APPELLATE CIVIL

Before Pritam Singh Pattar, J.

HARI CHAND,—*Plaintiff-Appellant.*

versus

HANS RAJ,—*Defendant-Respondent.*

Civil Regular Second Appeal No. 192 of 1974

April 7, 1975.

The Indian Easements Act (V of 1882)—Sections 15, 28, 32, 33 and 35—Suit for perpetual injunction to restrain threatened or intended disturbance of an easement—Plaintiff—Whether has to prove substantial damage from such disturbance—Right of easement already disturbed—Owner of dominant heritage—Remedies of—Stated.

Held, that from an examination of the various provisions of the Indian Easements Act, 1882, the legal position that emerges is that a plaintiff is entitled to a decree for perpetual injunction to restrain the defendant from disturbing the easement, if the act threatened or intended must necessarily, if performed, disturb the easement and he is not required to prove that the disturbance would cause substantial damage to him and would materially affect the enjoyment of his property in respect of which the easement is claimed. In other words, he is not required to prove that the threatened or intended obstruction or disturbance would cause such a diminution of light and air as to constitute a nuisance. If, however, the easement has already been disturbed them two courses are open to the owner of the dominant heritage. Firstly, he can sue under section 33 of the Act for compensation for the disturbance of the easement if the disturbance has actually caused substantial damage to him. Secondly, under clause (a) of section 35 of the Act, he can file a suit for mandatory injunction to remove the obstruction to the easement, and in that case, he must allege and prove that the obstruction has caused such a diminution of light and air as to constitute nuisance. In other words, he must prove that the disturbance of his easement has appreciably and materially affected his enjoyment of the building in respect of which the easement is claimed.

(Para 12)

Regular Second Appeal from the decree of the Court of Shri H. S. Ahluwalia, Additional District Judge, Sangrur, dated 19th day of January, 1974, reversing that of Shri Ranjit Singh Sood, Sub-Judge, Ist Class, Sangrur, dated the 31st October, 1972, dismissing the suit of the plaintiff and leaving the parties to bear their own costs throughout.

S. P. Goyal, Advocate, *for the Appellant.*

Mr. Harbans Lal, Advocate, *for the Respondent.*

JUDGMENT

P. S. PATTAR, J.—(1) This is a regular second appeal filed by Hari Chand plaintiff against the judgment, dated January 19, 1974, of the Additional District Judge, Sangrur, whereby he accepted the appeal filed by Hans Raj, defendant-respondent and set aside the decree, dated October 31, 1972, passed by the Subordinate Judge, 1st Class, Sangrur, and dismissed the suit of the plaintiff.

(2) The facts of this case are that Hari Chand, plaintiff-appellant is owner of a house situated in Sangrur town and in the western wall of his house, three ventilators shown at points 'A', 'B', 'C' in the plan attached to the plaint existed for the last about 50 years and he had been enjoying light and air through these ventilators peaceably, openly as of right and without interruption for more than 20 years and thus acquired a right of easement. The house of Hans Raj, defendant is situated on the western side of his house and he threatened to cause obstruction and to close the ventilators with a view to disturb the right of easement of Hari Chand, plaintiff. The plaintiff, therefore, filed suit for a perpetual injunction to restrain the defendant Hans Raj from causing obstruction to these three ventilators to prevent the passage of light and air to his house. The suit was resisted by the defendant. He denied the allegations made in the plaint. According to him, these ventilators were opened by the plaintiff in that wall after the year 1954 and he was not entitled to any injunction. It was denied that the plaintiff was the exclusive owner of the western wall of his house, in which the ventilators in dispute are located. On these pleadings of the parties, the following issues were framed by the trial Court:—

(1) Whether the plaintiff has acquired the right of easement regarding ventilators ?

(1-A) Whether the plaintiff is the exclusive owner of the wall in dispute ?

(2) Relief.

