APPELLATE CIVIL.

Before Tek Chand and Agha Haidar JJ.

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Jan. 19.

HAKIM MAL-TANI MAL (DEFENDANTS) Appellants

versus

MRS. V. E. EARLE (PLAINTIFF) Respondent.

Civil Appeal No. 638 of 1929.

Easement—of light and air—whether shadow of building constitutes interruption—"Prospect"—obstruction to—whether actionable—Indian Limitation Act, IX of 1908, section 26.

In a suit for an injunction restraining defendant from erecting a building, plaintiff while admitting that there were no doors or windows, the light and air to which was likely to be obstructed, pleaded that the shadow of the contemplated building would fall upon a portion of the blind wall of her house at certain hours of the day for periods fluctuating according to the time of the year. There was no finding that the shadow would in any way interfere either with the usefulness or comforts of the plaintiff's building or would amount to what is called in law a "nuisance."

Held, that the injunction should not have been granted.

Colls v. *The Home and Colonial Stores* (1), followed in *Paul* v. *Robson* (2), and *Vir Bhan* v. *Ramjidas* (3), relied upon.

Second appeal from the decree of Mr. G. C. Hilton, District Judge, Ambala, dated the 22nd December 1928, affirming that of Mr. E. C. Marten, Senior Subordinate Judge, Simla, dated the 21st September 1928, granting the plaintiff an injunction.

BADRI DAS and SHIV CHARAN DAS, for Appellants.

H. J. RUSTOMJI, for Respondent.

(1) 1904 A. C. 179. (2) (1915) I. L. R. 42 Cal. 46 (P.C.).
(3) 8 P. R. 1909.

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AGHA HAIDAR J.—This is a defendant's appeal arising out of a suit for a perpetual injunction restraining the defendant from erecting a certain building which it was alleged would interfere with the plaintiff's right to light and air, privacy and other amenities. The facts are very simple and, briefly stated, are as follows:—

There was a certain estate in Simla which used to be called "The Franklin Villa Estate," portions of which, by various transfers, into the details of which it is unnecessary to enter, came into the hands of the parties to the present litigation. The defendant proposed to build on his portion of the property, whereupon the plaintiff brought the present suit. The trial Court decreed the plaintiff's suit in its entirety and granted the injunction in the following terms:—

"An injunction is passed against the defendant restraining him from building upon this land any building, which will interfere with the said rights of the plaintiff."

The defendant went up in appeal to the lower appellate Court. The learned District Judge arrived at the finding that "the new building will interfere with the passage of light to the extent to which light was enjoyed at the time of the original transfer." He accordingly held that the plaintiff was entitled to an injunction restraining the defendant from erecting the proposed building and thereby diminishing the access of light that was enjoyed at the time of the transfer of 1908; and his finding as regards the plaintiff's right to air was of course to the same effect. In fact he granted the injunction to the plaintiff restraining the defendant from interfering with the

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plaintiff's right to light and air. To this extent he appears to have upheld the decree of the trial Judge. On the question of the right of privacy he observed that no customary right of privacy existed and therefore the plaintiff could not claim any such right. On the question of the right to prospect he rightly held that under the law the right to prospect was not recognised and therefore the learned Judge of the trial Court was not justified in granting the injunction to the plaintiff. But curiously enough after recording these findings the learned Judge concluded his judgment with the following remark :—

" In view of my findings regarding the easement of light and air, the appeal must be dismissed. I dismiss it with costs."

Now, according to the findings mentioned above the learned Judge could have only partially dismissed the appeal. In any event he ought to have allowed the appeal in respect of the injunction which had been granted by the trial Court in respect of the plaintiff's alleged right of privacy and prospect. The defendant has come up to this Court in appeal.

