Present : Pereira J. and Ennis J. 1914.

HANIFA *et al. v.* ISMAIL *et al.*

452—D. C. Colombo, 35,196.

Servitude—Roof projecting over another's land.

A right to have a portion of the roof of one's house projecting over or overhanging the adjacent land may be acquired by prescription; but where a portion of roof in respect of which a right so acquired is removed by its owner, he has no right in lieu thereof to claim to be allowed to let another portion of his roof at a different place and of different dimensions overhang the adjacent land.

THE facts are set out in the following judgment of the District Judge :—

The plaintiffs are the owners of premises bearing assessment No. 30, Prince Street, Pettah; the defendants own the adjoining premises on the west bearing assessment No. 29.

The plaintiffs allege that the defendants in April, 1912, pulled down their house and erected a large upstair building on the site of the old house, and that the new wall built by defendants is on the site of the old boundary wall which stood on premises No. 30, and that the defendants have encroached on premises No. 30 to the extent of 76.47 square feet.

The plaintiffs further allege that the eaves of defendants' new building and certain brick mouldings project over and overhang their premises, that the new building completely shuts out the light and air from premises No. 30, and that in consequence of the building operations considerable damage has been done to the walls of premises No. 30.

The plaintiffs estimate the value of the encroachment at Rs. 500, and the damage at Rs. 4,500.

The plaintiffs pray for a decree—

(1) Directing the defendants to remove the encroachment and the eaves and projections overhanging premises No. 30.

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(2) Declaring that premises No. 30 are free from the burden of any servitude claimed or asserted by the defendants in respect of the windows overlooking premises No. 29.

(3) Directing the defendants to close the windows.

(4) Directing the defendants to pay plaintiffs Rs. 4,500 as damages and further damages at Rs. 50 a month.

(5) For costs.

The defendants claim to be the owners of the site of the boundary wall upon deed No. 95 of November 25, 1897, and by prescription, and to have acquired a title by prescription to a servitude in respect of the projecting eaves and brick mouldings referred to in paragraph 5 of the plaint.

The parties went to trial on the following issues, viz.:—

(1) Was the wall dividing plaintiffs' from defendants' building standing on plaintiffs' land or on defendants' land?

(2) If not, was it a common wall ?

(3) If the wall was standing on plaintiffs' land, have defendants acquired a title by prescription to the wall and the land on which it stood ?

(4) Are the plaintiffs entitled to have the window overlooking plaintiffs' building in defendants' new building closed ?

(5) Do the eaves and brick mouldings of defendants' building project over the plaintiffs' land ?

(6) Have defendants acquired a title by prescription to have the eaves and brick mouldings projecting over plaintiffs' land ?

(7) What damage, if any, are plaintiffs entitled to owing to injury to plaintiffs' building by reason of want of proper care, if any, in carrying out the adjoining building operations, and by reason of plaintiffs not being able to let the building from April, 1912, if that were so ?

(8) In any case, can plaintiffs claim to have the said wall removed ?

* * * * *

It is clear, therefore, from the evidence of these two witnesses that the land on which the dividing wall stands belongs to the defendants, and I find accordingly on the 1st issue.

I answer the 2nd issue in the negative. I need not adjudicate on the 3rd issue and 8th issue.

As regards the 5th issue, defendants' counsel admitted that the eaves and brick moulding projected over plaintiffs' land, and I answer the issue in the affirmative.

The defendants' claim of a prescriptive right to have the eaves overhanging plaintiffs' premises is based on the allegation that the roof of the old building of No. 29 was higher than the roof of No. 30, and that the eaves overhang premises No. 30. The defendants acquired premises No. 29 in 1897, and they allege that to their knowledge the eaves of the old building overhung premises No. 30, and that the old building on No. 29 was an old one in 1897, and the eaves must have overhung No. 30 for many years prior to 1897.

I believe the evidence of the first defendant that the old building on No. 29 was in existence in 1897, and that the roof was higher than

the roof of premises No. 30, and that the eaves overhung the roof of No. 30, ever since 1897, to his knowledge . . . . . .

Defendants' counsel contended that the prescriptive right so acquired was not lost by the fact that defendants raised their roof and put the eaves on a higher level, and cited in support of his contention the case of *Pillay v. Fernando*.[1] In the case cited the plaintiff, who had for over thirty years a window in his wall overlooking the defendant's house, demolished the wall and rebuilt it, and it was held that the taking down and rebuilding of the wall did not destroy plaintiff's right of servitude. I am of opinion that the principle laid down in the case cited is applicable to the case under consideration, and I find on the 6th issue that the defendants have acquired a title by prescription to have the eaves projecting over plaintiffs' land, but that they have not acquired a prescriptive title to have the building projecting over the plaintiffs' land. As regards the window, the defendants have in no way established a right to have a window overlooking the plaintiffs' premises. The window can be closed without materially affecting the light and air of defendants' premises, and I answer the 4th issue in the affirmative.

As regards plaintiffs' claim to damages, the grounds on which damages were claimed in the plaint is not quite the same as the grounds put forward in the 7th issue proposed by plaintiffs' counsel.

In the plaint damages were claimed, (1) on account of the injury caused to the walls of plaintiffs' house, and (2) because defendants' new building completely shut out the light and air from plaintiffs' premises. At the trial, however, no claim to damage was put forward on the second ground alleged in the plaint.

I inspected the two houses on September 12, and it was obvious that defendants' new building in no way affected the light and air of plaintiffs' premises.

