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a document knowing its contents but misappreciating its legal effect he cannot deny his execution. For the purpose of dealing with the case on this footing a finding on the following issue is requisite.

Prior to the execution by defendant No. 2 of the document, was the covenant falsely read over to him or was the effect thereof declared to him in other manner than is contained in the writing, and if so, in what manner?

There will be a remand for the determination of these issues and the return must be in two months. No further evidence unless the Judge deems it necessary.

Issues sent back.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904. *March* 8.

RANCHOD SHAMJI (ORIGINAL DEFENDANT), APPELLANT, *v.* ABDULA-BHAI MITHABHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Ownership of soil—Encroachment by protrusion of beams—Mandatory injunction.

Plaintiff's beams overhung defendant's soil and defendant erected a building which overhung those beams. A question having arisen as to whether the beams gave the plaintiff a right to the column of air above them,

Held, that the defendant being the owner of the soil was entitled *primâ facie* to all above it and the diminution in his rights by reason of the beams did not extend beyond the protrusion of the beams themselves.

SECOND APPEAL from the decision of Chandulal M., First Class Subordinate Judge of Ahmedabad, with Appellate Powers, varying the decree of N. V. Samant, Subordinate Judge of Dohad.

The plaintiff sued for the removal of a superstructure newly raised by the defendant on the open ground adjoining the back wall of the plaintiff's house, alleging that the said superstructure prevented the access of light and air coming to his house from over the ground, or in the alternative that such part of the

* Second Appeal No. 565 of 1903.

superstructure be removed as had been raised by the defendant over and above the *dadhavatis* (projecting beams) inserted by the plaintiff in his own wall underneath his (plaintiff's) roof.

The defendant denied that there was any open land as alleged close to the wall of the plaintiff's house and contended that the said land belonged to him; that he had a right to use it as he chose and that on the plaintiff's request he permitted the plaintiff to open a *jali* (lattice) in the back wall of his house.

The Subordinate Judge found that the plaintiff had proved that he had acquired an easement to light and air through a *baka* (hole) in the back wall on the ground floor of his house and similarly through one on the second floor; that the plaintiff had no right to the removal of the new structure raised by the defendant and that the plaintiff was entitled to receive from the defendant rupees fifteen as damages. He, therefore, passed a decree accordingly.

On appeal by the plaintiff the Judge raised in all six issues, out of which the first four were as follows :—

(1) Is the plaintiff entitled to the right of easements regarding the light and air as claimed by him in his plaint?

(2) If so, can he have the defendant's superstructure demolished as sought for by him?

(3) If not, can the plaintiff be awarded damages, and if so, what?

(4) Are the *dadhavatis* attached to the plaintiff's house old? Is the plaintiff entitled to keep them on? and can the plaintiff have a part of the defendant's superstructure removed on that ground?

As there was no issue raised by the Subordinate Judge about the *dadhavatis* and as the evidence recorded by him was not sufficient to enable the Appellate Court to come to a finding on issues (3) and (4), the case was remanded for recording additional evidence and for findings on the said issues.

On the remand the Subordinate Judge took fresh evidence and found that (3) the plaintiff should be awarded rupees twenty-five as damages and that (4) the *dadhavatis* were about forty years old and the plaintiff was entitled to keep them free from any interference and that he was entitled to the removal of so much of the defendant's superstructure as affected the user of the *dadhavatis* by the plaintiff.

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The Judge found that (1) the plaintiff had acquired the right to receive light and air through the two apertures in question, one opening on the ground floor of his house and the other on the second floor of it by way of easement; that (2) the plaintiff could not have the defendant's superstructure removed on the ground of its interfering with the said right of easement; that (3) the plaintiff was entitled to rupees twenty-five only as damages for the defendant's interference with that right and that (4) the *dadhavatis* were forty years old and the plaintiff was entitled to have them left intact and to have such part of defendant's superstructure removed as stood over and above those *dadhavatis* and affected or interfered with the use of them by the plaintiff. The Judge, therefore, passed a decree in the following terms:—

I, therefore, vary the decree of the Court below and direct that the plaintiff do recover Rs. 25 as damages from the defendant for the diminution of light and air caused by him, and that the defendant do remove that part of his superstructure which he has raised over the plaintiff's *dadhavatis* and which affects or interferes with the plaintiff's use of them; and that in default the plaintiff will be entitled to have them removed and do remove them according to law through the Court at the defendant's expense in the execution proceedings. The rest of the plaintiff's claim is rejected hereby.

The defendant preferred a second appeal.

H. C. Coyaji, for the appellant (defendant):—The Judge was wrong in granting the mandatory injunction for the removal of our new structure overhanging the plaintiff's beams which projected over our land. The land admittedly belongs to us and consequently we are the owners of all things above it up to the skies, *cujus est solum ejus est usque ad cœlum*.

The plaintiff has, by the projection of his beams on our land, at the most acquired a right of easement, but we cannot thereby lose our right to build on our land so long as we do not disturb the plaintiff's right. Even supposing that the projection of the plaintiff's beams on our land for several years gave him a right to disturb our possession of the land, still we contend that he can get a right to the extent of the projection not to the whole column of air above it.

Lallubhai A. Shah, for the respondent (plaintiff) :—The projection is not in the nature of an easement. It is tantamount to occupation of the defendant's immoveable property : *Mohanlal Jechand* v. *Amratlal Bechardas* [1], see Printed Judgments for 1879, page 27. If it be treated as trespass on defendant's immoveable property, then we contend we have acquired a right to the space occupied by the projection underneath and above, *cujus est solum ejus est usque ad cœlum* : *Harvey* v. *Walters*.[2] The mandatory injunction was, therefore, properly granted.

H. C. Coyaji, in reply :—He referred to *Corbett* v. *Hill*.[3]

JENKINS, C. J. :—The plaintiff's beams overhang the defendant's soil, and the defendant has erected a building which overhangs those beams. The lower Appellate Court has granted a mandatory injunction directing the removal of the building.

The sole question is whether the beams have given the plaintiff a right to the column of air above them.

The defendant being the owner of the soil is entitled *primâ facie* to all above it, and in our opinion the diminution in his rights by reason of the beams does not extend beyond the protrusion of the beams themselves : see *Corbett* v. *Hill* [3] and *Harris* v. *De Pinna*.[4]

The injunction must, therefore, be dissolved and the decree must be varied to that extent.

The appellant will get the costs of this appeal.

Decree varied.

(1) (1878) 3 Bom. 174.
(2) (1872) L. R. 8 C. P. 162 at p. 165.
(3) (1870) L. R. 9 Eq. 671.
(4) (1886) 33 Ch. D. 238 at p. 260.