APPELLATE CIVIL.

Before Sir Ralph Sillary Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Ayyar.

ESA ABBAS SAIT (PLAINTIFF), APPELLANT,

v.

JACOB HAROON SAIT AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1909. October 27. November 5.

Easements Act V of 1882, ss. 13, 28, 33—Right of way not apparent and continuous easement—Air and light, extent of prescriptive right acquired in—When action for compensation for obstruction will lie—What relief appropriate to be granted.

A right of way is not an apparent and continuous easement within the meaning of section 13 of the Indian Easements Act.

The extent of prescriptive right to the passage of light or air to a certain window is the quantity of light or air which has been accustomed to enter that opening during the prescriptive period under section 28 of the Easements Act; no invasion of such right will give a right to compensation unless substantial damage is caused within the meaning of section 33 of the Act.

Where the injury caused by the invasion of the right is not small and a mandatory injunction will not cause serious loss or damage to the defendant, an injunction and not merely compensation will be the appropriate relief to be granted.

The fact that the owner of the dominant tenement has acquired light from other sources will not justify an interference with the prescriptive right acquired by him.

Dyers Company v. *King*, [(1870) L.R., 9 Eq., 438 at p. 442], referred to.

APPEAL against the decree of C. V. Kumarasami Sastriar, City Civil Judge, Madras, in Original Suit No. 107 of 1908.

The facts are thus stated in the judgment of the Court below:

"The plaintiff is the owner of house No. 34, Anderson Street, Georgetown, and the defendants are the owners of house No. 1-11 A and B, Stringer's Street, Georgetown. The plaintiff states that to the east of his house and to the west of the defendants' house there is a lane running from north to south and measuring 29 feet in length and about 3 feet in breadth, that the lane was enjoyed in common by the plaintiff and the defendants and their predecessors in title, that it was not only used as a passage for the scavenger to go to the plaintiff's house, but that the plaintiff and his predecessors in title had a free

* City Civil Court Appeal No. 28 of 1908.

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access and use of light and air to the said house passing through the said lane and over the defendants' house, and that the said rights have been enjoyed by them peaceably, openly and as of right and without interruption for over 30 years. He also states that there was a window existing for over 30 years in the kitchen room of his house opening out into the said lane and through which window also light and air used to pass to his kitchen room, and that the defendants about the end of February 1908, with a view to annoy and harass him, began to erect over the said lane, and are rapidly erecting a wall which, if completed, would block the passage through the lane and also close up the window of plaintiff's kitchen room and obstruct the free access and use of light and air to the plaintiff's house. It is further alleged that the defendants are intending to put up an upstair building immediately to the east of the said lane and that the said building, if put up, would completely shut out light and air coming from the east to the plaintiff's house. The plaintiff, therefore, sues for a declaration of his rights of easement both as regards the passage through the said lane for the scavenger of his house and as well as the free access and use of light and air to his house passing through the said lane and over defendants' house, and for a perpetual injunction restraining the defendants from erecting any wall in the said lane so as to obstruct the said passage and also the light and air flowing into his kitchen or from putting up a first floor to the east of the said lane so as to obstruct the free passage of light and air flowing into his house from the east; and also for a mandatory injunction directing the demolition of the wall erected by the defendants."

The defendants denied the existence of the window for the prescribed period. The lower Court found the existence of the window proved but dismissed the suit on the ground that it was not a case for injunction and there was no prayer for damages.

Plaintiff appealed.

