Privy Council Appeal No. 33 *of* 1922.

Banubai Framji Commissariat and another - - - *Appellants*

v.

Manilal Jugaldas - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD FEBRUARY, 1923.

Present at the Hearing :

LORD DUNEDIN.
LORD ATKINSON.
LORD WRENBURY.

[*Delivered by* LORD WRENBURY.]

The plaintiffs and the defendant in the action in this case are owners and occupiers of two bungalows adjoining each other situate in Chowpatty Road, Bombay. The first plaintiff is the widow and the second plaintiff is the surviving son of Framji Hormusji Commissariatwalla, who died in January, 1888. Under his will his widow is tenant for life of the one bungalow and his son is entitled in remainder. The widow and son have occupied this bungalow continuously since the testator's death. The defendant purchased the other bungalow in 1917.

The portion of the plaintiffs' bungalow which lies nearest to the defendant's bungalow consists of certain outhouses containing, so far as is material for the present purpose, two cook rooms. In each of these is a window looking out upon the defendant's main bungalow which is situate a few feet away on the other side of a carriage drive which is on the defendant's property. Each of these cook rooms depends to a substantial, and as regards the smaller cook room to a very substantial, extent upon the light to be obtained from these windows.

In February, 1917, the defendant upon purchasing the bungalow in which he came to reside, put up a scaffolding of posts and corrugated iron sheets opposite to and at a distance of 6 or 9 inches from each window. On the 24th January, 1918, the plaintiffs commenced the present action claiming relief upon the footing that for upwards of twenty years before February, 1917, they had enjoyed the access of light and air to the cook rooms through each of the windows without interruption, and that they had for the same time enjoyed the right to discharge smoke from the cook rooms through the windows.

The facts were that in or about 1892 a Mr. Ramji had purchased the bungalow, now the property of the defendant, and had lived there until 1900, and that about the year 1892 he erected a trellis the whole length of the boundary between the two properties. This trellis was 18 feet high and was about 6 inches from the face of the plaintiffs' windows. Portions of it remained until about 1909, and some part still exists beyond the limits of the plaintiffs' property. The plaintiffs do not dispute that this trellis was erected at that time, but they say that in consequence of remonstrance which they made, Mr. Ramji cut gaps in the trellis opposite the plaintiffs' windows so as to leave them unobscured. The defendant says no such gaps were cut. The only question in the case is whether these gaps were cut or not. There is conflicting evidence upon the matter. The trial Judge found that they were cut and gave the plaintiffs relief upon the footing that they were entitled to the easements which they claimed. On appeal, this decision was reversed and the suit dismissed. This is the plaintiffs' appeal.

The question for decision is purely one of fact. The plaintiffs' witnesses included the second plaintiff (the son), Mr. Merwanji Dadina, a friend of his, and Mr. Jussawalla who owned and occupied the defendant's bungalow down to 1892 or thereabouts when Mr. Ramji bought. The defendant's witnesses included Mr. Ramji and Mr. Taraporewalla, who owned the defendant's bungalow from 1909 to 1917. All of these Mr. Justice Marten accepted without reservation as witnesses of truth. They are, he says, " gentlemen whom it was a pleasure to see in the witness box." Their testimonies, he says, " can only be assailed on the ground of imperfection of memory or lack of opportunity for observation." And the Judge adds that Mr. Campbell (Counsel for the defendant) " did not ask me to say that the second plaintiff was saying what he knew to be false but that he had an inaccurate recollection," that it was " an hallucination on his part." Other four witnesses for the plaintiff were, the cook, Rustomji, who worked in these cook rooms and two friends of his, and a milk dealer who used to come to the premises. The learned Judge accepts the evidence given by all these witnesses.

One part of the story as told by the plaintiffs is that when the trellis was in course of erection, the first plaintiff (the widow) called in her solicitor, Mr. Chichgar, and that there was a discussion between Mr. Chichgar and Mr. Ramji. The defendant

says that Mr. Chichgar on learning that Mr. Ramji was going to put up a trellis covered with creepers said there would be no objection to that. The plaintiffs do not agree with this account of what passed. They say that at the interview between Mr. Chichgar and Mr. Ramji an arrangement was come to that gaps should be cut in the trellis opposite to the windows and that it was to that arrangement that it was said that no objection would be made. It is not probable that the plaintiffs' objections would be withdrawn on learning that a creeper-covered trellis was going to be erected within 6 or 9 inches of the windows, although it may well be that the case would be altered if gaps were to be cut in the trellis. Upon this point there is conflicting evidence. Mr. Ramji's account of it is that the objection was withdrawn when Mr. Chichgar learned that a trellis and creepers were what was intended. The second plaintiff says that he was present when his mother instructed Mr. Chichgar, and that the arrangement come to was that gaps should be cut in the trellis and that gaps were cut accordingly. The second plaintiff was then about thirteen or fourteen years of age. Their Lordships cannot follow the learned Judges on appeal in throwing any doubt on the evidence of the second plaintiff on the ground that he was then only twelve or thirteen years of age. The trial Judge was plainly entitled to give such weight to his evidence and to the probabilities of the matter upon this point as having regard to all the evidence he thought proper.

The evidence for the defendant that no gaps were cut rests substantially upon the evidence of Mr. Ramji. The learned Judge has told us quite plainly why he did not accept his story. He makes no attack on his veracity, but cannot rely upon his recollection. He was, he says, in poor health; he had to be seated in the witness box. He looked considerably more than sixty years of age, which was the age he gave, and in particular his recollection was unquestionably wrong upon one matter. He said there were two windows in a part of the building where, in fact, there was only one. This he said in answer to questions by the Judge who was obviously testing his memory.

In this state of the evidence the Court of Appeal have accepted Mr. Ramji's evidence, and have held that the second plaintiff has "set up the story" that there were gaps and "having determined to set up that story . . . . the rest of his plan was perfectly simple." This plan, according to Macleod, C.J., was to procure some half-dozen witnesses to combine in committing perjury. He seems to have forgotten that the Judge who saw those witnesses accepts them all as witnesses of truth. As regards the second plaintiff and Mr. Merwanji Dadina and Mr. Jassawalla he says that which has been already cited. As regards Rustomji and his two friends he says that Rustomji's story is in the main a true one although in a long cross examination he may have exaggerated his grievances from having the windows blocked. He had been thirty years in the plaintiffs' service. The Judge further says that Rustomji's two friends are respectable men and

" not the sort of men who can lightly be waived on one side as being false witnesses." The learned Judge considered, and, having seen the witnesses, rejected the suggestion of a conspiracy to commit perjury. " In my judgment," he says, " that allegation in unfounded."

Their Lordships are of opinion that in reversing the judgment of the trial Judge upon this mere question of fact, the Judges in the Court of Appeal have not given the weight which they ought to have given to the opinion he expressed upon the demeanour, intelligence, position, and character of the witnesses who were brought before him. They have attributed perjury to witnesses whom the trial Judge accepted as truthful; they have rested their judgment upon the evidence of a witness, Mr. Ramji, whose recollection the Judge who saw him thought was not to be relied upon. Their Lordships cannot follow the Court of Appeal in thus reviewing the findings of a learned Judge, who upon such matters was in a position to form a much better judgment than could be formed by Judges who had not had the advantage of seeing the witnesses. Their Lordships will humbly advise His Majesty that this appeal ought to be allowed and the order of the trial Judge restored, and that the respondent ought to pay the plaintiffs' costs here and below.

In the Privy Council.

BANUBAI FRAMJI COMMISSARIAT AND ANOTHER

v.

MANILAL JUGALDAS.

DELIVERED BY LORD WRENBURY.

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