(1870) 07 CAL CK 0006

Calcutta High Court

Case No: Special Appeal No. 177 of 1870

Birju Sahu and Others		APPELLANT
	Vs	
Mahomed Abdur Rahim and Others		RESPONDENT

Date of Decision: July 5, 1870

Judgement

Markby, J.
In this case the plaintiffs and defendants were owners of two houses separated by a narrow lane, but whether public or private does not appear. The defendants" house consisted originally of one story, and he built a second story with three windows looking towards the plaintiffs" house into the lane. The defendants also built a verandah, one end of which looked in the same direction. The object of the plaintiffs in bringing this suit was to compel the defendants to close these windows, to pull down the verandah, and also to close two doors in the lower story. The Munsiff held that the suit could not be maintained; that the mere fact that the females of the plaintiffs" house could be seen from the defendants" house did not give the plaintiffs a right of suit; and that if the plaintiffs were annoyed thereby, they had the remedy in their own hands by raising their walls or erecting a screen.

2. The Subordinate Judge thought otherwise. He considered that "if the privacy of any house occupied by pardanashin women was intruded on by the erection of another house, the party thus injured could certainly lay claim to its demolition."

3. The only question brought before us on this special appeal is whether or no the suit can be maintained. The appellants arguing against the maintenance of the suit, rely on a decision of Steer and L.S. Jackson, JJ., of the 18th June 1862. In that case the Munsiff held that the suit would He, but the Judge of Patna held that it would not. The Sudder Court upheld the decision of the Judge, saying: "We are not aware that where two owners of houses live contiguous, but separated by an intervening space, the custom of the country requires that neither party shall make any improvement on his property, if such improvement has the effect of depriving the other of a certain degree of privacy. We

should rather say that where the one opens a window which overlooks the other, it is the custom of the country that the other raises a screen or adopts some other contrivance to counteract the effect of the opening made in his neighbor"s house."

4. The appellants also rely on a decision of Phear and Hobhouse, JJ., Ramlal v. Mahes Baboo Ante, p. 677. There, both the lower Courts in Patna held that the suit could not be maintained. The Principal Sudder Ameen said: "It appears that the plain tiff complains of be-parda-zee,--that is, his females are seen from the windows in question. If that be the case, the remedy is in his own hands. He can build a wall or put up screens of that or any other materials in order to prevent the inmates of the house being seen by men from the windows. It is evident, therefore, that by the acts of the defendant, the plaintiff"s right to the enjoyment of light and air has not been invaded, nor has the defendant done any act by which an actionable wrong has been created." This Court said:--"We think that there is no legal right shown in this case, of the infringement of which the plaintiff is entitled to complain."

5. The appellants also refer to two cases--Manishankar Hargovan v. Trikam Narsi 5 Bom. H.C. Rep., 42; Kuvarji Premchand v. Bai Javer 6 Bom. H.C., Rep. 143, in which the suit was maintained, but on the express ground of a local usage in Guzerat.

6. The respondents, on the other hand, rely on Sreenath Dutt v. Nand Kishore Bose 5 W.R., 208, where the Court (Bayley and Pundit, JJ-) say:--"We further notice that the plaintiff is said to have built an upper-story to his house, overlooking the inner apartments of the defendants. Defendants on this built the wall, which, it is said, deprived plaintiff of light and air. Even if it were shown that light and air had long been enjoyed by the plaintiff, and have now been cut off by defendant"s wall, still as plaintiffs had no right to build an upper story, with reference to the circumstances of domestic life in India, so as to intrude on the privacy of the females of the defendant"s family, the plaintiff could have no relief in this respect, as he was the first and greater wrong-doer."

7. They also rely on a decision of Kemp and Seton-Karr, JJ., of the 10th August 1865 Unreported, which is in these words:--"We see no reason whatever to interfere in this case. Both the Judges of the lower Courts have visited the spot and have satisfied themselves that the opening of the windows complained of is a violation of the privacy to which the plaintiff has a right. There is nothing contrary to law in this finding, and it is certainly in conformity to the usage of the country."