(3) The Subordinate Judge, decided both these issues in favour of the plaintiff and decreed the suit. Hans Raj, defendant, filed appeal against this decree in the Court of the District Judge, Sangrur, which was accepted by the Additional District Judge,

Sangrur, on January 19, 1974, and he set aside the decree of the trial Court and dismissed the suit of the plaintiff. He held that even if these ventilators were closed, there was still sufficient light and air in two rooms of the house of the plaintiff coming through the doors and windows and the ventilators on the other side of the house. Feeling aggrieved, Hari Chand plaintiff filed this regular second appeal.

(4) Mr. S. P. Goyal, the learned counsel for the appellant, contended that the lower appellate Court affirmed the finding of the trial Court that the plaintiff has acquired the right of easement to enjoy air and light through the three ventilators in dispute in the western wall and this is a binding of fact and cannot be disturbed in second appeal. He maintained that after deciding issue No. 1 in favour of the plaintiff, the decision of the Additional District Judge that the plaintiff is not entitled to injunction as there was sufficient light and air enjoyed by him from the doors and windows and ventilators on the other side of his house, was erroneous and incorrect. He attacked this decision on various grounds, which shall be discussed below.

(5) Mr. Harbans Lal, the learned counsel for the respondent, stated that the decision of the lower appellate Court that the plaintiff has acquired the right of easement to get light and air from the ventilators is not based on evidence, and, therefore, it should be set aside. This contention is not correct and must be repelled. It is undisputed that the house of Hari Chand plaintiff is in existence there for the last more than 60 years. The western wall of this house was kutcha and in the year 1948, it fell down during the rainy season. It appears that this wall belonged jointly to Hari Chand and Sewa Singh. After the fall of this wall Sewa Singh and Pritam Singh did not reconstruct the wall jointly with Hari Chand plaintiff and they got possession of one-half of the land under the wall and Hari Chand plaintiff, constructed the new pucka wall on his land. There were three ventilators in this western wall before it fell down. This pucka wall in dispute was constructed by Hari Chand in the year 1948 and he kept three ventilators in the same at the previous places. The defendant Hans Raj is a transferee of that property from Sewa Singh and Pritam Singh. These facts are proved from the statements of Hari Chand plaintiff, P.W. 6 and Moti Ram, P.W. 4. Mohan Lal, P.W. 5 was the general attorney of Sewa Singh, whose house/property is situated on the western side of the house of Hari Chand plaintiff. Mohan Lal, as attorney

of Sewa Singh and Pritam Singh, executed the writing Exhibit P.W. 5/B, stating that the kutcha wall had fallen due to rains and that Sewa Singh and Pritam Singh did not want to reconstruct it and they had taken possession of their share of the land under the wall and that Hari Chand and Kundan Lal should reconstruct the wall on their own land and Sewa Singh and Pritam Singh shall have no concern with the same. He further mentioned in this writing that in the old wall there were three ventilators and Hari Chand and Kundan Lal could keep ventilators in the new pucka wall to be constructed by them at the same places. This writing corroborates the oral evidence of the plaintiff discussed above. The lower appellate Court remarked that the evidence in rebuttal consists of the statements of witnesses examined by the defendant and none of them gave any particular date, on which the ventilators in question were opened. He, therefore, affirmed the finding of the trial Court that these ventilators were in existence for more than 20 years prior to the filing of the suit and the plaintiff had been enjoying light and air through the same openly as of right and without any hinderance and he had acquired the right of easement. This is a finding of fact based on evidence and cannot be disturbed in second appeal. In this connection, reference may be made to *Deity Pattabhiramaswamy* v. *S. Hanymayya and others* (1), wherein it was held as under:—

> "The provisions of section 100 (Civil Procedure Code) are clear and unambiguous. There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be. Nor does the fact that the finding of the first appellate Court is based upon some documentary evidence make it any the less a finding of fact. A judge of the High Court has, therefore, no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the relevant evidence."

