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voluntarily made. I should not have pressed the contrary opinion, in those circumstances, had I after fully weighing all that was to be said on both sides been inclined for my own part towards that opinion. I feel that I ought, speaking for myself, to express my great indebtedness to the learned counsel on both sides. To the length the Court wished him to go Mr. Wadia stated the prosecution case with remarkable clearness and mastery of all its complex details, and had my opinion been more generally shared, and had it therefore been considered desirable to hear a more elaborate refutation of Mr. Robertson's argument against the admissibility of the confessions, it is quite possible that the prosecution had materials which in the able hands of the counsel representing the Crown would have completely dispelled my doubt. On the other side no single point that could and ought to have been pressed for the accused was omitted by Mr. Robertson whose powerful arguments greatly impressed me. I agree with my learned colleagues in the order proposed.

[*Statement of witness excluded from evidence: conviction approved: sentence reduced to three years' rigorous imprisonment.*]

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1907. *June 27.*

GANGABAI (PLAINTIFF) *v.* PURSHOTAM ATMARAM (DEFENDANT).*

Easement—Ancient Lights—Injunction to restrain defendant from interfering with ancient lights—Quia timet *action, necessary ingredients for.*

There are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger and there must also be proof that the apprehended damage will, if it comes, be very substantial.

Fletcher v. *Bealey*(1) followed.

* Original Suit No. 783 of 1906.

(1) (1885) 28 Ch. D. 688.

THE facts of this case appear sufficiently from the judgment.

Bahadurji (*Padsha* with him), for plaintiff.

Jinnah and *Mazumdar*, for defendant.

MACLEOD, J.:—The plaintiff is the owner of a house in Vithalvádi and sues the defendant, the owner of a house abutting the eastern wall of the plaintiff's house, for a declaration that certain windows in that wall are ancient lights and for an injunction to restrain the defendant from interfering with them. It appears that one Nowroji Kapadia, the plaintiff's agent, in October 1906 received information which led him to suppose that the defendant was going to pull down his house and erect a new one with a ground floor and three upper stories; whereupon he instructed plaintiff's solicitor to write a notice to the defendant on the 30th October, warning him against building so as to infringe the plaintiff's rights. To this the defendant made no reply and in my opinion no reply was called for. At that time the defendant's house was as it is shown in red in the plan annexed to the plaint now Exhibit C. On the north side of his house the roof sloped down so as to meet plaintiff's wall just below window No. 1 and at the south side there was a terrace which reached that wall a few feet lower down. After the letter of the 30th October, Nowroji noticed that the defendant appeared to be making additions to his building, new posts were being erected and that part of the roof which sloped towards the plaintiff's house was being removed. Without further notice this suit was filed on the 18th December and an *interim* injunction was obtained on the 20th December, the argument of which by consent has stood over till the hearing. The defendant admits that the plaintiff's windows are ancient lights but asserts that when the suit was filed he had no intention of raising his house so as to interfere with them. The action is a *quia timet* action to restrain an apprehended injury, and to maintain this the plaintiff must prove imminent danger of a substantial kind and that the apprehended damage, if it does come, will be irreparable. In *Fletcher* v. *Bealey*[1] Pearson, J., at

(1) (1885) 28 Ch. D. 688.

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page 698, said: "I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet* action."

On these points the plaintiff's case depends practically on the evidence of Nowroji. He says he heard from one Nagarchand Chaganchand, the partner, and one Dorabji, the mistry of Fakirchand Motichand, the owner of the house to the north of the defendant's house, that defendant was intending to build a house of three stories on the site of his old house. Now, Fakirchand, or probably his father (as he was only a boy), was building to the north of the defendant and wanted permission to enter defendant's premises so as to plaster his new south wall which abutted on the defendant's house. For this purpose both Nagarchand and Dorabji approached the defendant. Nagarchand says defendant told him he (defendant) was going to raise his house higher than Fakirchand's and therefore there was no necessity for Fakirchand to plaster his wall. Dorabji says when he went to ask defendant's permission defendant put him off on various pretexts and on the last occasion said he was going to raise his house higher than Fakirchand's. Both witnesses admit that there had been disputes between Fakirchand and the defendant owing to defendant complaining that his house had been damaged by Fakirchand's new building, which would be quite sufficient reason for defendant not wishing to grant Fakirchand any facilities for plastering his wall. Defendant says he never said anything about raising his own house as he had no such intention at that time. I am satisfied that it is more probable

