1944 *Present:* **Keuneman J.**

SIRIWARDENE, Appellant, *and* PERERA, Respondent.

30—C. R. Gampaha, 2,020.

Servitude of light and air—Claim in respect of new building—Building erected closer to common boundary—Burden of proof incumbent on plaintiff.

Where a building in respect of which a survitude of light and air is enjoyed is demolished and a new building is erected closer to the common boundary, the same servitude cannot be claimed in respect of the new building.

In an action for servitude of light and air it is incumbent on the plaintiff not only to prove that light and air will be diminished but also to show that there will be 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 had been used.

APPEAL from a judgment of the Commissioner of Requests, Gampaha.

E. B. Wikremanayake, for defendant, appellant.

S. C. E. Rodrigo, for plaintiff, respondent.

Cur. adv. vult.

July 4, 1944. KEUNEMAN J.—

The plaintiff brought this action for a declaration that he is entitled to free use of light and air to his house on the western side, and for an injunction restraining the defendant from erecting any building so as to obstruct the free use of such light and air. He further claimed damages to his building, as a result of the cutting of the foundations in respect of the building which the defendant had commenced to erect.

The learned Commissioner held against the plaintiff as regards the damages claimed, but granted the injunction; and defendant appeals.

As regards the plaintiff's claim to the servitude of light and air, the facts are as follows:—The plaintiff is the owner of Lot E on plan 3055 (P 1) and the defendant is the owner of the narrow strip Lot D on the same plan towards the west. On Lot E there was an old house which had three windows facing towards the west. The house had been built about 45 years ago. It consisted of a main building, which contained two of the windows, and a kitchen which contained one window. In 1930 the plaintiff had a plan approved by the Sanitary Board for improvements and extension of his main building towards the western boundary. According to the plan P 2, the main block which stood more than 12 feet from the boundary was brought 12 feet further to the west and almost up to the western boundary. The building, however, was not started till 1940 and was not completed till 1942, and a certificate of conformity has not yet been issued. The original wall of the main building in which the two windows were situated had been demolished and re-erected almost on the plaintiff's boundary. The kitchen was not demolished or re-erected.

The defendant had a plan approved (see D 1) in 1943 and had commenced building operations. The defendant's proposed house comes almost up to his eastern boundary, so that the two buildings will have only a space of a few feet between them.

Defendant's Counsel argued that the plaintiff was not entitled to the servitude of light and air to his new building, and I think there is substance in this argument. The prescriptive right to the servitude was in respect of a building set back over 12 feet from the boundary. The face of that building has now been demolished and has been re-erected almost on the boundary.

In *Pillay v. Fernando*[1] Wendt J. held that the taking down and the rebuilding of a wall should not be considered to evince an intention of abandoning the servitude, and that where the new window stood in substantially the same position as the old one, although the window was larger, the right to the servitude continued. But this depended on the question of fact. In the present case there is no evidence to show that the new windows in the main building are substantially the same as the old windows in respect of which the servitude was obtained, and, on the face of it, a window on the boundary and a window 12 feet from the boundary would appear to raise different problems. Further, there is nothing to show that if the windows had stood in the old position, light and air would have been obstructed.

[1] *14 N. L. R. 138.*

In my opinion the plaintiff's claim in respect of the windows in the main block fails.

The kitchen windows stands on a different footing. It has not been altered and the servitude subsists. But defendant's Counsel argued that the evidence adduced did not establish that an infringement of the right can be reasonably anticipated.

In *Goonewardena v. Mohideen Koya & Co.*[1] and in *Zahira Umma v. Abdul Rahiman*[2] the principles laid down in *Colls v. Home Colonial Stores*[3] have been adopted in Ceylon. It was accordingly incumbent on the plaintiff not only to prove that the light and air will be diminished but he must also show that there will be 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 had been used. The evidence on this point is very meagre. The plaintiff said generally—" If a building comes up alongside my western wall I will lose my right of light which I get from the three windows ". His witness Samaratunga, V. H., said—" If a wall is built on the western boundary the window light would be restricted. The kitchen window is 8 feet high from the ground." This last point is of importance, for the plaintiff said " I expect to put up a building which is 9 feet high." Also Peter de Saram, Supervisor of the Sanitary Board, called by the defendant, said—" If the defendant's building is put up, the light and air to the plaintiff's building will be blocked ", but added—" If the improvements asked in D 4 are effected, the building will have enough light ". D 4 is a letter by the Chairman, Sanitary Board, directing plaintiff to do certain things before he can obtain a certificate of conformity. In default the plaintiff was liable to be prosecuted.

In my opinion the evidence is insufficient to prove that the diminution of light and air will be so substantial as to render the building unfit for the purpose for which it is used. No real attempt has been made to establish this in the evidence. All that has been proved is that there will probably be some restriction in the light and air. The present action must accordingly fail.

The appeal is allowed with costs, and the plaintiff's action dismissed with costs. But the right is reserved to the plaintiff to bring any further action which may be available to him later in respect of any infringement of the servitude of light and air coming through the kitchen window on the western side.

Appeal allowed.