is not diminished because the obstruction is of my own creating in the past: the darkness is still there however or by whomsoever created. Nor is my room dark to-day, merely because it may be darkened by an obstruction another may create to-morrow, and of physical comfort as dependant on light and air the same is true.

Therefore for the purpose of applying the test of the plaintiffs' physical comfort we must look to the state of their property as it is, not as it was, or as it may be. In estimating therefore the plaintiffs' present physical comfort I think it is erroneous to take into account lights previously obstructed, though by the plaintiffs; and (in my opinion) the plaintiffs cannot claim that we should exclude from consideration sources of light alleged to be liable to obstruction hereafter.

How far these matters may affect the remedy to be granted I do not now discuss. But the precariousness of any source of light or air may be relevant to the question whether substantial damage has been caused by diminution in the value of the premises; and though this point was not argued before us in this shape, it may legitimately be considered, as the distinction I have drawn does not exclude the applicability of much that has been urged before us: it merely gives it a different direction.

But even so I think in the circumstances of this case the existing sources of light and air were rightly taken into consideration, though in respect of some of the windows concerned no prescriptive right of light and air exists. I doubt whether it would be possible to obstruct those windows without disturbing prescriptive rights established in respect of windows in their immediate neighbourhood.

But apart from this, the defendant's contention that these sources of light and air must be taken into consideration would (in my opinion) preclude him from hereafter obstructing them: that would be to approbate and reprobate. And more than that, he has offered an undertaking which will completely preserve them to the plaintiffs. This undertaking will be embodied in the Court's decree.

The defendant's undertaking too as to the smoke from the cookroom in his premises renders it unnecessary to consider the plaintiffs' objection on this score.

This then brings me to the question of fact whether substantial damage has been caused by the obstruction of the free passage of light and air to the plaintiffs' premises.

The evidence adduced before Chandavarkar, J., had to be, and was largely speculative, and for that reason no doubt has not been discussed before us by the appellants, it being the wish of the parties that our inspection should take its place. Of all the witnesses called the learned Judge, who has bestowed on this case the greatest care, has placed most reliance on Mr. Chambers; he describes him as an architect of great experience, who gave his evidence with extreme candour: and again he says "Mr. Chambers gave his evidence very clearly and appeared to me to have made his observations as to the premises in dispute with considerable care. Upon the whole I regard him as the most satisfactory of the witnesses examined in the case. And the effect of his evidence is decidedly in favour of the defendant."

This appreciation has not been impugned, and ocular observation has convinced my learned colleague and myself that Mr. Chambers' anticipations were well founded.

The defendant's new building has no doubt deprived the plaintiffs of their pleasant prospect over their neighbour's compound, but of that they cannot successfully complain. We are only concerned with such substantial damage as can be ascribed to the interruption of the free passage of the light and air. The only room in the old buildings affected is the big south room, and I can only say that so far as light and air goes it is, notwithstanding the defendant's building, a decidedly comfortable room and my visit to it completely dispelled the sombre hues of the gloomy picture painted before us with so much skill and pathos by the learned counsel for the appellant.

Though I did not see the premises before the erection of the plaintiffs' building, the evidence furnishes materials for estimating the light and air to which the plaintiffs had a prescriptive right, and no material diminution is proved, and when I have regard to the present condition of the southern room I have no doubt

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that the plaintiffs have completely failed to prove such substantial damage to the old buildings as the Act requires.

Then there are the privies, which the learned Judge considered damaged to the extent of Rs. 100.

How the plaintiffs succeeded in obtaining any damages is not clear; for I am told that the disturbance was at the date of the decree only apprehended, while compensation under s. 33 can only be awarded where the disturbance has *actually caused substantial damage*. Obviously then it cannot be said the Judge should have awarded more compensation, where there was no power to award any.

It has occurred to me whether it would be legitimate for us now to estimate the damages by reference to conditions which have come into existence since the decree of the first Court was passed (*Rustomji* v. *Sheth Purshotamdas*[1]). But I am met by the difficulty that we have no materials on which to base our estimate, and I cannot on mere speculation say that Rs. 100 is not an adequate compensation.

But it is said an injunction should have been granted. The Judge obviously was of opinion that though there might be substantial damage, the case was not one where in his discretion he ought to grant an injunction.

Can we say he exercised his discretion wrongly? Clearly not. When regard is had to the nature of the openings and their position, and to the purpose they are intended to serve, it is in my opinion impossible to contend that the learned Judge was not well within the limits of his powers when in the exercise of his discretion he determined not to grant an injunction.

The only other objection urged is that the learned Judge should not have awarded Rs. 1,000 in respect of the undertaking as to damages given on the interim injunction granted against the defendant.

But this point was not pursued when counsel's note was read as to the circumstances under which this sum was fixed.

Apart therefore from the question of costs in the lower Court—as to which we are to hear further argument—I hold that the decree should be confirmed with costs, subject to the

(1) (1901) 25 Bom. 606.

variation necessitated by the introduction of the undertakings I have mentioned.

I would add one word of explanation: though many English authorities were cited to us, I have mentioned none. It is not that I have omitted to consider them, but in this Presidency the Law of Easements is defined by the Indian Easement Act, 1882, and it therefore seemed to me, in the language of Bowen L. J., a wiser policy to go back in a humble spirit to the words of the Act by which our decision must be governed.

Decree confirmed.

Attorneys for appellants: *Messrs. Bicknell, Merwanji and Romer.*

Attorneys for the respondent: *Messrs. Payne & Co.*

B. N. L.

ORIGINAL CIVIL.

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

KARSONDAS DHARAMSEY (ORIGINAL DEFENDANT No. 8), APPELLANT, *v.* BAI GUNGABAI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS), RESPONDENTS.*

1905. *November* 6.

Limitation Act (XV of 1877), section 5—Admission of appeal after prescribed time—Application for excuse of delay—Practice.

To entitle a person to succeed on an application to excuse delay in presenting an appeal, he must satisfy the Court that he had sufficient cause for not presenting an appeal within the prescribed period. When the time for appealing is once passed a very valuable right is secured to the successful litigant; and the Court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages which he has obtained.

THIS was a motion on behalf of Karsondas Dharamsey (original defendant No. 8) for leave to file an appeal against a decree passed on the 10th April 1901 by Russell, J., in O. C. J. suit No. 573 of 1899.

* Motion to appeal from the decision of Russell, J., in O. C. J. suit No. 573 of 1899.