APPELLATE CIVIL.

Before Mr. Justice A. G. P. Pullan.

1929 August, 8.

SANGAM MADHO (DEFENDANT-APPELLANT) *v.* RAM NARAIN (PLAINTIFF-RESPONDENT.)*

Privacy, right of—Presumption of the existence of the right of privacy in Indian towns—Window set in a wall giving neither light nor air to a room—Right of privacy, infringement of.

A right of privacy is assumed to exist in all Indian towns. Every case of this kind must be governed by its particular facts but the question in every such case is whether the construction amounts to a substantial interference with the right of privacy.

Where a right of privacy is found to appertain to the plaintiff's house a window set in a wall constructed by the defendant over his building which gave neither light nor air to a room but was quite useless and overlooked about a third of the plaintiff's courtyard does certainly infringe upon the right of privacy possessed by the plaintiff and cannot be allowed to stand. *Abdul Rahman* v. *Bhagwan Dass* (1), *Musammat Subhaga* v. *Musammat Janki* (2), and *Sardar Husain* v. *Ahmad Husain* (3), referred to.

Mr. *Radha Krishna*, for the appellant.

Messrs. *Hakimuddin* and *Naziruddin*, for the respondent.

PULLAN, J. :—This appeal arises out of a dispute between two neighbours in the town of Unao. The first dispute took place in 1926 when the present defendant, who is the appellant before me, wished to construct a wall adjoining the wall of the plaintiff's house. The dispute was submitted to arbitration and the arbitrator, who is stated to be the Government pleader of Unao, made an award containing *inter alia*

*Second Civil Appeal No. 153 of 1929, against the decree of Mr. Munsif North, Unao, dated the 23rd of May, 1928, dismissing the plaintiff's 15th of April, 1929, modifying the decree of Pandit Hari Kishen Kaul, Munsif, North Unao, dated the 23rd of May, 1928, dismissing the plaintiff's suit.

(1) (1907) I.L.R., 29 All., 582. (2) (1926) 29 O.C., 136.
(3) (1928) 5 O.W.N., 538.

the following clause :—"that the wall on the side of Munshi Ram Narain shall be absolutely blank, i.e., it shall have no cornice, eaves, drains, spouts, doors or windows in it on the side of Munshi Ram Narain," and there is another condition, namely, "that a parapet over the house roof shall be at least six feet in height so as to prevent people peeping through it to the north." The intention of this award is manifest. It is in the first place that the wall of the defendant shall not be constructed in such a way as to interfere with the rights of the plaintiff in respect of his existing constructions, and in the second place it is intended to provide that the defendant shall not by his further constructions interfere with the right of privacy possessed by the plaintiff, otherwise there is no point in the order requiring the parapet to be six feet high. The defendant not being satisfied with this state of affairs proceeded to extend his wall beyond the boundary of Munshi Ram Narain's house, and on a portion of it, which he has constructed across a plot of land described now as *rasta* or path, he has in the first place constructed two doors, one an entrance to his house and the other an entrance to a new latrine, and above this he has constructed a wall with a window in it which has been shown by the personal inspection of the Munsif to overlook about one-third of the court-yard of Munshi Ram Narain. There is no question that by making these constructions the defendant has offended against the spirit of the award made by the arbitrator.

The Munsif dismissed the suit and owing to the position of the defendant, who is a vakil practising in Unao, an application was made by the plaintiff to have the appeal heard in Lucknow. This application was granted by Mr. Justice HASAN and the appeal was heard by the Third Additional Judge of Lucknow and almost entirely decreed.

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The defendant now appeals. The first point raised deals with the window. Now it was certainly intended by the arbitrator that no window should be made in the wall of the defendant which could overlook the court-yard of Munshi Ram Narain, and the learned Judge has, with great fairness towards the defendant, allowed that the award should be restricted to that portion of the wall which was in dispute in the first case and should not be further applied to an extension of the wall. But even on this view he has felt constrained to interfere with the window. Had this been a window of a room used for the legitimate purpose of obtaining light and air, there might have been something to be said for the defendant, but the Munsif himself found, that the window was useless. It is merely set in a wall and gives neither light nor air to any room. Sir GEORGE KNOX remarked in the case of *Abdul Rahman* v. *Bhagwan Das* (1) "there is a great deal to be said in favour of the right of privacy being more substantially and materially invaded by apertures which would permit a person to look on without being observed, than by the existence of an open space where the presence of the looker on would at once be conspicuous and could easily be guarded against." This ruling is perhaps not intended for general application and the remarks should certainly be read with the previous remark in the same judgment that every case of this kind must be governed by its particular facts and that the question in every such case is whether the construction amounts to a substantial interference with the right of privacy. A right of privacy is assumed to exist in all Indian towns, and this has been laid down both by the late Mr. Justice MISRA in the case of *Musammat Subhaga* v. *Musammat Janki*

(1) (1907) I.L.R., 29 All., 582.