P. R. Sundara Ayyar for *T. R. Ramachandra Ayyar* and *P. V. Doraiswami Mudaliyar* for appellant.

C. E. Odgers for respondents.

JUDGMENT.—The plantiff in this case became the owner of the western house through exhibits B and B-1. The defendants on the other hand became entitled to the eastern house through exhibits C and D. Both houses originally belonged to one

Lazaro. The dispute relates to a lane 3 feet broad between the two houses, and certain rights claimed by the plaintiff therein. The defendants denied the existence of the lane. This plea has been negatived by the City Civil Judge and we think his conclusion is perfectly right on the evidence. The plaintiff claimed common ownership in the lane and this question formed the subject of issue I. In his plaint the plaintiff restricted his claim to common enjoyment. It is admitted on the plaintiff's behalf that Lazaro did not convey any interest in the lane to the plaintiff. We must therefore uphold the Judge's finding as regards the claim to common ownership. The plaintiff's claim to a right of passage through the lane for his scavenger cannot also be sustained. The plaintiff has not had 20 years' enjoyment of such a right of way since the severance of the tenements. For it is admitted the lane was blocked up ten years ago. A right of way is not a continuous easement (see illustration (*b*) to section 5 of the Indian Easements Act, V of 1882). And therefore even assuming that it was used as a passage for scavengers at the time when Lazaro owned both the premises there would be no apparent and continuous easement within the meaning of section 13 of the Indian Easements Act.

It remains to consider whether the rest of the plaintiff's claim is well founded. The plaintiff claims an easement of light and air through a window in the eastern wall of his house opening into the lane in question. The defendants dispute the presence of the window. That it has existed for more than 20 years is established by the evidence of the plaintiff's first and second witnesses. And we adopt the conclusion arrived at by the City Civil Judge that the evidence on the plaintiff's side largely preponderates over the defence evidence as regards the period of its existence. The finding of the court below as regards the dimensions of this window has not been seriously questioned. We have no reason to doubt its correctness. The plaintiff has rebuilt the room to which the window was the means of access for light and air. The new window is placed in the site of the old one, though it exceeds the old dimensions of $1\frac{1}{2}$ feet $\times$ 1 foot. It is clear that the plaintiff is not entitled in respect of that excess. But his right to light and air through the window to the extent of the old dimensions cannot be affected. The defendants have built a wall along the western edge of the lane so as to completely close up the window and debar all access of light and air from the side of the lane.

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Are the defendants entitled to do this? Several cases have been cited in the course of the argument on both sides. But, before referring to any of them, we may draw attention to section 28, clause (*c*) of the Indian Easements Act, which is decisive of the law in this Presidency. It runs as follows: "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 irrespectively of the purposes for which it has been used." This is not in accordance with the view taken by the House of Lords in *Colls* v. *Home and Colonial Stores, Limited*(1). The rule there stated was that "to constitute an actionable obstruction of ancient lights, there must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind." Any diminution of light is insufficient. Even a substantial diminution of light that the premises have been accustomed to receive is not also sufficient to found a cause of action. But it must be such a diminution as to render the light remaining "insufficient according to the ordinary notions of mankind for the comfortable use and enjoyment of the house as a dwelling house." As pointed out by Lord Macnaughten, this was not the view taken in *Calcraft* v. *Thompson*(2), and *Scott* v. *Pape*(3). What Lord Macnaughten characterises as the extreme view taken in these cases was "that the right which was acquired by the so-called statutory prescription was a right to a continuance of the whole or substantially the whole quantity of the light which had come to the window during a period of 20 years." At the time of the passing of the Indian Easements Act, this was apparently the prevailing view based upon the third section of the Prescription Act, notwithstanding *Clarke* v. *Clark*(4), and *Kelk* v. *Pearson*(5). But whether this was so or not, there is no doubt the Indian Legislature chose to adopt the view enunciated by Lord Chelmsford in *Calcraft* v. *Thompson*(2). And to remove any doubts there might be if the language of section 3 of the English Prescription Act was adopted, the Indian Legislature made its

(1) (1904) A.C., 179.
(2) (1867) 15 W.R., 387.
(3) (1886) L.R., 31 Ch. D. 554.
(4) (1865) L.R., 1 Ch. 16.
(5) (1871) L.R., 6 Ch. 809.

meaning clear by stating that "the extent of the right is the quantity of light or air which has been accustomed to enter that opening during the prescriptive period." Whatever difficulty there may be in applying the law in England to the circumstances of a particular case, as to which see *Jolly* v. *Kine*(1) there can be none so far as section 28 of the Indian Easements Act is concerned. The case with which we are dealing is not one of mere diminution of the light and air passing through the window, but of total obstruction. And therefore even if the English law were applicable, it would fall within the rule that the obstruction would be actionable if it rendered the room unfit for comfortable enjoyment. The window is the only source of access for fresh air. It is the only passage for the light from the open sky.