To the same effect was the law laid down in v. *Ramachandra Ayyar and another* v. *Ramalingam Chettiar and another*, (2). It was further held in the latter decision that the High Court cannot interfere with the conclusions of fact recorded by the lower appellate Court, however erroneous the said conclusions may appear to be to

(1) A.I.R. 1959 S.C. 57.
(2) A.I.R. 1963 S.C. 302.

the High Court. Therefore, the decision of the lower appellate Court that the plaintiff has acquired the right of easement to enjoy light and air through the ventilators in dispute for more than 20 years prior to the filing of the suit cannot be disturbed in second appeal. There is no force in the contention of the counsel for the respondent-defendant and the same is rejected.

(6) It was argued before the lower appellate Court by the counsel for the defendant that there was sufficient light in the rooms of the plaintiff from the doors, windows and ventilators, which opened on the other side of his house, and, therefore, decree for a perpetual injunction could not be passed in his favour. In para No. 9 of the judgment of the trial Court, it was mentioned that the counsel for the defendant conceded that the closure of the three ventilators in dispute will cause material diminution in the light and air to the two rooms of the plaintiff enjoyed through the three ventilators in dispute. There was no evidence on the file to show that the light and air enjoyed by the plaintiff from the other sides of his house was sufficient and there will be no appreciable/substantial damage to the plaintiff if these ventilators in dispute were closed. In order to decide this contention raised before him by the counsel for the defendant, the Additional District Judge inspected the spot on January 18, 1974, in the presence of the parties and their counsel at 5 p.m. He found that the three ventilators in dispute were of the size of 15′×15″ and at that time were filled with brick jali with three holes of about 12′×3″ each. At the time of the inspection, most of the light was coming from the doors and windows in the rooms on the other side. He found that if the ventilators were closed, there was nominal reduction of the light of the rooms of the house of the plaintiff. On the basis of this inspection note, the learned Additional District Judge held that that there was sufficient light in the rooms of the house of the plaintiff from sources other than the three disputed ventilators and that, therefore, he was not entitled to the injunction prayed for as there was no diminution in the light and air. The lower appellate Court based its conclusion solely on its inspection of the spot. The inspection note could not be a substitute for evidence and the inspection note could only assist the Court in appreciating the evidence of the parties. Admittedly, there was no evidence of the parties on this point and consequently the decision of the lower appellate Court cannot be sustained as it is not based on any legal evidence.

(7) The counsel for the appellant argued that the right of easement of the plaintiff-appellant is established and that the

threatened or intended act of the defendant would disturb the easement of light and air through the ventilators in dispute and, therefore, the appellant is entitled to perpetual/prohibitory injunction prayed for in the plaint. He further maintained that the decision of the Additional District Judge that to get decree for injunction the appellant must also prove that the disturbance of his easement would appreciably and materially affect the enjoyment of his house and cause substantial damage to him is wrong and incorrect. In support of this contention, the learned counsel for the appellant referred to various provisions of the Indian Easements Act, 1882 (Act V of 1882) (hereinafter called the Act), and decisions of various Courts.

(8) Section 15 of the Act says that where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years, ... the right to such access and use of light or air support or other easement, shall be absolute. Section 28 of the Act states that with respect to the extent of easements and the mode of their enjoyment, the following provisons shall take effect:—

(a) .....

(b) .....

(c) *Prescriptive right to light or air.*—The extent of a prescriptive-right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has "been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used".

According to section 32 of the Act, the owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person. Section 35(b) of the Act says that subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement (a) ..... (b) if the disturbance is only threatened or intended—when the act threatened or intended must necessarily, if performed, disturb the easement.

(9) In support of his contention, the learned counsel for the appellant, relied on *Santhannagari Ramavya and others* **v.**

Narasimhapuram Narayana Chetty (3), wherein it was held as under:—

> "If the plaintiff has been receiving light and air through two ventilators for over the statutory period and has thus acquired an easementary right to receive light and air through those two ventilators then he can insist that he is entitled to continue to receive the same amount of light and air as before through the ventilators though he might be getting sufficient light and air by other means."