8. There is also said to be a decision in the Agra High Court Reports of 1867, that the suit can be maintained, but the pleaders have not been able to show us the case in the Reports See Goor Dass v. Manohur Dass 2 Agra H.C., Rep. 269.

9. In 3 M.H.C.R. 141 the Madras High Court held that there was no "right of privacy," but the question, for reasons which do not appear upon the face of the judgment, was discussed with reference to European and not with reference to Hindu or Mahomedan

law.

10. It is remarkable that, in the cases in which the right is upheld, nothing is said of gaining by prescription a right to prevent your neighbor from building his house so as to overlook your premises, but the "right of privacy" is spoken of as if it were an inherent right of property, and the invasion of privacy is spoken of as something like a trespass. And in the present case the Subordinate Judge considers that intrusion on the privacy of female apartments is an "injury" which the law will prevent.

11. It seems to me impossible to support this view. That privacy is of the utmost importance I can well understand; and that the law should lay down rules to prevent that privacy being wantonly and unnecessarily invaded, would be also intelligible. But to hold that privacy is a right, and the invasion of it an injury, would lead, as it appears to me, to the most alarming consequences to the owners of house property in towns. By erecting female apartments a man would prevent his neighbors building as they wished on property situate at a very great distance, and the erection of such apartments by two or three different persons might render all the surrounding land useless for habitation. But though this is the ground of the Subordinate Judge"s decision, it is not necessary to go so far in order to maintain this suit. For instance, a right exists by express enactment in France, that a window should not be opened within a distance of six feet from a neighbor"s property, and such a right might exist by usage in this country. But it does not appear that it is so, or that there is anything analogous to it. The only right which I find anywhere set up here is this supposed "right of privacy," and that is a right which, in my opinion, cannot exist at any rate independently of prescription or grant or express local usage.

12. With regard to the case of Sreenath Dutt v. Nand Kishore Bose 5 W.R., 208, I wish to guard myself carefully from saying that I should dissent from the proposition there laid down. I think that the opening of new windows affecting a neighbor"s privacy may very possibly give him a right, according to the usage of the country, of protecting his privacy by any erection which he chooses to put upon his own land; and that the person who has opened these new windows cannot complain that such erection interferes with his light and air. That is a very different question from the present, and does not arise here. I agree with the Munsiff that it is much more reasonable that the plaintiffs should protect themselves than that they should prevent the defendants improving their houses. I think he was right in holding that the suit could not be maintained, and in dismissing the suit. I think the decision of the Subordinate Judge ought to be reversed, and the suit dismissed, the plaintiffs paying one set of costs in all the Courts.

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[1] Before Mr. Justice Phear and Mr. Justice

Hobhouse.

Ramlal v. Mahes Baboo.*

The 2nd September 1868.

This suit was instituted on 29th January 1867. The plaintiff prayed that the defendant might be compelled to remove certain windows which he had put into the second story of his house, overlooking the apartments occupied by the females of the plaintiff''s household.

The defendant stated that the windows complained of were made in the year 1865. The first story of his house was built in 1857, and was surmounted by a terrace which had been used by the members of his family, overlooking the house of the plaintiff; that the plaintiff had made no objection to the windows, and was in fact not inconvenienced by them. The Court of first instance dismissed the plaint, and the Principal Sadder Ameen upheld the decision. In the course of his judgment he referred to Broom''s Legal Maxims, page 367, where it is said "an action does not lie if a man build a house whereby my prospect is interrupted or open a window whereby my privacy is disturbed; in which latter case the only remedy is to build on the adjoining land opposite to the offensive window." Reference was also made to pages 368, 369 of the same work.

Plaintiff appealed to the High Court

Phear, J.--We think there is no legal right shown in this case, of the infringement of which plaintiff is entitled to complain.

*Special Appeal, No. 916 of 1868, from a decree of the Principal Sudder Ameen of Patna, dated the 11th January 1868, affirming a decree of the Sudder Munsiff of that District, dated the 28th May 1867.