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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman.

DHED MULIA BHANA (ORIGINAL DEFENDANT), APPELLANT, *v.* DHED SUNDAR DANA (ORIGINAL PLAINTIFF), RESPONDENT.* 1913. *July* 3.

Easements Act (V of 1882), sections 18 and 23—Easement—Projection of eaves—Raising the height of the eaves—Burden on the servient tenement not to be increased—Customary easement—Privacy—Invasion.

The term "easement" as defined in the Easements Act (V of 1882) applies just as much to a projection of eaves in a dry country where there is no discharge of water as in a country where there is abundant rainfall and there is discharge of water.

If a man has acquired an easement from a projection of his eaves to a fixed extent over his neighbour's land, he can raise the height of those eaves so long as he does not throw an increased burden on the servient tenement.

The defendant constructed a window and apertures (*jalis*) in the back wall of his house and they commanded the plaintiff's *khadki* or courtyard which could be used for females to bathe and similar purposes of privacy. From the defendants' window the people sleeping in the plaintiff's house could be seen and from the apertures, though above a man's height, a person, if he was so inclined, could peep through into the plaintiff's house and the male apartment next to the open verandah (*osari*). The plaintiff having sued for an injunction restraining the defendant from making any openings in his wall,

Held, that though it was doubtful whether the plaintiff was entitled to relief on the ground of the invasion of his privacy, still as there was a written agree-

*Second Appeal No. 96 of 1913.

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ment between the parties in the year 1879 whereby the defendant's father agreed that he would not make any opening in his back wall, the plaintiff had the right to require the defendant to close the said apertures and window.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, in cross appeals Nos. 260 and 284 of 1911, varying the decree of M. B. Bhatt, First Class Subordinate Judge.

The plaintiff sued for (1) an injunction permanently restraining the defendant from making any opening whatever in his back wall abutting on the plaintiff's courtyard, (2) an injunction restraining from obstructing him in building a wall on his own land so as to close up the new openings made by the defendant during the pendency of the suit, (3) an injunction permanently restraining the defendant from shifting his eaves from the position in which they stood and beyond 10 inches which was their original projection, (4) an injunction permanently restraining the defendant from raising his house so as to disturb the light and air enjoyed by the plaintiff's house, (5) an order for the removal of the acts complained of, should they be made during the pendency of the suit and (6) such other relief as the Court might deem proper to award. The plaint alleged that the defendant was rebuilding his house with the intention of raising it and to shift his eaves and to project them beyond their limit of 10 inches on the ground of plaintiff's courtyard and that such acts would disturb the privacy of his house and interfere with its light and air.

In denying the plaintiff's claim the defendant contended *inter alia* that there were in the back wall of his house two apertures and one window for more than 20 years past, that the plaintiff had not acquired the easement to receive light and air to his house as the story thereto was raised within the last 20 years and

that no injury resulted to the plaintiff by his raising his house.

The Subordinate Judge found that the defendant's back wall was a dead wall without openings as alleged by the plaintiff, that the defendant had not projected his eaves beyond their former limit, that the plaintiff had acquired no right of easement to the upper story of his house, that the plaintiff could not prevent the defendant from raising his house, that the plaintiff was entitled to and had enjoyed privacy with respect to his upper story and that the defendant's intended building interfered with the privacy of the plaintiff's house.

The Subordinate Judge therefore issued an injunction requiring the defendant to close his two apertures and one window in dispute in the back wall of his house in suit and restraining him from ever making any opening whatever in the said wall in future. In other respects the plaintiff's suit was dismissed. In connection with the plaintiff's claim relating to the window and the apertures the Subordinate Judge referred to an agreement, Exhibit 23, dated April 1879. The agreement was produced by the plaintiff and it contained a stipulation on the part of the defendant's father that he would not make any opening whatever in his back wall. With respect to the plaintiff's claim as to the eaves the Subordinate Judge observed :—

It is true defendant has raised his house and has in doing so shifted the position of the eaves. It is argued for the plaintiff that on the authority of the ruling in *Ranchod* v. *Abdulabhai* (Bom. L. R. 6, p. 356) the defendant has only the right to maintain his projection where it was originally and that he cannot shift its position. This ruling related to the right of the owner of the soil to build below and above the said projection without disturbing the projection as such. The ruling decided that the ownership of the column below and above the projection remained with the owner of the soil. This ruling does not consider the question of easement, for apart from the encroachment and adverse possession the defendant has in the present instance acquired the right of easement to discharge his eaves in the plaintiff's ground.

