

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Sultan
Nawaz Jung v. Rustumji Nanabhoy Byramji
Jijibhoy, from the High Court of Judicature
at Bombay; delivered 22nd July 1899.*

Present at the Hearing :

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

SIR EDWARD FRY.

[*Delivered by Sir Richard Couch.*]

In 1868 the trustees of Rustumji Jamsetji Jijibhoy conveyed to the Appellant a house and premises in Hornby Row Bombay consisting of a ground floor and four upper stories in the south and west walls whereof there are a number of windows. Upon the south side of this house there stood until 1893 a house belonging to the Respondent which was separated from the Appellant's house by a narrow space and extended in height to a point below the level of the Appellant's third story windows. On the 6th of May 1893 the Respondent's solicitors by letter informed the Appellant that his windows were opened and suffered to exist under a special arrangement made between their predecessors in title and that such arrangement was confirmed and ratified by the Appellant by an instrument in writing dated the 28th July 1883; that as their client intended to build a house upon his premises up to or possibly higher than the Appellant's existing house the requisite notice

to close up his windows and remove the projections would be served in due course. In reply to this letter the Appellant's solicitors wrote on the 17th July 1893 that their client was not aware of the alleged arrangements or of the writing of the 28th July 1883 and that the windows existing in the south wall of his house and opening on the premises of the Respondent were ancient and that full light and air had been enjoyed by the occupiers of the Appellant's house without any obstruction or interruption for a number of years. The Respondent having commenced foundations for his intended house the Appellant after some further correspondence between the solicitors on the 13th October 1894 filed a plaint in the High Court at Bombay praying that it might be declared that he is entitled to free and uninterrupted access of light and air to and for the windows on the south and west sides of his house save so far as the same was obstructed by the Respondent's old house. On the same day on an affidavit verifying the plaint and saying that the Respondent was rapidly proceeding with the erection of his new house a rule *nisi* for an *interim* injunction was granted by the Court.

The suit came on for hearing on the 14th March 1895 when the learned Judge who heard it held that the arrangements evidenced by letters of the 11th May 1865 and 17th March 1868 were temporary arrangements and came to an end when the Respondent wrote the letters of the 2nd November 1871 and 17th July 1872 and dissolved the injunction and made a decree for Rs. 4,500 damages with costs. Both parties appealed, the now Respondent on the ground that the now Appellant had not acquired an easement as claimed and the Appellant on the ground that the learned Judge should have granted an injunction and not have awarded

damages only. The Appeal Court was of opinion that the letter of the 11th May 1865 was a contract or agreement by which the Appellant's predecessor in title is allowed to enjoy the access of light and air through the windows on the south side of his house in return for which he promises that he will not raise any objection to those windows being blocked when the Respondent should rebuild and raise his house. And being also of opinion that so long as that promise remained in force the Appellant could acquire no easement in respect of those windows and that it had not been put an end to the Appeal Court reversed the decree of the Lower Court and dismissed the suit.

Their Lordships have come to the same conclusion. The letter of the 11th May 1865 is from Rustomji Jamsetji Jijibhoy to Byramji Jijibai the grandfather of the Respondent under whose will he acquired his house and is as follows :—

“ Upon the house of Bhai Pestanji Merwanji
 “ Tabak adjoining your (house) in Hornby
 “ Row purchased from the heirs of Rustomji
 “ Mancherji Bengali which I have purchased
 “ from Bhai Saheb Kharsedji Furdinji I have
 “ now raised a fourth storey and have placed
 “ windows on the south side thereof. As to
 “ those windows at the time when you shall
 “ build the neighbouring house higher (than
 “ mine) I shall not raise any objection in respect
 “ of the abovementioned windows on the south
 “ side which may be shut up and should I raise
 “ any the whole is to be considered null and
 “ void. This is the sole request.”

On the 17th May 1865 Byramji Jijibhoy wrote to Rustomji Jamsetji Jijibhoy as follows :—

“ I have received from you sir the note dated
 “ the 11th of May 1865 in respect of Bhai

“ Pestanji Tabak’s house. And as regards what
 “ you have communicated in writing about the
 “ additional building which you sir have erected
 “ thereon there is a slight difference therein.
 “ And on your coming to Bombay or on my
 “ coming to Poona when you sir will be at
 “ Poona I shall give an explanation in respect
 “ thereof. And if you should deem it meet do
 “ you be good enough to make some alterations
 “ in what has now been written and amend the
 “ same because I do not think it advisable to
 “ raise any dispute whatever with a gentleman
 “ like you I have therefore by writing this
 “ given you a little trouble. This is the sole
 “ representation.”