It was attempted to be argued that in the reconstruction of the room, door-ways have been opened on the western and southern sides, which, though not directly communicating with any open space but only into another room or verandah, would be the means of ingress for other light. It does not appear that this arrangement makes the place fit for comfortable enjoyment in respect of light and air, notwithstanding the defendants' obstruction. Indeed the fact that the plaintiff had found it necessary to enlarge the window negatives such a possibility. But we do not think that there is any warrant for the defendant justifying his action on the ground of possible light and air in consequence of changes made by the plaintiff which might be a source of additional light to the room in question. In *Dyers' Company* v. *King*(2), it was said by Vice-Chancellor James "the right is a right as between the owner of the dominant tenement and the owner of every servient tenement; he has a right to as much light to and for the use of his house over his neighbour's land as he enjoyed 20 years ago; and the neighbour has no right to deprive him of the light which has so come to and for the use of the house over the neighbour's land because the owner of the dominant tenement has * * * obtained other light." The circumstances do not justify the supposition of a release by the dominant owner by implication. Nor is the access of light and air by means of the new arrangement so material as, to use the language of James, V. C., "to be much in excess of anything

(1) (1907) A.C. 1.

(2) (1870) L.R., 9 Eq. 438, at page 442.

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required by the dominant owner for the reasonably comfortable enjoyment of the premises as he enjoyed them." The above case is quoted with approval by Lord Lindley in *Colls* v. *Home and Colonial Stores, Limited*(1). See also Gale on 'Easements' VIII edition, page 335.

Though the extent of the right is determined under the Indian Easements Act by the quantity of light and air that has been enjoyed through the opening in question for the prescriptive period, the Act does not make every infringement of that right the basis of an action for compensation. The proviso to section 33 of the Indian Easements Act, enacts that the disturbance of the easement should have actually caused substantial damage to the plaintiff. What amounts to substantial damage is stated in three explanations added to the section. Explanation 2 relates to the free passage of light; and explanation 3 to that of air. In the first case the damage is not substantial unless, firstly, it is likely to injure the plaintiff by affecting the evidence of the easement or by materially diminishing the value of the dominant heritage; or, secondly, it interferes materially with the physical comfort of the plaintiff, etc. There can be no doubt that in the present case the act done by the defendants is likely to injure the plaintiff by affecting the evidence of the easement. It is unnecessary to consider whether there is evidence to show that it will materially diminish the value of the dominant heritage. It may be said with equal confidence that the obstruction caused will materially interfere with the physical comfort of the plaintiff. It may perhaps be that by introducing substantial damage, as defined, as the pre-requisite of an action for compensation, the Indian Legislature has tried to reconcile the conflicting views propounded in England in the cases already referred to. Although the extent of the right acquired is apparently larger under the Indian Act, interference with it is not made actionable in every case, at least as regards the claim to compensation or injunction. By bringing in "material interference with the physical comfort of the plaintiff" as one of the alternative cases of substantial damage, a result is arrived at similar to that reached in *Colls's Case*. As regards the easement to the free passage of air, substantial damage is caused only if the act done interferes materially with the physical comfort of the

(1) (1904) A.C., 179 at p. 211.