To the same effect was the law laid down in *A. S. Minus* v. *E. F. Davey*, A.I.R. 1933 Rangoon 18, and *Tamluk Trading & Manufacturing Co. Ltd.* v. *Nabadwipchandra Nandi*, A.I.R. 1932 Calcutta 542, I am in respectful agreement with the view taken in these decisions. The plaintiff-appellant has been receiving light and air through the three ventilators in dispute for more than 20 years and this acquired a right of easement to receive light and air through these ventilators and, therefore, he is entitled to enjoy the easement wihout disturbance by any other person as before through these ventilators, though he might be getting sufficient light and air by other means. The decision of the lower appellate Court is, therefore, not correct and must be set aside.

(10) As against this, Mr. Harbans Lal, the learned counsel for the defendant-respondent, relied on *Devinder Kumar* v. *Smt. Chatro Devi* (4). The facts of this case were that the parties were owners of adjoining houses and the dispute between them related to the access of light and air through the two windows in the plaintiff's house, one on the second storey and the other on the third storey. The plaintiff filed civil suit on the allegations that he had acquired right of easement for access of light and air through these two windows as of right, peaceably and without interruption, and that the defendant had started construction on the second storey of her house and was causing material obstruction to the ingress of light and air through the window on the second storey, and that she had also threatened to raise construction in front of the window on the third storey. Mandatory injunction was sought enjoining the defendant to remove the four-walls in front of the window on the second storey while prohibitory injunction was sought restraining the defendant from constructing any room

(3) A.I.R. 1968, Andhra Pradesh 151.

(4) A.I.R. 1966, Pb. 502.

or building in front of the two windows so as not to interfere with the access of light and air through those windows. The suit was resisted by the defendant. The trial Court granted decree for perpetual injunction restraining the defendant-respondent from causing any obstruction to the appellant's right of use of light and air from the window on the third storey, and also restraining the respondent from closing the window on the second storey in any manner. However, the suit for mandatory injunction was dismissed. Feeling dissatisfied, the plaintiff filed appeal against this decree for the grant of the mandatory injunction as prayed for in the plaint. The defendant also filed cross-objections against the same. The Additional Senior Sub-Judge dismissed both the appeal and the cross-objections. The plaintiff then filed second appeal in the High Court for the relief of mandatory injunction for demolition of the four-walls and roof in front of the window on the second storey. On these facts, it was held:—

"Since section 28 of the Easements Act has not to be taken in isolation, but has to be read along with the provisions of section 33 and 35 of the Easements Act, it is obvious that a person complaining of the disturbance of his right of easement has in order to succeed in the suit, to show not only that there has been a disturbance of an easement or of any right accessory thereto, but has also to prove that the disturbance has actually resulted in substantial damage to him. It is further clear from Explanation II of section 33 of the Act that no damage would be substantial in the case of right to the free passage of light through the opening of a house, unless—

(1) it is likely to injure the plaintiff by affecting the evidence of the easement by materially diminishing the value of the dominant heritage, or

(2) it interferes with the physical comfort of the plaintiff, or

(3) prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to the institution of the suit.

Explanation III of section 33 shows that in the case of right to the free passage of air through the opening of a house the damage would be substantial if it interferes materially with the physical comfort of the plaintiff, even though it is not injurious to his health."

This decision is clearly distinguishable and has no application to the facts of this case. In that case the right of easement had already been disturbed before the filing of the suit for mandatory injunction, and, therefore, the plaintiff could not get a mandatory injunction merely on proof of his right of easement unless it was proved that the obstruction caused such a diminution of light so as to constitute nuisance. In this respect reference may be made to section 35(b) of the Act, which says that subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement—(a) if the easement is actually disturbed—when compensation for such disturbance might be recovered under this Chapter. Section 33 of the Act gives the conditions, under which compensation for disturbance of easement can be claimed. It says that the owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto provided that the disturbance has actually caused substantial damage to the plaintiff. Explanations I, II and III read as under:—

> "*Explanation I.*—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement ,or by materialy diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section 34.
>
> *Explanation II.*—Where the easement disturbed is a right to the free pasage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first Explanation, or interferes materialy with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.
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> *Explanation III.*—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health."

