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Section 24 of the Indian Penal Code defines the word 'dishonestly' as follows:

"Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person is said to do that thing dishonestly".

Nanavatty,
J.

Here it is proved to the satisfaction of the lower appellate Court that the applicant did not intend by his act to cause wrongful gain to himself, and the temporary loss of the use of his cycle by Babu Mahabir Prasad, Vakil, was not such a loss about which even Babu Mahabir Prasad himself has complained. In these circumstances it seems to me that the stigma of theft cannot be imputed to a respectable person of the position of the applicant.

For the reasons given above, I allow this application for revision, set aside the conviction and sentence passed upon the applicant and order that the fine if paid be refunded.

Application allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

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February, 7

RIYASAT ALI AND ANOTHER (DEFENDANTS-APPELLANTS) v.
ZAMIN ALI AND ANOTHER (PLAINTIFFS-RESPONDENTS)*

Perpetual injunction to close drain—Nuisance—Finding that latrine drain is always a nuisance without reference to evidence, whether good.

Where in a suit for perpetual injunction to close the drain of a latrine, the Court without referring to the evidence orders the closing of the drain remarking that the water discharged from an Indian latrine is always foul and stinking and should as a rule be treated as a nuisance, *held*, that the finding based on a sweeping statement of the kind without reference to the evidence on the point cannot be sustained.

*Second Civil Appeal No. 285 of 1934, against the decree of Pandit Girja Shankar Misra, Additional Subordinate Judge, Lucknow, dated the 14th of August, 1934, reversing the decree of Babu Hiran Kumar Ghoshal, Munsif, Haveli, Lucknow, dated the 22nd of December, 1933.

Mr. *Mohammad Husain*, for the appellants.

Mr. *Hakeem-ud-din Siddiqi*, for the respondents.

SRIVASTAVA, J.:—This is a second appeal by the defendants against the judgment and decree, dated the 14th of August, 1934, of the learned Additional Subordinate Judge of Lucknow reversing the decree, dated the 22nd of December, 1933, of the Munsif Flavali, Lucknow.

The parties to this litigation are relations and neighbours. There is only a lane running on plot No. 18 which separates the house of the plaintiffs from that of the defendants. The house of the plaintiffs stands on plot No. 19 and that of the defendants on plot No. 17. On the north of the lane there is a plot No. 16 which also belongs to the plaintiffs. The plaintiffs sued the defendants for a permanent injunction for removal of a *parnala* and the closing of a drain from their latrine. The complaint about the drain was that it discharged foul water almost in front of the plaintiffs' main door and constituted a nuisance. It was further complained that the water of the drain flowed on the plaintiffs' land. The learned Munsif appointed a commissioner to prepare a plan of the locality and also visited it himself. His finding with regard to the drain was that the stink of the water from the latrine did not constitute such a nuisance as to entitle the plaintiffs to a permanent injunction. He was also of opinion that the plaintiffs had no right to get the *parnala* removed. In result he dismissed the entire claim. On appeal the learned Additional Subordinate Judge has disagreed with the trial Court and has granted the plaintiffs a permanent injunction to the effect that the defendants shall close up the drain. He has maintained the *parnala* but has ordered change of the course of water discharged by the *parnala* so as to prevent its flow on plots Nos. 16 and 19 belonging to the plaintiffs.

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Sripastava,
J.

The learned counsel for the defendants does not question the correctness of the lower appellate Court's order in regard to the *parnala*. He has confined his argument to the order for closing of the drain. He maintains that it does not constitute a nuisance and contends that the closing of it would cause serious inconvenience to the defendants.

It may be pointed out that the plaintiffs have made no complaint about the existence of the latrine in the defendants' house. It has not been suggested either in the plaint or in the evidence that the latrine constitutes any nuisance to the plaintiffs. The gravamen of the complaint is that the water discharged from the latrine through the drain in question is so stinking that the drain constitutes a nuisance. The learned Additional Subordinate Judge has made no reference to the evidence on this point but merely remarked as follows:

"Water from an Indian latrine is always foul. Its stink and filth are apt to spread all kinds of diseases. It is a public and a private nuisance both. As the drain flows in front of the appellants' main door, they have a right to complain of it."

In my opinion the learned Subordinate Judge has based his finding on a sweeping statement which it is difficult to accept in the broad terms in which he has put it. As he had made no reference to the evidence bearing on this point I had the evidence read to me by the learned counsel for the respondents. That evidence is to the effect that the water discharged from the drain of the latrine emits a foul smell which makes it impossible for the plaintiffs to sit in their *barotha*. This evidence was not believed by the learned Munsif and unfortunately the learned Additional Subordinate Judge has expressed no opinion in respect of it. To me the evidence appears to be greatly exaggerated. If the view of the learned Additional Subordinate Judge which amounts to this, that water discharged from latrines in Indian homes should as a rule be treated as a nuisance

is to be accepted, then it would make the lot of many people very unhappy as it would practically have the effect of preventing them from having any outlet for the water from the drains in their latrines. In *St. Helen's Smelting Company v. Tipping* (1) Lord Wensleydale observed as follows:

"Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected".

In the circumstances I am not satisfied with the lower appellate Court's finding about the drain in question constituting a nuisance. In my opinion the learned Munsif who had visited the locality had arrived at a more just and correct conclusion in this matter. The result therefore is that the lower appellate Court's order for the closing of the drain must be set aside. It is admitted by the learned counsel for the appellants that they have no right to discharge the water of this drain on plots Nos. 16 and 19 which belong to the plaintiffs. They must therefore divert the water of the drain in such a way as not to flow on plots Nos. 16 and 19.

I accordingly allow the appeal and modify the order of the lower appellate Court by setting aside the order for closing of the drain subject to the condition that the flow of the water discharged from it is so diverted as not to flow on plots Nos. 16 and 19. The defendants are allowed a month's time within which to carry out the above directions. In the circumstances parties will bear their own costs in this Court. The order of the lower appellate Court about costs and in all other respects will stand.

Appeal allowed.

(1) (1865) 11 H.L.C., 642 (653).

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Srivastava,
J.