(1) and Mr. Justice RAZA in the case of *Sardar Husain* v. *Ahmad Husain* (2). Mr. Justice MISRA in the first of these rulings also said that the mere fact that the house was not at the time occupied by *purdanashin* ladies would not affect the right of privacy enjoyed by the owner. In the present case I have no doubt that a right of privacy appertains to the plaintiff's house and that this was acknowledged by the parties themselves at the time of the arbitrator's award. I also find that a window such as that constructed by the defendant does infringe upon the right of privacy possessed by the plaintiff, and I consider that the order passed by the lower court in respect of this window is a proper one and should be maintained.

The second question relates to the construction of certain eaves on the wall. These are, in my opinion, in direct contravention of the award. At the best it could only be said that they are constructed on an adjoining extension of the old wall, and they are bound to cause damage to the plaintiff's wall underneath by the fall of water. I agree with the lower court that these eaves should be removed or dealt with in such a way that they no longer project from the defendant's wall.

The third point for consideration is the latrine constructed by the defendant to the west of the new main door. The finding of the court below is that this latrine opens on to a *chabutra* which belongs to the plaintiff in the sense that it was built by him along with the rest of his house some 12 years ago. I see that when the defendant applied to the Municipal Board for permission to make his new building he did not in his map show any outside door to this latrine. This appears to be an after-thought and consequently was not necessary to the original design.

(1) (1926) 29 O.C., 136. (2) (1928) 5 O.W.N., 588.

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It has been argued at length that as the plaintiff was unable to prove that he owned the land on which the *chabutra* stands, the defendant had a good right to use that *chabutra* as a means of access to his new latrine. I cannot accept this view. Whatever may have been the right of the plaintiff to the land, he is certainly entitled to the use of his own *chabutra* and the defendant has no right to interfere with that right. I find, therefore, that he is not entitled to open a door on to the *chabutra*, nor is he entitled to have his *napdan* placed on the *chabutra*. An alteration of his *napdan* will not cause him much trouble as I see by the map that he took the precaution of constructing it so that it can equally well be opened on to the lane. As to the door it is argued that it need not be removed. This argument cannot be rebutted. The only question is whether it can be used and it certainly cannot be used. If it is any satisfaction to the appellant the order as to the removal of the door may be converted into one ordering it to remain permanently closed. The only remaining subject of dispute between the parties is about certain water spouts which are made so as to discharge their water on the plaintiff's *chabutra*. This point was not seriously pressed in appeal and I see no reason to interfere with the very proper order passed by the court below.

A cross-objection was made as to the main door on the ground that that controverts the award in the former suit and an attempt also was made to raise the question as to the plaintiff's right or ownership in the land on which the *chabutra* has been built. I do not consider that the award could be made to extend to the door leading on to the lane beyond the plaintiff's house, and I hold that the finding of the court below as to the ownership of the land is a question which cannot be challenged in second appeal.

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I am, therefore, not disposed to interfere with the judgment of the court below either in the interests of the appellant or in that of the respondent, and I dismiss both the appeal and the cross-objection with costs.

Appeal dismissed.

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Before Mr. Justice A. G. P. Pullan.

MOHAMMAD KHAN AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* SHEO BHIKH SINGH AND OTHERS (DEFENDANTS-RESPONDENTS.)* 1929 *August*, 8.

Findings of fact, when liable to interference in second appeal —Evidence Act (I of 1872) sections 65 and 91—Secondary Evidence of a document, when admissible—Parti land—Presumption of possession on parti land.

Where the findings of an appellate court, in so far as they are findings of fact, have no effect on the suit and in so far as they go beyond the findings of fact, they are demonstrably wrong, and are based on a most inadequate appreciation of the facts, they cannot make the decision insusceptible to failure in second appeal, and the court of second appeal can interfere.

Under section 91 of the Evidence Act, the only evidence as to a grant when it has been reduced to the form of a document is the document itself unless secondary evidence as to its contents is admissible. Secondary evidence can only be admissible under section 65, clause (*c*) of the Act, which is not applicable where there is no evidence on the record to show that the document had been lost.

Parti land of a village is presumed to be in possession of the zamindar and though another person be in physical possession of it if he has not been able to set up any title the zamindar must be held to be in possession.

*Second Civil Appeal No. 77 of 1929, against the decree of Pandit Gulab Singh Joshi, Subordinate Judge of Partabgarh, dated the 24th of January, 1929, reversing the decree of Babu Avadh Behari Lal, Munsif of Kunda at Partabgarh, dated the 5th of November, 1928, decreeing the plaintiff's suit.