APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

1902. *January 6.*

BAI HARIGANGA (ORIGINAL DEFENDANT), APPELLANT, *v.* TRICAMLAL KEDARESHWAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Light and air—Injunction—Alteration of easement—New windows higher than the old ones—New easement—Indian Easements Act (V of 1882), section 23.

Plaintiff had two windows in the rear wall of his house. In 1886 he rebuilt his house and opened new windows, which were of nearly the same size, but were a little higher than the old ones. In 1899 defendant built his house and blocked up these two new windows. The plaintiff sued for an injunction. The first Court dismissed the suit. The lower Appellate Court reversed the decree and granted an injunction, holding that the plaintiff did not lose his easement by changing the position of the windows, because the new ones were nearly of the same dimension, and as their position was higher than that of the old windows, the burden on the servient tenement was rather less than before. On second appeal,

Held, reversing the decree and dismissing the suit, that the easement claimed in respect of the new windows, which did not receive the same cones of light as were enjoyed through the old ones, was quite distinct from the easement in respect of the old windows; and that, therefore, the easement respecting them could be acquired only by enjoying it for the required length of time.

SECOND appeal from the decision of Ráo Bahádur Lalshankar Umiashankar, Additional First Class Subordinate Judge, A. P., at Ahmedabad, reversing the decree passed by Ráo Sáheb Karpurram Manmathram, Subordinate Judge of Ahmedabad.

Suit for injunction.

The plaintiff was the owner of a house in Ahmedabad, in the back wall of which there were two windows (*jálias*). Beyond this back wall there was a piece of open ground belonging to defendant, on which the defendant had a shed, the roof of which was lower than plaintiff's windows.

In 1886 plaintiff rebuilt his house and opened four windows in the back wall, two on the second floor and two on the third floor. In the old wall there had been two windows only. The position of the new windows on the second floor was not the same as that of the old ones: and it was found by the Court of first instance that "the old *jálias* were below the present *jálias*."

* Second Appeal No. 277 of 1901.

In 1899 defendant pulled down his shed and built a house which obstructed the light and air to the two windows on the second floor of the plaintiff's house.

Plaintiff thereupon filed this suit, praying for an injunction against the defendant.

Defendant pleaded that the windows on the second floor, as also those on the third floor, of plaintiff's house were new, and that plaintiff had not acquired any easement in respect of them.

The Court of first instance dismissed the suit on the following grounds:

> The present *jálias* are not where the old *jálias* were. As the present *jálias* are not more than thirteen years old, and they are above the old *jálias*, the plaintiff has acquired no right of easement to receive light and air through them."

On appeal, the lower Appellate Court reversed the decree and directed the defendant to "remove the obstruction caused to the two *jálias* in the back wall in the second floor of plaintiff's house" on the following grounds:

> The lower Court holds that plaintiff, in about 1887, closed the old *jálias* and opened the disputed *jálias* higher in the wall. There is no evidence to show that the disputed *jálias* are of greater dimensions than that of the old *jálias*. The question then is whether the present *jálias* impose greater burden on the servient tenement. As the new *jálias* are nearly of the same dimensions and as their position is higher than that of the old *jálias*, I think the burden on defendant is rather less than before. . . . . I therefore hold that plaintiff does not lose his old right of easement by changing the position of the *jálias*, and that plaintiff has acquired a right of easement of light and air through the disputed *jálias*.

Defendant appealed to the High Court.

L. A. Shah for appellant (defendant):—The lower Courts have found that the new windows are not in the same position as the old ones. There is no part common to both. The old easement, therefore, is gone, and no new easement has been acquired. Section 23 of the Easements Act (V of 1882) does not apply: *Scott* v. *Pape* [1]; *Pendarves* v. *Monro* [2]; *Fowlers* v. *Walker* [3]; *Lallu Fatechand* v. *Padamsi Motichand* [4]; *Newson* v.

[1] (1886) 31 Ch. D. 554.
[2] (1892) 1 Ch. 611.
[3] (1881) 51 L. J. Ch. 443.
[4] (1889) P. J. p. 310.

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Pender.[1] The lower Appellate Court is wrong in assuming that the new windows higher up in the wall cannot increase the burden on the servient tenement: see Michell's notes on section 23 of the Indian Easements Act (V of 1882).