In *Devinder Kumar's case supra*, the easement had already been disturbed and the passage of light and air through the window on the

second storey of the house was obstructed by constructing four-walls and roof in front of that window, and, therefore, the case fell under clause (a) of section 35 of the Act. The plaintiff in that case failed to prove that this obstruction caused substantial damage to him within the meaning of section 33 of the Act. It was not proved in that case that the alleged obstruction caused such a diminution of light and air as to constitute a nuisance. But, in the instant case, there is a mere threat to disturb the easement and no disturbance has been caused to the easement as yet. The present case fell under clause (b) of section 35 of the Act and the question of proving special damage to the plaintiff does not arise.

(11) The counsel for the respondent then placed reliance on *Mohammed Ziman Khan* v. *Malik Umar Hayat Khan* (5), *Suri Ralla Ram and another* v. *Shiv Ram* (6), *Rattan Chand* v. *Lal Chand* (7) and *Sohan Singh* vs. *Jagat Singh and others* (8). All these decisions are also distinguishable and have no application to the facts of this case. In all these cases, the easement had already been disturbed before the institution of the suit, and it was held that no injunction could be granted to the plaintiff to demolish the obstruction caused to an easement unless the alleged obstruction caused such a diminution of light and air as to constitute a nuisance. It was further held that a mandatory injunction will be refused if in spite of obstruction to light and air, there would be sufficient quantity of light and air, which is received from other sources. These decisions have no application to the facts of this case. Therefore, there is no force in the contention of the learned counsel for the respondent, and the same is rejected.

(12) The legal position, therefore, that emerges from the examination of the above-mentioned provisions of the Indian Easements Act, 1882, and the decisions cited by the counsel for the parties is—

(1) that the plaintiff is entitled to a decree for perpetual injunction to restarin the defendant from disturbing the

(5) A.I.R. 1936, Lahore 792.

(6) A.I.R. 1935, Lahore 751.

(7) A.I.R. 1934, Lahore 240.

(8) A.I.R. 1928, Lahore 980.

easement, if the act threatened or intended must necessarily, if performed, disturb the easement and he is not required to prove that the disturbance would cause substantial damage to him and would materially affect the enjoyment of his property, in respect of which the easement is claimed. In other words, he is not required to prove that the threatened or intended obstruction/disturbance would cause such a diminution of light and air as to constitute a nuisance.

(2) However, if the easement has already been disturbed, then two courses of action are open to the owner of the dominant heritage. Firstly, he can sue under section 33 of the Act for compensation for the disturbance of the easement, if the disturbance has actually caused substantial damage to him. Secondly, he under clause (a) of section 35 of the Act, can file a suit for mandatory injunction to remove the obstruction to the easement, and in that case, he must allege and prove that the obstruction caused such a diminution of light and air as to constitute a nuisance. In other words, he must prove that the disturbance of his easement would appreciably and materially affect his enjoyment of the building, in respect of which the easement is claimed.

(13) In the instant case, it is proved that the plaintiff had been enjoying the access and use of light and air through the three ventilators in dispute peaceably without interruption as an easement for more than 20 years before the filing of the suit and he is entitled to enjoy the easement without disturbance by any other person and is entitled to the perpetual injunction prayed for in the plaint. The decision of the lower appellate Court is incorrect and must be set aside.

As a result, this appeal is accepted, the decision of the lower appellate Court is set aside, and the decree passed by the trial Court in favour of the plaintiff against the defendant-respondent is restored. Under the circumstances of the case, the parties are left to bear their own costs throughout.

B. S. G.