June 15, 1910

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

GOONAWARDANA *v.* MOHIDEEN KOYA & CO.

D. C., Kandy, 18,525.

Servitude of light and air—Prescription—Slight diminution of light and air—No cause of action arises therefrom.

A right to the servitude of light and air can be acquired by prescription. But the right which can be so acquired is not a right to all the light and air which may have come to the buildings, not a right to have it come absolutely undiminished, but only to have so much of it come as is required for the use and enjoyment of the building. A person has no right to complain merely because the amount which comes to his building is diminished; he must show that there has been such a substantial diminution as to render his building appreciably less fit than it was before for occupation or use for the purpose for which it has been used.

THE facts are fully set out in the judgments.

Bawa, for the defendants, appellants.

Van Langenberg, for the plaintiff, respondent.

Cur. adv. vult.

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The plaintiff says that he is the owner of a piece of land at Nawalapitiya with buildings on it, and that he and his predecessors in title have had, for more than ten years before the cause of action arose,

the free and unrestricted use of light and air from the defendants' land by a title adverse to and independent of all others, and so he had acquired title to such light and air by prescription; that the defendants, eleven months before this action, put up on their own land a building whereby the plaintiff's houses have been deprived of light and air, and have been darkened and rendered unhealthy and less valuable; and that in consequence of the infringement of his right to light and air the rent of his houses has fallen. He also says that the defendants wrongfully and forcibly opened through the compound of his (the plaintiff's) houses a drain for conveying cattle dung and other offensive matter from their land to the drain under the plaintiff's houses, with the result that his houses are subject to bad smells, and are liable to be damaged by overflow of water in rainy weather. He claims a declaration of his title to the free and unrestricted use of light and air from the defendant's land, and an order on the defendants to remove their building and to close the drain opened by them, and damages. The District Court granted all that he asked for; and this is the defendants' appeal.

The plaintiff's buildings are three adjoining boutiques facing a road. Through the back or western wall of each of them is a door leading to a kitchen; and through the back or western wall of each kitchen is a door leading into a narrow compound, a longitudinal strip of land 4 feet to 4½ feet in breadth; and beyond that, still going westward, is the defendants' land. The building of which the plaintiff complains is on the defendants' land close up to the plaintiff's boundary. We are bound by the decision in *F. W. Neate v. Maria de Abrew Hamine* [1] to hold that a right to the servitude of light and air can be acquired under section 3 of Ordinance No. 22 of 1871. And if it can be so acquired, there is plenty of evidence that the plaintiff has acquired the right to access of light and air to his buildings over the defendants' land. But the right which can be so acquired is not a right to all the light and air which may have come to his buildings, not a right to have it come absolutely undiminished, but only to have so much of it come as is required for the use and enjoyment of his building. He has no right to complain merely because the amount which comes to his building is diminished; he must show that there has been such a substantial diminution as to render his building appreciably less fit than it was before for occupation or use for the purpose for which it has been used. This, I believe, is the Roman-Dutch Law, although I cannot find it very clearly expressed in *Voet (book VIII.)* and it is the English Law (*Colls v. Home and Colonial Stores, Limited* [2]).

The Judge inspected the premises. He found that the three rooms at the back of the plaintiff's three boutiques are occupied as kitchens; they have no windows, and are very dark, and the eaves come down as low as the doors. The plaintiff's compound or

[1] *(1883) 5 S. C. C. 126.* [2] *(1904) L. R. A. C. 179.*

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passage at the back of the kitchens, on the west, is 4 to 4½ feet in breadth. The defendants' building is a half wall 5 feet high, with four pillars rising above it to a height of 3 feet 9 inches, and the roof is of corrugated iron, the ridge being 11 feet above the floor; it contained tiles and timber, and was apparently used as a storeroom; the plaintiff called it a cattle shed, and there is evidence that it was used as a cattle shed for a few days. The Judge noted after his inspection that "defendants' building appears to me to keep out a certain amount of light and air."

The Judge finds that the defendants' building "has deprived plaintiff's boutiques of a certain amount of light and air, and has diminished their value to a certain extent." By "boutiques" he appears to mean not the part of the building used as a boutique, but the whole building; for it seems clear from the plan and evidence that the access of light and air to the parts facing the road could not possibly be affected by the defendants' building, and that only the kitchens could be affected. The plaintiff in his evidence says: "The front part of the boutique is used for selling things, and the back is used as a store. The back portion of the building has chiefly suffered. It did not strike me that a few glass tiles would remedy the defect. I think it would now." He seems to mean glass tiles in the kitchen roof, for the boutique has an upper storey. He says that if the doors are open there will not be so much light in the front. But surely if a few glass tiles in the roof would remedy the defect, or if a window would remedy it, he has no reasonable cause for complaint. If he chooses to keep his room like a cave, with no means for access of light except through a door, he cannot prevent his neighbours from building on their own land, merely because he will not put in a window which would give him light enough. With regard to the damage caused to his buildings, the Judge says that the evidence is very unsatisfactory; that no books were produced and no tenants called; but he thinks that some damage was caused. That, however, is not enough. For a house may be rendered less valuable by the neighbours building on their adjoining lands, and the owner cannot prevent it, unless the right which he has acquired to access of light and air has been appreciably interfered with so as to render his house substantially less fit for use and occupation than it was before. And, in my opinion, the plaintiff has not proved this.

With regard to the drain, the allegation in the plaint (paragraph 7) is that the defendants wrongfully and forcibly opened a drain through the plaintiff's compound; the issue as to that was whether the defendants are guilty of the nuisance complained of in paragraph 7; and there is not a word of evidence in support of it.

In my opinion the decree should be set aside and the action dismissed. I agree to the order proposed by my brother Middleton as to costs.

