APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

HIMATLAL MAGANLAL SHAH (ORIGINAL DEFENDANT), APPELLANT *v.* BHIKABHAI AMRITLAL SHAH (ORIGINAL PLAINTIFF), RESPONDENT.* 1918. *January* 28.

Indian Easements Act (V of 1882), section 24—Accessory Easement—Extension of the doctrine of accessory easement.

The plaintiff and the defendant owned neighbouring houses. The wall of the plaintiff's house abutted on the defendant's land. The plaintiff had acquired an easement of discharging rain water from eaves of his roof on to the defendant's land. On the strength of this easement the plaintiff sued for an injunction to restrain the defendant from making any use of his land which would prevent the plaintiff from going upon it for the purpose of repairing the wall of his house. The trial Court refused to grant the injunction. The lower appellate Court found that the case fell under section 24 of the Easements Act 1882, and that the repair of the wall was an accessary easement to the admitted easement of discharging the water through the eaves. On appeal to the High Court,

Held, that the right to enter upon the defendant's land to repair the wall which would preclude the defendant from making any use of his land, was not such an easement as the plaintiff was entitled to or was contemplated by section 24 of the Easements Act, 1882.

SECOND appeal against the decision of R. S. Broomfield, Joint Judge of Ahmedabad, modifying the decree passed by P. M. Bhat, Second Class Subordinate Judge at Nadiad.

Suit for an injunction.

The plaintiff and the defendant owned neighbouring houses in Nadiad. The wall of the plaintiff's house abutted on the defendant's *khadki* land. The plaintiff had acquired an easement of discharging rain water upon the defendant's land from the eaves of his house which projected from 3 to 5 inches in length over the defendant's land. The defendant wanted to put up a

* Second Appeal No. 51 of 1917.

1918,

HIMATLAL MAGANLAL v. BHIKABHAI AMRITLAL.

drain on the land by the side of the plaintiff's wall. The plaintiff sued for injunctions restraining the defendant from making a drain in his land and from interfering with plaintiff's right to enter the land for the purpose of repairing the wall.

The defendant contended that the plaintiff had no right to enter his land for the purpose of repairing the wall and that he had no right to obstruct him in putting up a drain in his own land.

The Subordinate Judge refused to allow the injunctions prayed for.

The Joint Judge, on appeal, agreed with the Subordinate Judge in refusing to grant the injunction restraining the defendant from putting up a drain on his *khadki* land but granted the other injunction on the ground that the right to enter the land for the purpose of repairing the wall was accessory to the easement already established and falling under section 24 of the Indian Easements Act, 1882. He relied on *Hayagreeva* v. *Sami*[1].

The defendant appealed to the High Court.

M. H. Vakil for the appellant:—Though the plaintiff may have acquired the easement of discharging rain water from the eaves, it does not give him the accessory right of entry upon the defendant's land to repair his (plaintiff's) own wall supporting the eaves. An easement to have the water carried over the defendant's land does not disentitle the defendant from building on his own land so long as he does not obstruct the passage of water: see *Bala* v. *Maharu*[2]; *Manilal Harjivan* v. *Bapu Harivalav*[3]. Defendant's land is only 6 feet 8 inches in width and a right of entry as claimed will virtually amount to an injunction to

(1) (1891) 15 Mad. 286.

(2) (1895) 20 Bom. 788.

(3) (1898) P. J. p. 1.

build on the land if a passage has to be left for such entry. Section 24 of the Easements Act, 1882, does not warrant such an extension of the doctrine of accessory easements. The case of *Hayagreeva* v. *Sami*[1] relied on by the lower Court does not represent a correct view of the section as the roof could be repaired from above and the wall from within.

G. N. Thakor, for the respondent:—This is an accessory easement following as a necessity from the principal easement. *Hayagreeva* v. *Sami*[1] is exactly on all fours with the present case. The roof and the wall could not be repaired from above and from within without great inconvenience to the plaintiff. The wall may not require any repair from inside but repairs to the outer side may be necessary as a result of the rain-water falling from the eaves and it is for this purpose we have to go over the defendant's land.

BEAMAN, J.:—The only substantial point with which we are called upon to deal is whether the lower appellate Court was right in granting the plaintiff an accessory easement, the extent of which is unfortunately not defined in the decretal portion of his judgment. The plaintiff is admittedly entitled to an easement of discharging water upon the defendant's land from eaves which project, as we are told here, although we do not discover this on the record, from 3 to 5 inches in length. This probably is about the fact, if not absolutely accurate. On the strength of this easement the plaintiff asked the Court below to give him an injunction, restraining the defendant from making any use of his land which would prevent the plaintiff from going upon it for all the purposes of repairing the wall of his house abutting thereon. The first Court refused this injunction, and in my

[1] (1891) 15 Mad, 286.