G. K. Parekh for respondent (plaintiff):—The English cases cited by the other side are not applicable here. They are cases decided under 2 and 3 Will. IV, c. 71, which contained no provision corresponding to section 23 of the Indian Easements Act (V of 1882). This section is not limited to the mode of enjoying the easement, but extends also to the place of enjoying it. The case of *Lallu Fatechand* v. *Padamsi Motichand*[2] was not decided under the Easements Act: it was a case before the Act came into force in this Presidency. It is not correct to say that the easement in respect of the new windows, which are a little higher than the old ones, is a new easement. The lower Appellate Court is right in saying that the burden on the servient tenement has not increased. In fact, the defendant now gets the advantage of building up to the level of the new windows.

CANDY, J.:—The question is with regard to the two windows (*jálias*) on the second floor of plaintiff's house, which he built in 1886.

Plaintiff claims to have acquired an easement of light and air through these windows, because there were two old *jálias* for light and air in the old back wall of his house before he rebuilt in 1886. The first Court held that there was no such acquisition, because the present *jálias* are not where the old *jálias* were. The Judge of the lower Appellate Court held that plaintiff does not lose his old right of easement by changing the position of the *jálias*, because the new *jálias* are nearly of the same dimensions, and as their position is higher than that of the old *jálias*, the burden on defendant is rather less than before.

No authority was quoted for the above proposition. Against it Mr. Shah has quoted cases, such as *Scott* v. *Pape* [3] and *Pendarves* v. *Monro*,[4] which show that where the windows of the altered or new building do not enjoy the same cones of light, or a sub-

(1) (1884) 27 Ch. D. 43.
(2) (1889) P. J. p. 310.
(3) (1886) 31 Ch. D. 554.
(4) (1892) 1 Ch. 611.

stantial part thereof, as were enjoyed by those of the old building, the right will be lost. For the respondent Mr. Gokuldas relies on section 23 of the Easements Act, and contends that the English cases cited were decided upon the basis of the construction to be put on section 3 of the Prescription Act. But, as pointed out by Mr. Michell in his notes to section 23 of the Easements Act, the wording of the Prescription Act is substantially the same as that of section 15, paragraph 1, of the Easements Act; and it seems obvious that an additional burden is imposed on the servient heritage, when the easement claimed is entirely different from that which was formerly enjoyed. Such must be the case when the cones of light cannot be the same. Compared with the old enjoyment, the access of light and air since 1886 may not be so burdensome; but it is a different burden, and not having been enjoyed for twenty years, it is not absolute.

I would, therefore, reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge. All costs on the plaintiff.

FULTON, J.:—The easement of light appears to consist in the right of the owner of the dominant tenement to prevent the owner of the servient tenement from obstructing the passage of certain definite rays or pencils of light: Easement Act, section 4, *Scott* v. *Pape*.[1] and *Pendarves* v. *Monro*.[2] When the easement has been acquired, the owner thereof, if he rebuilds his house, is entitled to the full use of the same rays of light as he was previously entitled to, irrespective of the precise position of the window through which they are received.

Section 23 of the Easements Act provides that the dominant owner may from time to time alter the mode or place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage. The burden on the servient heritage consists in the obligation to allow the particular rays in respect of which the easement has been acquired to pass unobstructed. In a case of this sort where the position of the window has been changed, the question is whether it is the same ray which enters by the new window as previously entered

(1) (1886) 31 Ch. D. 554. (2) (1892) 1 Ch. 611.

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through the old window. If the position of the new window is such that the ray of light passing through it would have equally passed through the old window, then the easement which entitles the owner of the dominant estate to a free passage for that ray remains unaffected. If, on the other hand, the position of the new window is such that the rays passing through it would not have passed through the old window, then it is clear that no easement exists to secure free passage for such rays. If the position of the new window is such, in reference to the old window, that it is doubtful whether the rays passing through the two windows would have been the same, the claimant to the easement who has to establish his right must fail. The new window may be of the same size as the old window. It may admit to the room a similar quantity of light as before. The passage of that light may be as little injurious to the owner of the servient tenement as the passage of the light which fell on the old window. But if the rays of light falling on the new window are different, that is, if the rays though projected would not have entered by the old window, then it is not an old but a new easement which is being set up. That appears to me to be the conclusion derived from the English cases on the subject and to be in accordance with the provisions of the definition of 'easement' and section 23 of the Act.

In the present case Mr. Lalshankar has found that the new windows are higher in the wall than the old windows were. It was not argued that the rays of light which enter by the new windows could have entered by the old ones. The easement, therefore, which the plaintiff seeks to enforce is different from the former easement. Accordingly we must reverse the decree of the lower Appellate Court and restore that of the Second Class Subordinate Judge, with costs on the plaintiff throughout.

Decree reversed.