MIDDLETON J.—

This was an appeal against a judgment declaring plaintiff entitled to the free and unrestricted use of light and air from the defendants' land, and ordering the defendants to remove a shed built by them along the plaintiff's western boundary and to demolish the drain opened by them, and further ordering the defendants to pay damages and costs. It was conceded by counsel for the appellants that plaintiff under his conveyance had obtained all rights as regard light and air which he claimed, and that such a right may be acquired by prescription under Ordinance No. 22 of 1871, according to the ruling in Neate's case,[1] which is binding on this Court. It appears from the judgments of Clarence and Dias JJ. in that case that under the Roman-Dutch Law the learned Judges thought it would not be possible to acquire a negative servitude by prescription. The possibility, however, of such a thing is demonstrated in *2 Maasdorp 207 and 208*, although the difficulty of it as regards such a right as *ne luminibus officiatur* seems almost insurmountable, and at page 176 of *2 Maasdorp* is only contemplated by grant. The real question in the present case was whether there had been such an interference with the plaintiff's rights of ancient light and air as would entitle him to the remedy decreed to him.

As regards the drain, it was contended that no cause of action was proved, inasmuch as the allegations of opening a new drain had not been substantiated, that plaintiff admitted the right of the defendants to send their rain water over his premises, and that plaintiff's vendor proved (page 15) that the drain always existed. Counsel for the respondent left the question as to the plaintiff's right in regard to the drain in our hands practically without argument, and, in my opinion, the arguments of the appellant's counsel must prevail, on the grounds alleged that no cause of action is proved as regards the drain. It is clear, to my mind, that the defendants had from the nature of the adjoining land, and by long use, the right to pass their rain water over the plaintiff's land, and the evidence does not show that the defendants did anything more than concentrate on their own land the direction of the water, which seems to me to be rather a convenience than otherwise to the plaintiff. The plaint (paragraph 7) admits that there is a barrel drain under plaintiff's house, and the evidence, in my opinion, does not establish that the defendant did anything more than concentrate, by making a drain on his own land, the water to that barrel drain. Nor do I think that as regards cattle manure anything more than an isolated instance of its passage has been proved, certainly not sufficient to constitute an actionable nuisance. In my opinion the judgment as regards this drain should be set aside.

Amongst other issues settled, the third issue was whether in consequence of the defendants' acts the plaintiff's houses have been

[1] *Wendt's Reports 188–196.*

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deprived of light and air, and have been darkened and rendered unhealthy and less valuable than they were before. In my opinion this issue, even if answered in the affirmative, would not entitle the plaintiff to succeed. The plaintiff may have been deprived of light and air, and his premises darkened and rendered less valuable, and yet he would not be entitled to succeed in this action.

A building on the opposite side of a wide public road, or even if a high one at a further distance, would obstruct the light and air to some extent of buildings opposite to or in the shadow of it, but the question is what amount of obstruction is actionable, and what is the proper remedy, compensation, or a mandatory injunction. Nothing has been quoted to us from the Roman-Dutch Law as a guidance to the decision of these questions, but the case of *Colls v. Home and Colonial Stores, Limited*,[1] has been relied on by the appellants. To my mind this is a case which may well form the basis of our decision on the question before us. I think, therefore, we must consider whether there has been a substantial privation of light and air enough to render the occupation of the plaintiff's houses, uncomfortable according to the ordinary notions of mankind, or to prevent the plaintiff from carrying on his business as beneficially as before. If actionable, we ought then to apply the ruling of A. L. Smith L.J. in *Shelfe v. City of London Electric Lighting Company*[2] to ascertain whether damages or an injunction should be granted.

Regarding the evidence by the light of the first test, we find that the buildings alleged to be deprived of light and air were the boutiques and their small kitchens without windows and with small doors; that it is admitted that the alleged deprivation might be made good by glass tiles, but the question of windows to the kitchen has not apparently been considered in the Court below; that the District Judge says that it appears to him that the defendants' building keeps out a certain amount of light and air from the plaintiff's boutiques, and has diminished their value to a certain extent.

The District Judge further finds that the shed did not exist in its present condition until the defendants recently erected it there. This finding is not contested by counsel for the appellant. The plaintiff strove to show that he had been compelled to raise the front roof of his boutiques to get more light, but I find it most difficult, nay impossible, to believe that the erection of the shed in question could affect the light or air of the front boutiques, which open into the four kitchens, mainly effected by doors. I cannot, moreover, understand the plaintiff when he says that even if these doors are open there will not be so much light in front (page 14/33.) If the doors are shut, it matters not, it seems to me, whether the defendants' shed is there or not. The plaintiff says the building has darkened his houses very much and deprived them of air. His witness, Muttusami, says the shed has darkened the boutiques very much, and

[1] *(1904) A. C. 179.* [2] *(1895) 1 Ch. D. 287.*

Ahamado Lebbe says the new shed shuts out light and air, while the carpenter he calls speaks of raising the verandah in front because the houses were dark inside on account of a wall built at the back of the defendants'. None of the witnesses assert that the kitchens used as storerooms are rendered so dark as to prevent the plaintiff from carrying on his business as beneficially as before, and I cannot believe the front boutiques could be affected in any way. I am inclined to think that the real cause of the trouble and complaint may have been the passage of manure on one occasion from the defendants' premises through the plaintiff's drain. In my opinion the plaintiff has not established an actionable wrong either as regards the building or the drain, and I would allow the appeal, and set aside the judgment of the District Judge and dismiss the plaintiff's action.

Under the special circumstances of the case, and of the defence raised by the defendants as to the old building, I would only give them their costs of the appeal, and would order each party to pay his own costs in the Court below.

Appeal allowed.