
**Mr. A. Caspersz, Receiver to the Estate of the Late Raja Kali Sunkar
Ghoshal Bahadur Vs Raj Kumar alias Rajendra Kumar Sarkar**

Appeal from Appellate Decree No. 466 of 1897

Court: Calcutta High Court

Date of Decision: July 13, 1898

Judgement

Banerjee, J.

In this appeal, which arises out of a suit brought by the Plaintiff-Respondent, for various reliefs, some of which have been

granted and some refused, the only question that arises for determination is, whether the Courts below were right in giving the Plaintiff a decree

declaring his right to light and air, and ordering the demolition of a wall erected by the Defendant. The learned vakil for the Defendant Appellant

contends that the decree is wrong because the Courts below have omitted to determine properly the question whether the right to light and air

claimed by the Plaintiff is not extinguished by reason of the Plaintiff's present house being a new house.

2. The lower Appellate Court has not dealt with the question in any way but the manner in which it has been dealt with by the first Court whose

judgment on this point has been affirmed on appeal is this. It says :--"It is contended by Defendant's vakil that Plaintiff has recently built his house

upon the site upon which his old house stood and if he acquired right to the entrance of light and air in his former house, that right had ceased to-

exist as soon as it was pulled down. But it is admitted that the new house is rebuilt on the site of the old house. The old house had also doors and

windows on the western side the reconstruction of a house on the old site does not at (sic) the right to light and air which the owner had enjoyed

while the old house had existed. The Defendant No. 1 has, no doubt, infringed Plaintiff's right of way, right to discharge water and right to the light

and air by erecting a wall."

3. We are of opinion that the view taken by the first Court in this passage, which has been impliedly affirmed by the lower Appellate Court, is

erroneous in law. While, on the one hand, it is quite true that the mere fact of the old house having been taken down, or having fallen down, and a

new house being erected on its site, would not by itself, be sufficient to extinguish any right to light and air which the owner of the house may

possess,, on the other hand, it is not correct to say that because the owner of the old house was entitled to light and air coming through certain

windows and doors, he would, after reconstruction of the house on the old site, continue to be entitled to light and air coming through any windows

and doors in the same wall, irrespective of the positions and dimensions of the doors or windows. The question whether the right is, or is not,

extinguished will depend on whether the new doors and windows are in the same position and are of the same dimensions as the old doors and

windows; in other words, the question for consideration will be whether the easement claimed as appertaining to the newly constructed house

imposes a different and greater burden on the servient tenement. This question has not at all been considered by either of the lower Courts. The

case must, therefore, be sent back to the lower Appellate Court in order that it may determine the question upon the evidence which is on the

record.

4. The view we take is supported by the case of *Fowlers, v. Walker* L. J. 49 Ch. 598 : L.J.51 Ch. 443, and *Pendarves, v. Monro* L.R (1892) 1

Ch. 611. Having regard to the fact that the question was not very clearly raised in the Tower Appellate Court, we think that the proper order to

make. in regard to the costs of this appeal is, that each party should bear his costs.