

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.*

NASARBHAI AHMEDBHAI AND ANOTHER, (ORIGINAL DEFENDANTS),  
APPELLANTS, v. MUNSHI BADRUDIN VALAD GULA'M MOHIDIN,  
(ORIGINAL PLAINTIFF), RESPONDENT.\*

1891.  
September 16.

*Party wall—Right to build on—Right to continue eaves projecting for more than thirty years over neighbouring property—Damages or injunction—Correct issues for trial.*

Where the plaintiff's eaves had projected over the defendants' roof, which rested on a wall common between the parties, for more than thirty years, and the plaintiff had thus acquired a right to have the water carried from his roof on to the defendants' roof, and where the defendants raised the common wall and removed the plaintiff's eaves,

*Held*, that the plaintiff was entitled to relief either by damages or injunction; to determine which, issues framed according to the state of the authorities, and sent for the decision of the lower Court.

THIS was a second appeal from the decision of Ráo Bahádur Chuniál Máncólál, First Class Subordinate Judge of Ahmed abad, with appellate powers.

The plaintiff, Munshi Badrudin, alleged that his house and that of the defendants adjoined each other; that in January, 1888, the defendants projected the wing and eaves of their roof over the plaintiff's roof and wall, and cut off his wing; that the defendants raised the common wall and inserted certain beams therein; that the defendants had also encroached upon a piece of open land belonging to the plaintiff, by erecting a privy and wall thereon. The plaintiff, therefore, prayed that the defendants be compelled to pull down the newly added wall, to cut off their wing and eaves projecting over plaintiff's wall and roof, to remove the beams inserted in the wall, and to give possession of the open land upon which a wall and a privy had been erected by the defendants. The plaintiff also prayed for an injunction.

The defendants, Nasarbhai valad Ahmadbhai and his wife Bu Nur Bu, answered that the wing of the plaintiff's roof did not project over their roof; that the wall in dispute belonged to them and the plaintiff jointly; that in raising their house they

\*Second Appeal, No. 621 of 1890.

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had raised the common wall to half its breadth with the consent of the plaintiff's wife; that the plaintiff might remove their wing whenever he should raise his house; and that the land upon which the wall and the privy had been erected did not belong to the plaintiff.

The Subordinate Judge (Rao Saheb N. N. Nanavati) found that the wall in dispute belonged jointly to the plaintiff and the defendants; that the latter had projected their wing and eaves over the plaintiff's roof; that in doing so they had cut off his wing; that the land in question did not belong to the plaintiff; and that the defendants' wing and its eaves, which projected over the plaintiff's roof, should be cut off.

Against the decree of the Subordinate Judge the plaintiff appealed to the District Court, which found that the wall in dispute belonged to the plaintiff alone, and not jointly to him and the defendants; that the plaintiff had acquired a right of easement to have the wing of his roof projecting over the defendants' roof; that the defendants had no right to cut off that wing in raising their house, and that the land in dispute did not belong to the plaintiff.

The District Court, therefore, amended the decree of the Subordinate Judge, by allowing the claim with respect to the common wall.

The Subordinate Judge with appellate powers observed in his judgment: "Although the general understanding of the public, in this part of the country, is that a wing, however old, can be removed by a neighbour in raising his house, still the Courts have held that that is not a correct understanding. The right to have one's wing projected over another's land, or roof, is as much a legal right of easement as the right to light and air. The plaintiff's wing and its eaves had been there for more than thirty years, and even if the wall in dispute belonged jointly to the parties, the defendants have no right to cut off the plaintiff's wing and its eaves."

Against the decree of the District Court the defendants appealed to the High Court.

*Ganpat Sadāshiv Rāo* for the appellants.

*Māneshshāh Jehāngīrshāh Talegārkhān* for the respondent.

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SARGENT, C. J.:—The wall which has been actually raised and built upon by the defendants, has been found by the Court of first instance, and apparently also by the lower appellate Court, to be a joint wall between the parties; but the lower appellate Court has also found that the plaintiff's eaves had projected over the defendants' roof, which rested on the common wall, for more than thirty years, and that he had thus acquired a right to have the water carried from his roof on to the defendants' roof. Under these circumstances, the defendants having raised the common wall and removed the plaintiff's eaves, the plaintiff is entitled to relief, either by damages, or mandatory injunction. To determine which, it will be necessary, in the state of the authorities, for the Judge to find on the following issues: see *Jamnādās Shankarlāl and Vrijbhukhan Shankarlāl v. Atmārām Harjivan*<sup>(1)</sup>; *Ganesh Vishnu v. Ganesh Bāpuji*<sup>(2)</sup>; *Benode Coomaree Dossee v. Soulaminey Dossee*<sup>(3)</sup>:—

1. Has the plaintiff acquiesced in the defendants' building, or warned the defendants to desist from such building; and at what stage of the building operations was such warning given?
2. How soon, after the plaintiff's eaves were removed, did the plaintiff take legal proceedings against the defendants?
3. Can the injury caused to the plaintiff by the removal of his eaves be adequately compensated by damages, and, if so, what damages should be awarded?

The findings to be returned to this Court within three months. Parties to be allowed to give fresh evidence.

*Issues sent down.*

(1) I. L. R., 2 Bom., 133.

(2) P. J., 1882, p. 63.

(3) I. L. R., 16 Cal., 252.