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Defendant's house is there these more than 20 years and defendant has discharged rain water from his roof on the plaintiff's ground. In raising his house defendant does not, I think, increase the burden in the plaintiff's soil. By raising his house defendant has given the plaintiff the facility to raise his own house if he liked provided he managed to receive the rain water from his (defendant's) eaves into some structure like a terrace.

Both the parties preferred cross-appeals. The plaintiff in his appeal urged that the First Court was wrong in its finding as to the right of the defendant to project his eaves, and the defendant in his appeal urged that the first Court was wrong in its finding as to the plaintiff's right of privacy and in finding that the windows were new.

The District Judge dismissed the defendant's appeal and in allowing the plaintiff's appeal enjoined the defendant "not so to construct the eaves of his new roof as to project over the land of the plaintiff" for the following reason :—

The right to protrude eaves over the land in possession of another is a totally different right to an easement to discharge rain-water. Rain-water can be discharged without protrusion of eaves, and eaves can be protruded without discharge of rain-water. The right to protrude eaves is a physical invasion of immoveable property and as such is exposed to a prescription of 12 years. Therefore the fact that a person has had his roof encroaching in one part of plaintiff's column of air gives him no right to give up his old encroachment and begin an entirely differently situated encroachment, still less to further protrude.

The defendant preferred a second appeal.

G. N. Thakore, for the appellant (defendant).—The finding that we have projected our eaves is due to a misapprehension of the law. It was admitted in the plaint that our original eaves projected to the extent of 10 inches and relief was claimed on that footing. The first Court found that our present eaves are in a line with the eaves of the other house. The District Court erroneously assumed that the projection of the eaves was an encroachment and found that there was an

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encroachment because the present eaves are differently situated. The projection of eaves is an easement as held in *Chotalal Hirachand* v. *Manilal Gagalbhai*[1]. We also rely on *Harvey* v. *Walters*[2].

The injunction regarding the window and apertures should not stand. The parties are Dheds (scavengers) and not entitled to the right of privacy with respect to their houses without alleging and strictly proving the custom of privacy. No such custom was alleged and proved. The finding also is very halting. The openings command a view of the open courtyard and the male apartments of the house. No right of privacy could be claimed with respect to these: *Keshav Harkha* v. *Ganpat Hirachand*[3], *Shriniras Udpirav* v. *L. Reid*[4]. The ruling in *Manishankar Hargovan* v. *Trikam Narsi*[5] is not applicable and the privilege should not be extended any further.

G. K. Parekh, for the respondent (plaintiff).—The finding as to the eaves is a finding of fact and cannot be disturbed in second appeal. The District Judge did not merely proceed upon the assumption that the projection was an encroachment. Even if he did, we submit that he was right. A new column of space is now occupied by the eaves. The burden on the servient tenement would be increased by the roof being raised. Besides it is not found that the eaves are meant for rain-water.

As regards the window and apertures both the lower Courts found that our right of privacy is invaded. The right of privacy is recognized in Gujarat by custom: *Manishankar Hargovan* v. *Trikam Narsi*[5]. It was not necessary to allege and prove it. The window and

(1) (1913) 37 Bom. 491.
(2) (1873) L. R. 8 C. P. 162.
(3) (1871) 8 Bom. H. C. R. (A.C.J.) 87
(4) (1872) 9 Bom. H. C. R. 266.
(5) (1867) 5 Bom. H. C. R. (A.C.J.) 42.

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apertures do overlook our windows and the *khadki* which is used by females. The finding is binding in second appeal. Besides the injunction as regards the window and apertures our claim is also based on the agreement which was arrived at between the parties and which is relied on by the Courts.

Thakore, in reply.—There was no reference to the agreement in the plaint. There could be no privacy as to the courtyard. Admittedly there are tenants in the plaintiff's house.

SCOTT, C. J. :—There are two questions on which the parties are at issue in this appeal. The first is whether the defendant who at a previous time had his eaves projecting ten inches over the plaintiff's land (and so far as we can judge he had uninterrupted enjoyment of them for twenty-five years) should be interfered with when he raises the wall of his house and projects the eaves to the same extent at a correspondingly increased height. The learned District Judge has held that except in the case of the discharge of water from the eaves the nature of the interference with the right of the servient tenement is trespass and not within the law relating to easements. We are unable to agree with his opinion upon that point. It appears to us that the definition of 'easement' in the Easements Act applies just as much to a projection of eaves in a dry country where there is no discharge of rain-water as in a country where there is an abundant rainfall and there is discharge of water. It is to be observed, moreover, that in Ahmedabad there is often an abundant rainfall, and the eaves must be used in the ordinary course for the discharge of rain-water. The case falls within the decision of this Court in *Chotalal Hirachand* v. *Manilal Gagalbhai*[1]. If the defendant has acquired an easement from a projection

[1] (1913) 37 Bom. 491.

of eaves ten inches over the plaintiff's land, he can raise the height of those eaves so long as he does not throw an increased burden upon the servient tenement. That is provided by section 23 of the Easements Act: see also *Harvey* v. *Walters*[1].

