

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Young

PANNA (PLAINTIFF) v. RAM SARAN AND ANOTHER
(DEFENDANTS)*

1933
April, 21

*Easements Act (V of 1882), sections 28, 33, 35 and 43—
—Prescriptive right to light—Measure of right—Substantial interference—Easement of discharging rain water—
Material increase of burden caused by change in the dominant heritage—Easement extinguished.*

Where the plaintiff established a right of easement of discharging rain water from the eaves of her kachcha house with a gabled roof so that half the water fell on the defendant's land which adjoined the house on one side, but later she changed the kachcha house into a pucca house with a flat roof discharging the entire rain water through a single spout on the defendant's land, it was *held* that there being a complete change in the character of the easement, the burden whereof had been materially increased, the easement was extinguished.

Held, also, that a plaintiff is not entitled to a mandatory injunction for demolishing the defendant's wall blocking the passage of light to one of several windows of a room in the second storey of the plaintiff's house unless the plaintiff proves that the disturbance of the right of easement of receiving light has caused substantial damage within the meaning of section 33, explanation II, of the Easements Act. Section 28 of the Act should be read together with sections 33 and 35; and any interference with the extent of the prescriptive right, as mentioned in section 28(c), will not give a right of action either for damages or for a mandatory injunction unless the degree of interference is such as to come within explanation II of section 33.

Mr. V. D. Bhargava, for the appellant.

Messrs. S. N. Verma, S. K. Mukerji, and Prem Chandra Kapilan, for the respondents.

MUKERJI and YOUNG, JJ. :—This is a second appeal from the decision of the learned Subordinate Judge of Ghazipur.

The action was for a mandatory injunction directing the defendant to remove a wall that he had built, on the

*Second Appeal No. 399 of 1930, from a decree of Krishna Das, Subordinate Judge of Ghazipur, confirming a decree of Muhammad Zamir-uddin, Munsif of Ghazipur, dated the 27th of May, 1929.

1933

PANNA
v.
RAM SARAN

ground that it interfered with existing easements belonging to the plaintiff. There were two houses, the plaintiff's, to the north, and the defendant's, to the south. Originally the plaintiff had a kachcha house with a gabled roof, and she discharged water from her roof both to the north and to the south. For this easement, that is, an easement to discharge half her water to the south, she had acquired a prescriptive right. Some 15 years ago, however, the plaintiff changed her kachcha house into a pucca house and instead of the gabled roof she erected a flat roof on her house. In the new roof there was now only one hole which discharged all the water from the roof towards the south.

The plaintiff also claimed an easement for the light to her room on the second storey of her house. The position as regards this second storey is somewhat obscure. The learned Judge does not come to a definite decision whether an easement has been acquired for the light to this second storey or not. There is no finding whether the second storey has been built for the requisite period of twenty years or not. It is unnecessary, however, for our purpose to send the case back for a decision on this point, as it is possible to decide this question on a point of law.

Taking the second easement first, the plaintiff claims that she is entitled—assuming that she has proved the right—to the same quantity of light which she has always had in the room on the second floor. There were apparently two windows to the north, one to the east and one to the south, that is, one facing the defendant's land. The defendant has built his house right up against the house of the plaintiff so that the whole of the light of the window facing south has been obliterated. The learned Munsif finds in accordance with section 33, explanation II, of the Easements Act that there is no material interference with the physical comfort of the plaintiff and that she is not prevented from carrying on her accustomed business on the second floor by the erection of the defendant's house and the blocking up of the window. The

1933

 PANNA
 v.
 RAM SARAN

learned Judge in the lower appellate court comes to the same conclusion, and upon this finding and the view taken on sections 33 and 35 of the Easements Act, dismissed the suit with regard to this easement. The appellant contends, however, that section 28(c) of the Easements Act gives her an absolute prescriptive right to the same quantity of light and air through the window which she has always had. If section 28 remained by itself, this view of the law would undoubtedly be right. We have, however, to read sections 28, 33 and 35 together. Section 33 clearly enacts that a suit for compensation for the disturbance of an easement only lies provided that the disturbance of an easement has actually caused substantial damage to the plaintiff. Explanation II takes this matter further and defines what is substantial damage and says that substantial damage is that damage which "interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit." Section 35 enacts that "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 this chapter."

It is clear, therefore, in our opinion, that damages may only be recovered if there has been substantial interference as described in explanation II, and that an injunction can only be granted when compensation might be allowed under section 33, explanation II, that is, that both in the case of an action for damages or for an injunction *simpliciter*, it is necessary for the plaintiff to show conclusively that there has been substantial interference with her physical comfort, etc.

This view of the case has been supported in *Lachmi Narain v. Ram Bharosey* (1) and *Gajadhar v. Kishori Lal* (2). The latter is a Bench decision. There is one

(1) A.I.R., 1926 All., 764.

(2) (1915) 13 A.L.J., 385.

1933

PANNA
v.
RAM SARAN

case in *Kunni Lal v. Kundan Bibi* (1), where a single Judge decided the case on the view that section 28 alone was enough and that a plaintiff had an absolute right, quite apart from damage, to an injunction. In that case, however, we note that sections 33 and 35 of the Easements Act were not discussed. We may further note that the English law on this is substantially the same, and has been considered in *Colls v. Home and Colonial Stores* (2) and *Jolly v. Kine* (3) and also in *Paul v. Robson* (4), the last decision being a decision of the Privy Council, the English Law being applied to Calcutta.

With regard to the claim in respect of the other easement, namely, the right to discharge water, the learned Judge in the court below has come to a correct decision. The whole nature of the easement, by the alteration of the gabled roof to a pucca flat roof, has been completely changed. Formerly there was a right to sprinkle water the whole length of the eaves on one side of the house. The right to that easement was established. Now the water of the whole roof is discharged through one hole on to the defendant's land. A change of this character completely destroys the original easement, and it cannot be said that there is any prescriptive right for the new condition of affairs and that the burden has not been increased substantially. The claim, therefore, on this head must also be dismissed.

The appeal on both points having failed, is dismissed with costs.

(1) (1907) I.L.R., 29 All., 571.

(3) [1907] A.C., 1.

(2) [1904] A.C., 179.

(4) (1914) I.L.R., 42 Cal., 46.