that he is speaking the truth than the plaintiff's witnesses. Even supposing he had said something to this effect to Nagarchand and Dorabji I do not think the plaintiff would have been entitled to rush into Court without at the very least taking further steps to ascertain (1) whether defendant had actually said what was imputed to him; (2) whether such intention, if given effect to, would inevitably cause an interference with the plaintiff's rights. We have, however, further corroboration of the truth of defendant's story from facts the plaintiff discovered after the suit had been filed. Exhibit H is a file of papers produced from the office of the Executive Engineer to the Municipality which relates to an application made by the defendant in September 1905 for permission to make certain alterations to the house in question, which I shall call hereafter the north house, and the one adjoining to the south which also belonged to him. From the plan annexed to the application it is clear that the only alteration to the north house which defendant's engineer proposed was to build three privies—one on the top of the other—at the north-west corner of the north house which if built in accordance with the plan would have blocked up window No. 1 wholly and Nos. 3 and 4 partially. The plans were returned in May 1906 with Exhibit I. This was in the usual form of the sanction granted by the Executive Engineer to a building application and contained several conditions which had to be complied with before building could be commenced. On the 5th September defandant got a notice from the Municipal Commissioner (Exhibit 3) to pull down a portion of the existing wall of his north house as it was unsafe, and in consequence he gave up the idea of making the proposed alterations. If, therefore, as the plaintiff alleges the defendant had been talking in October about his intention of raising his house higher than Fakirchand's he could not have been referring to his intention to make the alterations mentioned in Exhibit H.

Only two theories are possible : (1) He must have been talking of some altogether new plans. But there is not the slightest evidence that he ever had had any.

(2) He was in need of some excuse to get rid of Fakirchand's repeated requests for permission to come on to his (defendant's)

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property. The evidence, however, of Mr. Merwanji, the defendant's engineer, completely clears up the confusion introduced by the somewhat conflicting statements of the plaintiff's witnesses as to the repairs and alterations to the north house. Defendant called him in to advise about the notice of the 5th Setpember. He advised defendant to pull down the rotten portion which was some feet from the eastern end of the north wall of the north house right away from the plaintiff's premises. This was the only work that was done by the defendant before plaintiff's notice of the 30th October. Defendant also showed Mr. Merwanji Mr. Hate's plans and Exhibit 1. In October Mr. Merwanji advised that, if the conditions of the Executive Engineer were complied with, it would necessitate a completely new building and defendant had better give up the idea. While examining the north house in consequence of the notice of the 5th September Mr. Merwanji found some rotten timber in another portion of the north house at the west end and advised that certain repairs and alterations should be executed. These works were commenced about the 25th November and presumably were the cause of the plaintiff's filing this suit. Unfortunately, Mr. Merwanji made no plan of his proposed alterations, but he has told us now what was intended and what was done before the work was stopped by the injunction. The part of the roof which sloped towards the plaintiff's house was to be removed and a terrace built over the existing privy at the north-west corner, and four posts were to be renewed. Actually the old roof had been removed and four new posts put in exactly in the place of the old ones. The four ground floor posts were 8″ by 8″, the distance from wall to wall being 14′. The first floor posts were 7″ by 7″: a small excavation was also made in the south wall for the purpose of the terrace. There was no intention of raising the building higher than it had been before; that could not have been attempted without submitting plans to the Municipality.

It has been argued for the plaintiff that the new posts were capable of carrying a building of a ground floor and three upper stories and that therefore she was justified in filing the suit. It is really difficult to treat such a contention seriously. If the defendant had pulled down his north house entirely, and had

erected a framework on the ground floor complying with the Municipal regulations for a building of three upper stories, the plaintiff might have had cause for apprehension, but the mere fact that defendant renewed 4 old posts with new ones of greater dimensions could not possibly have justified an action on the part of the plaintiff. There is no doubt that plaintiffs in light and air cases have often to be content with damages if they cannot get an injunction in time from the Court. It is, therefore, necessary to take proceedings at the earliest opportunity, but the limits which have been imposed on *quia timet* actions are fully set out in *Pattisson* v. *Gilford*(1) and *Fletcher* v. *Bealey*(2) cited by Mr. Jinnah for the defendant. In my opinion there was not the slightest justification for the filing of the suit. The plaintiff has failed to prove either that there was imminent danger or that the damage from the apprehended danger if it came would be irreparable. She says in effect she was afraid the defendant would build a three-storied building. This could have been done without causing her any damage. The argument that the defendant intended to build so as to cause damage because he told Dorabji and Nagarchand that there was no necessity for plastering Fakirchand's wall (even assuming the contention to be proved) and that therefore there was imminent danger apprehended by the plaintiff before the suit was filed fails on the ground that there is no evidence that plaintiff's agent knew what has now been deposed to by Dorabji and Nagarchand. All he says is: "I filed the suit because the rear portions of defendant's house had been pulled down and defendant intended to build three stories."

The suit must be dismissed with costs throughout, including the costs of all interlocutory proceedings and the intended application for postponement.

Suit dismissed.

Attorneys for the plaintiff: *Messrs. Bhaishankar, Kanga & Girdharlal.*

Attorneys for the defendant: *Messrs. Daphtary, Fereira & Divan.*

B. N. L.

(1) (1874) L. R. 18 Eq. 259 at pp. 262, 263. (2) (1885) 28 Ch. D. 688.