1918.

HIMATLAL MAGANLAL v. BHIKABHAI AMRITLAL.

opinion very rightly refused it. I entirely agree with the reasons given and the characterisation of the plaintiff's case by the trial Judge. In appeal the learned Judge below found that the case fell under section 24 of the Indian Easements Act and that the repair of the wall was an accessory easement to the admitted easement of discharging water through the eaves. It appears to me that this is an altogether illegitimate extension of the doctrine of accessory easement. The wall is just as necessary to the support of the roof as a whole as to the support of these slightly projecting eaves beyond it, and yet it is contended that because of this so-called easement the plaintiff is to have a vague and undefined easement which might preclude the defendant from making any use of his land within 5 or 6 feet of the plaintiff's wall. It does not appear to me that this is such an easement as any person is entitled to or was contemplated by section 24 of the Indian Easements Act. It is true that we have been referred to a very similar case in Madras (*Hayagreeva* v. *Sami*[1],) in which the learned Judges took a different view, a view to which the learned Judge below intended to give effect. The result, however, is manifestly most unjust, and in principle it would come to this, that whoever built a house to the very limit of his own land might, if his neighbour did not build upon his land within twenty years, compel him to forego making any use of it for any profitable purpose within an altogether indefinite distance of the plaintiff's wall. The actual easement is for no more than discharge of water over 3 to 5 inches of defendant's land and that easement can very easily be secured and continued without extending it in the manner in which it has been extended by the learned Judge below. Such eaves, for example, in so far as they are separable from the roof as a whole

(1) (1891) 15 Mad. 286.

and entitled to special treatment on the ground of constituting an easement, could very easily be supported from the central roof beam or in any other way entirely independent of the wall. It is only by saying that the wall is necessary to support the roof as a whole and that the eaves are dependent upon the maintenance of the roof that we arrive at the position that the maintenance of the wall is in itself a ground for granting an extended easement over the defendant's land. I do not think that that is a reasonable view in principle.

But after all it is not necessary to generalize and, looking to the facts of the particular case and the view taken of it by the learned trial Judge, I should have no hesitation in saying that this at any rate was not a proper case for granting an injunction of the kind prayed for by the plaintiff.

In the lower appellate Court we find the learned Judge saying that it was not suggested that the plaintiff could repair his wall in any other way than by having the use of the defendant's land which he asks for. It may not have been suggested, but it is pretty clear, that there must be ways in which the plaintiff could do any necessary repairs to his wall from within, and without further encroaching upon the defendant's land. For example, to take an extreme case, we might say that if the plaintiff really was so anxious about the repair of this wall and the maintenance of the easement, he might build his wall two feet further back upon his own land, the eaves then projecting two feet five inches instead of five inches beyond the wall and so preserving the old easement. There would be no difficulty whatever in arranging the matter so, though it would no doubt be very inconvenient to the plaintiff. But the course proposed by the plaintiff and sanctioned by the learned Judge below is certainly as inconvenient and in my opinion far more unjust to the defendant.

1918.

HIMATLAL MAGANLAL v. BHIKABHAI AMBITLAL.

In this view of the case, I think that the learned Judge below was wrong in granting the plaintiff the relief he has done, and that the proper order is that the plaintiff's suit should be dismissed, and in my opinion it ought to be dismissed with all costs at any rate of the two appeals.

HEATON, J. :—I agree. I think that the meaning of section 24 of the Indian Easements Act as illustrated by the examples given has been misunderstood by the lower appellate Court. The accessory rights mentioned in that section are not intended to be of such a nature as to deprive the owner of the servient tenement of his rights of property unless such a result is absolutely essential. We can in this case only say that it is absolutely essential that the plaintiff should reach his wall from the outside in order to repair it, by assuming that it is impossible for him to do it from the inside. Clearly, it seems to me, it is not impossible for him to do it from the inside, although it may be very inconvenient. The plaintiff, if he wishes to repair his wall and if the defendant is unwilling that the plaintiff should go on to his land for the purpose, must do so from the inside.

I think it quite right that this claim should be dismissed and the appeal allowed. I agree as to the order proposed as to costs.

Decree reversed.

J. G. R.