At the trial the plaintiffs claimed damages on account of the injury to the walls and on account of their not being able to let premises No. 30 owing to the injury to the walls.

I entirely disbelieve the evidence of the first plaintiff that his tenant Ena Omer left the premises in April, 1912, owing to the breaks and cracks in the walls caused by the building operations. . . . . .

For the reasons given by me I answer the 7th issue in the negative.

I find that the plaintiffs are entitled to a decree directing the defendants to remove the moulding and close the window. I otherwise dismiss plaintiffs' action. The defendants are, I think, entitled to be paid their costs by plaintiffs.

Elliott, for plaintiffs, appellants.

Bawa, K.C., for defendants, respondents.

Cur. adv. vult.

May 8, 1914. PEREIRA J.—

The District Judge does not appear to me to be right in his decision on the question of the plaintiff's right to have the portion of the defendant's roof projecting over or overhanging the plaintiff's

[1] *(1905) 14 N. L. R. 138.*

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premises taken down. He appears to have based his decision on the judgment in the case of *Pillay v. Fernando*.[1] There, what this Court held was no more than that, in the case of the servitude *ne luminibus officiatur*, the doing of such a necessary thing as the renovation of an old wall, in which was the aperture or window for the enjoyment of light and air, should not be deemed to prejudice the servitude enjoyed by the owner of the dominant tenement; that is to say, in building up the new wall he might place a window or leave an aperture in it so that he might enjoy the servitude as before; and it will be seen that in the judgment of the District Court, which was affirmed in that case, the plaintiff (owner of the servitude) was restricted to the exact locality and dimensions of the old window. In the present case, however, the portion of the defendant's roof that now projects over the plaintiff's land is at a totally different place from that at which a projection is said to have at one time stood; and the present projection apparently covers a much larger area than the old one. It has been said in appeal that what the defendant was entitled to was the *servitus projiciendi*, and that in the case of such a servitude, when the dominant tenement is so altered as to destroy the projection, the servitude would still exist to the extent of giving the owner of the dominant tenement a right to have a projection elsewhere, the advantage of which would, in substance, be the same as that enjoyed by the owner by means of the old projection. I can find no authority in the Roman-Dutch law for this latter proposition, and as regards the former there is nothing to show that the defendant had at any time the right to a *servitus projiciendi*. He never had, by reason of a grant, last will, pact, or stipulation, any right to project any part of his house over the plaintiff's land. His case is no more than that for more than ten years he had a portion of his roof projecting over the plaintiff's land. The maxim of the English law—*cujus est solum ejus est usque ad coelum et inferos*—is as much a maxim also of the Roman-Dutch as of the Roman law (see *Voet 8, 2, 18*), and the old projection of the defendant's roof was, therefore, no more than an encroachment by the defendant on the plaintiff's land, in respect of which the defendant had acquired prescriptive rights, which certainly did not extend to a right to remove that particular encroachment and encroach on another part of the plaintiff's land.

The learned District Judge is also in error in ordering that the window on the defendant's wall overlooking the plaintiff's premises be closed. The plaintiffs have every right, by means of suitable contrivances, to shut out light and air from the window so as to prevent the defendant from acquiring by prescriptive enjoyment the servitude *ne luminibus officiatur* (see *Neate v. Abrew*;[2] *Wendt 188*), and I may here say that that right will not be affected by the decision in this case, but they cannot maintain a claim to

[1] *(1905) 14 N. L. R. 138.* [2] *5 S. C. C. 126.*

compel the defendant to close the window. The appellant's counsel did not contest this proposition, and therefore I need say no more about the matter.

As regards damages, I am inclined to think that the plaintiffs have made out a sufficiently strong case to be entitled to an award in their favour. The most satisfactory witness on the question appears to me to be Mr. Braid. I prefer his evidence to that of the witness who, with doubtful propriety, combines the vocation of builder and superviser of buildings with that of a proctor of this Court, especially in view of the evidence of the witness C. C. Dias, who says that the cracks on the wall of the plaintiff's house have increased in size slightly during the building operations. In his evidence Mr. Braid pledges himself to the statement that the cracks on the wall were of comparatively recent date, and that in his opinion they were due to the defendant's building operations. He gives his reason, namely, that there is a decided settlement of the wall and floor adjoining the property on which the building operations were being carried on. The District Judge, who inspected the buildings, does not controvert this reason. He says: "The cracks appeared to me to be old ones." He judges merely from appearances. I do not think it safe to allow an opinion so formed by the Judge to displace the sworn testimony of a competent engineer, especially when the reason given by the latter for his opinion is left without comment. Of course, the cracks may be repaired in a variety of ways. They may be merely plastered up at a cost of a few rupees, but I see no reason to reject Mr. Braid's evidence when he says that it would cost about Rs. 700 "to remedy these defects and make the house fit for occupation." As it was possible that Mr. Braid included in this sum expenditure other than the remedying of the defects for which the defendant was responsible, I thought that there should be a fuller assessment of damage, but on my suggestion the appellant's counsel was content to accept Rs. 250, and this I think is, if anything, too low an estimate.

I would vary the decree by deleting the order on the defendant to close the window of his new building which overlooks the plaintiff's premises, and by condemning the defendant to remove so much of the roof of his house as projects over or overhangs the plaintiff's premises, and to pay the plaintiffs Rs. 250 as damages. I would also direct that each party do bear his own costs in both Courts. In other respects the decree should, I think, stand affirmed.

ENNIS J.—I entirely agree.

Varied.