We understand the learned District Judge's finding, that the defendant has projected his eaves beyond their former limit, to be based upon his proposition of law that the defendant cannot project his eaves at all at a different height to that at which they were originally projected. The decree of the District Judge, therefore, must be modified in respect of the eaves.

The second point is based upon a customary easement which is alleged to be in force throughout Gujarat. Customary easements are recognized under the Easements Act, section 18. It was stated in *Manishankar Hargovan* v. *Trikam Narsi*[2], that "A series of decisions, extending over a long number of years, has settled the question, that, in accordance with the usage of Gujarat, a man may not open new doors and windows in his house, or make any new apertures, or enlarge old ones, in a way which shall enable him to overlook those partitions of his neighbour's premises which are ordinarily secluded from observation, and in this manner to intrude upon that neighbour's privacy; and that an invasion of privacy is an infraction of a right, for which the person injured has a remedy at law". The decisions which are quoted in support of that proposition do not entirely bear it out. For example, one of the cases quoted is *Syed Imambuksh* v. *Guggul Purbhoodas*[3], decided in 1862, where the plaintiff sued to cause an eyelet made in the back-wall of the defendant's house to be blocked up as destroying the privacy of his

(1) (1873) L. R. 8 C. P. 162. (2) (1867) 5 Bom. H. C. R. (A.C.J.) 42.
(3) (1862) 9 Harrington 274.

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premises. The defendant pleaded that the opening was not recent and that the plaintiff did not suffer any inconvenience from it. It was alleged by the plaintiff that the opening could be used in order to look into his privy. The learned Assistant Judge, however, did not consider that the plaintiff suffered any material inconvenience from his yard being commanded by the eyelet, and the Sadar Diwani Adawlut accepting the finding of the Assistant Judge confirmed his decree with costs. That is the most recent case to be found in the Reports prior to the decision in *Manishankar Hargovan* v. *Trikam Narsi*[1]. Then in *Keshav Harkha* v. *Ganpat Hirachand*[2], in a second appeal, Melvill and Kemball, JJ., after referring to the dictum in 5 Bom. H. C. Reports, said: "We are certainly not disposed to extend the privilege further than it was carried in that case; and as it appears from the Assistant Judge's judgment in the present case that the window opened by the defendant looks, not into the plaintiff's private apartments, but into an open courtyard outside his house, we are of opinion that there has been no invasion of the plaintiff's privacy which will entitle him to have the window closed." Here the finding of the lower Court is that "the *jalis* and windows in the back-wall of the defendant's house command a *khadki* or courtyard which is a place which can be used for females to bathe and similar purposes of privacy, and the defendant admits that from his present window people sleeping in plaintiff's house can be seen, and the *jalis* are no doubt above a man's height but if one were inclined to peep through the same he can peep straight into the plaintiff's house—the male apartment next to the *osari*. Even if he were to peep into the *khadki* of the plaintiff's house the privacy of his people and that of his tenants would be disturbed". If the case rested there

(1) (1867) 5 Bom. H.C.R. (A.C.J.) 42. (2) (1871) 8 Bom. H.C.R. (A.C.J.) 87.

we should hesitate to hold that the plaintiff was upon these findings entitled to relief having regard to the decision in *Syed Imambuksh* v. *Guggul Purbhoodas*[1] and in *Keshav Harkha* v. *Ganpat Hirachand*[2]. But there was an agreement between the parties reduced to writing in April 1879, in which it was agreed by the defendant's father that he would not make any opening in his back-wall. The wall in which these *jalis* and windows, which are complained of, are opened, is a continuous back-wall with the back-wall in existence at the date of the agreement of 1879. Having regard to that agreement we cannot interfere with the decision of the lower Courts requiring the defendant to close up the *jalis* and windows which he has opened in his back-wall.

We, therefore, vary the decree of the District Judge by deleting the injunction against the construction of the eaves of the new roof so as to project over the land of the plaintiff. It must be understood that this variance of the District Judge's decree in no way authorizes the defendant to project his eaves more than ten inches over the plaintiff's property. Plaintiff must have the costs which are incidental to the institution of the suit. As to all other costs each party must bear his own.

Decree varied.

G. B. R.

(1) (1862) 9 Harrington 274.

(2) (1871) 8 Bom. H.C.R. (A.C.J.) 87.