In this letter the writer appears to be willing
 to accept the promise in the previous letter but
 to wish for some alterations leaving it however
 to Rustomji Jamshedji Jijibhoy to do as he
 deemed meet. It does not appear that there
 was any further correspondence until the 4th
 September 1867 when Byramji Jijibhoy wrote
 to Haji Ismail Haji Hubib as “Agent to the
 Jemadar of Hyderabad” (a title of the Appellant)
 as follows :—

“ Learning that you have purchased for the
 “ Jemadar the house No. 7 in Hornby Row from
 “ the trustees of the estate of Mr. Rustomji
 “ Jamsetji Jijibhoy I take this opportunity of
 “ drawing your attention to the correspondence
 “ that has passed between myself and Mr. R. J.
 “ Jijibhoy respecting the windows and projected
 “ conframes opening on the north of my property
 “ No. 6 Hornby Row wherein the said Mr. R. J.
 “ Jijibhoy has agreed to throw no obstacle or
 “ hindrances of any kind whenever I required
 “ the said windows and their projections to be
 “ blocked up that writing (? being) insufficient
 “ I asked him in my letter dated 17th May
 “ 1865 to send me a more particularised paper

“ to the above effect but owing to different
 “ circumstances and the late difficulties of that
 “ gentleman’s affairs the matter rests still
 “ incomplete.

“ But as you are now the agent for the present
 “ proprietor of the said house I shall thank you
 “ to pass me a fresh agreement or writing
 “ binding the proprietor his heirs executors
 “ administrators and assigns to block up the
 “ said windows and the projected conframes
 “ at any time I or my heirs executors
 “ administrators and assigns shall demand and
 “ require the same to be done without hindrance
 “ or delay on your part. In the absence of such
 “ an agreement or writing to the above effect
 “ forthcoming from you within a reasonable
 “ time I shall be compelled to have these
 “ windows blocked up and the conframes
 “ removed at once. Although I have not the
 “ slightest intention of adopting this course I
 “ should like to have the business done in a
 “ regular and straightforward manner preventing
 “ thereby any unpleasantness hereafter.”

Then followed two letters from the Respondent’s solicitors about preparing an agreement in accordance with the latter part of the letter of the 4th September and on the 28th February 1868 the solicitors for Haji Esmail wrote them that he had no power to execute any such agreement but he would if they wished it give the Respondent a Gujerati note in the form the Respondent had obtained from Rustomji Jamsetji Jijibhoy until the return of the Jemadar Uwad when the arrangement the Respondent wished would probably be carried out. Accordingly a Gujerati letter dated 17th March 1868 to the Respondent was written and sent by Haji Esmail. It is as follows :—

"As to your one house bearing No. 6 situate
 "in Hornby Row which has been purchased
 "from Parsee Dadabhai Rustomji Nowroji
 "Bengali on the east side thereof there is
 "Jamadar Awad bin Umar's house which said
 "house the said party had purchased from
 "Set Rustomji Jamshedji Jijibhai. And the
 "windows and the Kan frame (weather board)
 "of the said house open towards your side.
 "You have a right to shut up the said
 "windows and Kan frame (weather board). And
 "whenever you may build your house I am not
 "to raise any objection whatever to your
 "shutting up the same." No other agreement
 was executed.

The Indian Easements Act 1882 Section 15
 enacts 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 20 years the right to such
 "access and use shall be absolute" and Explan-
 ation I. says "nothing is an enjoyment within the
 "meaning of this section when it has been had in
 "pursuance of an agreement with the owner or
 "occupier of the property over which the right is
 "claimed and it is apparent from the agreement
 "that such right has not been granted as an
 "easement." It was contended for the Appellant
 that the matter here rested in negotiations and
 there was no agreement. Their Lordships do
 not agree to this, they think the fair inference
 from the letter of the 17th May 1865 is that the
 Respondent accepted the promise in the letter
 of the 11th May 1865 but wished for some
 alterations in the form of it which he left to the
 option of R. J. Jijibhoy. This is confirmed by
 the letter of 4th September 1867, in which he
 refers to the correspondence and says that
 R. J. Jijibhoy had agreed to throw no obstacle

or hindrances of any kind whenever he required the windows to be blocked up. (This is not accurate as the promise only related to the Respondent building his house higher but it is probably what was meant.) Then he says that in his letter of the 17th May 1865 he asked for a more particularised paper to the above effect. This shows he considered that he had accepted the promise in substance but wanted it to be in a different form. He then asked for an agreement or writing binding the Appellant himself to block up the windows. This would be a different action from what is mentioned in the letter of 11th May but having the same result. If this had been agreed to it might have been contended that it was to be substituted for the other agreement but it was not agreed to. The Appeal Court has found that there was an agreement in pursuance of which the Appellant is allowed to enjoy the access of light and air through the windows on the south side of his house in return for which he promises that he will not raise any objection to those windows being blocked when the Respondent should rebuild and raise his house and the Judges say they were informed that the learned Judge at the trial in his oral judgment treated the letter of the 11th May as an agreement between the parties. Their Lordships are of this opinion, and they see no reason for holding that the Respondent when he asked for the other agreement waived the performance of the promise in the letter of the 11th May 1865 or intended to abandon that agreement. Such negotiation as there was related to the other proposed agreement. It appears to their Lordships that there was an agreement between the parties which prevented the enjoyment by the Appellant of the access of light and air through the windows under Section

15 of the Easements Act, giving a right to an easement and they will humbly advise Her Majesty to affirm the decree of the High Court in the appeal to it, and to dismiss this Appeal. The Appellant will pay the costs of it.