plaintiff though it is not injurious to his health. The closing of the only aperture which could admit fresh air in this case must be regarded as a material interference with the physical comfort of the plaintiff. Our notions as regards the relative importance of the easements as to light and air must differ in a tropical country from those in England. As pointed out by Mr. Justice Markby in *Modhoosoodun Dey* v. *Bissonauth Dey*(1) "In England an aperture is made chiefly for light: the sun being less bright, and the air colder there, we desire to obtain all the light we can, and only to admit just so much air as is necessary for wholesome ventilation; for which reason we always use glass in our windows. In this country the object is precisely the reverse—to get as much air as possible, and to exclude the superfluous light." We do not attach any importance to the evidence of Mr. Pogson which cannot outweigh the circumstance that the only passage for the ingress of fresh air has been closed by the action of the defendants. We think such an obstruction must materially interfere with the physical comfort of the occupants of the room. The plaintiff therefore is entitled to relief.

It has been argued for the respondents that compensation in money is an adequate remedy. Reliance is placed on the observations of A. L. Smith, L.J., in *Sheller* v. *City of London Electric Lighting Co.*(2) and also on those of some of the learned Lords on *Colls* v. *Home and Colonial Stores, Limited*(3). The decision in *Kine* v. *Jolly*(4) confirmed by the House of Lords in *Jolly* v. *Kine*(5) has also been referred to in support of the defendants' argument. We do not think that these cases lay down any hard and fast rule. The injury in the present case no doubt cannot be regarded as merely threatened or intended. The easement has been actually disturbed by the building up of the wall so as to close the aperture. But the defendants have not completed their construction, so that a mandatory injunction might lead to serious damage and loss to them. The case falls under clause (*a*) of section 35 of the Indian Easements Act; and section 54 of the Specific Relief Act, I of 1877, warrants the order we propose to make. We do not think that the injury to the plaintiff's legal

(1) (1875) 15 B.L.R., 361 at p. 367.
(2) (1895) 1 Ch., 287, at pp. 321, 322.
(3) (1904) A.C., 179.
(4) (1905) 1 Ch., 480.
(5) (1907) A.C., 1.

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rights is small, in which case damages might be the more appropriate relief. In *Higgins* v. *Betts*(1), Farwell, J., held it to be a proper case for injunction notwithstanding the decision in *Colls's Case*. And in *Chotalal Mohanlal* v. *Lallubhai Surchand*(2), Jenkins, C.J., granted an injunction even after hearing *Colls's Case* cited. The facts of *Anath Nath Deb* v. *Galastaun*(3) were very different. We think it will be sufficient to give the plaintiff a decree in the following terms, that the defendants be directed to remove so much of the wall already raised by them as interferes with the free passage of light and air through the plaintiff's window to the extent of the old dimensions, $1\frac{1}{2} \times 1$ ft., and that the defendants be further directed not to build any wall so as to obstruct the passage of light and air through the said window to the extent of its old dimensions. The rest of the plaintiff's claim will stand dismissed. Each party will bear his costs throughout.

Messrs. Branson and Branson—attorneys for respondents.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1909. September 22, 29, 30. December 1.

PALAMALAI MUDALIYAR *alias* PALAMALAI PILLAI (DEFENDANT), APPELLANT,

v.

THE SOUTH INDIAN EXPORT COMPANY, LIMITED (PLAINTIFFS), RESPONDENTS.*

Fraudulent conveyance—Transfer of Property Act, s. 53—Conveyance void if intended to convert land into cash and place it beyond reach of creditors—Equity on setting aside transfer—Transferee entitled to a charge for amount spent in discharging valid prior mortgage.

A transferee for value, who takes the transfer with the intention of helping the transferor to convert his immoveable property into cash which can be easily concealed and thus to defeat or delay his creditors cannot be treated as a transferee in good faith within the meaning of section 53 of the transfer of Property Act.

Ishan Chunder Das Sarkar v. *Bishu Sirdar*, [(1897) I.L.R., 24 Calc., 825], followed.

(1) (1905) 2 Ch., 210.
(2) (1905) I.L.R., 29 Bom., 157.
(3) (1908) I.L.R., 35 Calc., 661.
* Appeal No. 45 of 1907.