The point raised by Mr. Badri Das is that on the findings arrived at by the Courts below and which are binding upon this Court in second appeal, the learned District Judge was in error in maintaining the injunction in respect of the right to light and air. It is admitted before us, and indeed it could not be disputed, that there are no doors or windows, the light and air of which is likely to be obstructed by the proposed building of the defendant in any way. In fact all that is likely to happen is that the shadow of the defendant's contemplated building would fall upon a portion of the blind wall of the house belonging to the

plaintiff. Furthermore this shadow would not remain on the wall at all times but only at certain hours of the day and such hours would fluctuate according to the time of the year. It is difficult to understand how on these facts the plaintiff could ask for an injunction at all restraining the defendant from erecting a building which would merely cast a shadow upon a portion of her wall. The law relating to the right to light and air is now settled by the decisions of the highest Courts both in this country and in England. We have the leading case of the House of Lords, *Colls* v. *The Home and Colonial Stores* (1), which was followed by their Lordships of the Privy Council in *Paul* v. *Robson* (2). The relevant portion from the House of Lords' judgment is quoted at page 53 of *Paul* v. *Robson* (2) and runs as follows :—

"The right of the owner or occupier of a dominant tenement to light is based upon the principle stated by Lord Hardwicke in 1752, in *Fishmongers' Company* v. *East India Company* (3), that he is not to be molested by what would be equivalent to a nuisance. He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, having regard to the locality and surroundings. That is the basis on which the decision of this House proceeded."

By no stretch of imagination can it be said that this statement of the law would apply to the case of a shadow which would be cast by the defendant's building upon a portion of the plaintiff's wall and

(1) 1904 A. C. 179. (2) (1915) I. L. R. 42 Cal. 46 (P.C.).
(3) (1752) 1 Dick 163.

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especially when such a shadow would not in any way interfere with the plaintiff's enjoyment of light and air which she had been receiving through her doors and windows. We have also a decision of a learned Judge of the Chief Court of the Punjab which lays down the law clearly on the subject. This will be found in *Vir Bhan* v. *Ramjidas* (1). Reference is made to the case of *Colls* v. *The Home and Colonial Stores* (2), and other leading cases and the learned Judge rightly observed " that as the interference with the access of light through the ancient windows of the plaintiff must be of such a character as sensibly to interfere with the comfort or convenience or usefulness of the building according to its character as a residence or a place of business or warehouse, or whatever else it may be, according to the ordinary notions of mankind, and unless it amounts to that, there is no cause of action, the mere deprivation of a certain percentage of light being insufficient for a suit, and in considering the sufficiency of the light, the locality and the light coming from other quarters should be considered."

There are cases of the other Courts, too, on the point, supporting this view but they need not be mentioned, having regard to the important cases already quoted. Here, there is no finding whatever that the shadow, which would fall upon the plaintiff's wall by the defendant's proposed building, would in any way interfere either with the usefulness or comfort of the plaintiff's building or would amount to what is called in law a " nuisance." In the absence of any such finding the learned Judge of the lower appellate Court was not justified in granting the injunction to the

(1) 8 P. R. 1909. (2) 1904 A. C. 179.

plaintiff in respect of her alleged right to light and air.

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In this view of the case I would accept the appeal, set aside the judgment and decree of the Court below and dismiss the plaintiff's suit with costs throughout.

TEK CHAND J.—I agree in the order proposed by my learned brother.

TEK CHAND J.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Agha Haidar JJ.

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Jan. 23.

RAM SARUP (PLAINTIFF) Appellant

versus

ABDUL HAQ (DEFENDANT) Respondent.

Civil Appeal No. 2618 of 1926.

Indian Limitation Act, IX of 1908, section 26—Easement —requirements of section—English law—prescription—distinction—"peaceable"—"as of right"—meaning of—Interruption—whether unsuccessful suit for injunction constitutes —Second Appeal—Legal inference from facts found—question of law.

A suit for injunction to remove an obstruction to certain doors, *parnalas* and drains, infringing plaintiff's alleged right of easement was dismissed on first appeal on the finding that the plaintiff's enjoyment of the easement was not "as of right," "open and peaceable," but was "contentious and precarious." The plaintiff had for the whole of the required period of 20 years been using the doors, etc. openly in the exercise of an asserted right, his enjoyment being visible and manifest, and not furtive or secret; but the present defendant had during that period instituted a suit against the plaintiff's predecessor-in-title for an injunction, which relief was refused. On second appeal, plaintiff did not seek to challenge the findings of fact arrived at by the lower Appellate Court but argued that, on these findings the legal inference drawn was wrong.