

Gokal Prasad Vs. Radho

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SooperKanoon Citation : sooperkanoon.com/449026

Court : Allahabad

Decided On : Dec-31-1969

Reported in : (1888)ILR10All358

Judge : John Edge, Kt., C.J. and ;Mahmood, J.

Appellant : Gokal Prasad

Respondent : Radho

Judgement :

John Edge, Kt., C.J.

1. In this case the plaintiff brought his action alleging that the defendant had wrongfully built a new house in such a way that certain eaves of that new house projected over the plaintiff's land, and that a verandah and certain doors of that house interfered with the privacy of those portions of the plaintiff's house and premises which were occupied and used by the females of the plaintiff's family, and claimed to have the eaves in question, and the verandah removed, and the doors which were complained of closed. The females of the plaintiff's family are parda-nashin women. The plaintiff's house was admittedly an old one. The eaves of the defendant's new house do in fact project over the plaintiff's land. The doors in question open on to and afford access to the verandah. The doors, as admitted by the defendant in her deposition, interfere with the privacy of the plaintiff's female apartments. The Officiating Munsif of Allahabad, having considered some

of the authorities bearing on the case, decreed the plaintiff's claim, as above stated, with costs. The District Judge of Allahabad, on appeal, reversed the decree of the Officiating Munsif. As to the claim for the removal of the eaves, the District Judge acted on a petition which was filed by the defendant in his Court. The petition was to the effect, that in case the plaintiff should hereafter desire to raise his wall, she, the defendant, would not object to the removal of the eaves complained of. It is obvious that instead of that petition affording a reason for the dismissing of that part of the plaintiff's suit which related to the removal of the eaves, it was practically an admission by the defendant that the plaintiff was entitled to have those eaves removed. As to that portion of the suit which related to the interference with the privacy of the plaintiff's premises, the District Judge, overlooking the admission of the defendant in his evidence, and being influenced by a personal inspection came to the conclusion that the 'doors could scarcely be said to inconvenience the plaintiff at all.' The District Judge appears to have confined his attention in the inspection, to the effect of the doors in question on the privacy of the courtyard of the plaintiff, and to the position of that courtyard with regard to other houses in the neighbourhood. The District Judge in reversing the decree of the Officiating Munsif, dismissed the plaintiff's suit. From that decree of the District Judge this appeal has been brought.

2. As to the eaves, it is clear that the Munsif's decree was right and must be restored. As to the plaintiff's claim in respect of the interference with the privacy of his premises, we heard the arguments of the vakils on each side and took time to consider our judgment, not because my brother Mahmood or I had any doubts as to how we should decide, but because, owing to the conflicting authorities which were cited and to the importance in these Provinces of the question before us, we thought it advisable to consider those authorities at some length and to see if the records in this Court threw any additional light upon the subject.

3. The Indian Easements Act (V of 1882) has not been applied to these Provinces. This compels us to ascertain whether a right or easement of privacy is a right or easement which can be recognised by, what I may call, the common or customary law of India or of these Provinces, and further, whether such a right or easement does exist in these Provinces. With these objects in view, I have, so far as I am

aware, considered all the reported decisions of the Courts in India to which I have access, and also the records of the unreported decisions of this Court which appeared to bear upon these questions. I shall now attempt to show, as shortly as I can, what have been the decisions in the cases which I have been able to examine. I shall, in the first place, go through the decisions of the Sadr Diwani Adalat of the North-Western Provinces and of the High Court; then I shall take such of the reported decisions of the High Courts at Calcutta, Madras, and Bombay, respectively, and of the Chief Court of the Punjab, as I have been able to find in the library of this Court.

4. The earliest reported case, decided by the Sadr Diwani Adalat of the North-Western Provinces in which the question of a right of privacy arose, is that of *Nuth Mull v. Zuka-oollah Beg*, S. D. A. N.-W. P. Rep., 1855, p. 92, in which Begbie, Smith and Jackson, JJ., held in 1855, on appeal from the decree of the Principal Sadr Amin of Delhi, that the erecting by the defendant of a new house, so that the plaintiff's premises were overlooked from the roof of the new house and their privacy thereby interfered with, gave the plaintiff a cause of action against the defendants. The Judges in that case differed only as to the nature of the relief to be granted.

5. In *Gunga Pershad v. Salik Pershad*, S. D. A. N.-W. P. Rep., 1862, Vol. ii, p. 217, the plaintiff sued to close a window newly opened by the defendant on the ground that it was an innovation which interfered with his privacy. The Munsif who tried the suit found that the window did not interfere with the privacy of the plaintiff as alleged, but held that the existence of the window was not to be made a plea by the defendant for hindering the plaintiff from, at any time, building a wall on his own land, which would have the effect of shutting up the defendant's window. The plaintiff did not appeal. The defendant appealed against so much of the decree as gave the plaintiff a right at any time to build a wall to shut up his window. Consequently the finding of the Munsif, that the defendant's window did not interfere with the plaintiff's privacy, stood. The Principal Sadr Amin of Allahabad on appeal reversed that portion of the Munsif's decree, the subject of the appeal. On special appeal to the Sadr Diwani Adalat of the North-Western Provinces, Ross and Roberts, JJ., in 1862, affirmed the decree of the Principal Sadr Amin, on the

grounds that the relief decreed by the Munsif had not been sought by the plaintiff, and that the granting of that relief might interfere with the defendant's acquiring by prescription the right to enjoy the air and light afforded by the window which he had made. In that case it was not suggested by the Munsif, the Principal Sadr Amin, or the Judges of the Sadr Diwani Adalat that a right of privacy could not be acquired, the wrongful interference with which would give a cause of action.

6. In *Goor Dass v. Manohur Bass*, N.-W. P.H. C. Rep., 1867, p. 269, which was a special appeal to this Court from the decree of the Civil Judge of Benares reversing a decree of the Principal Sadr Amin of Benares, Morgan, C.J., and Spankie, J., in 1867, clearly recognised the right of privacy as a right existing in these Provinces. The whole of this judgment is instructive. It is as follows.

7. 'The Judge holds that the plaintiff cannot obtain the relief asked for, that is, the closing of the windows. His observation that the defendant has no objection to the plaintiff's putting up an ornamental screen, opposite to and: within a few feet of the windows, leads to the conclusion that the defendant's right had been established, and that it was by concession on his part that this degree of obstruction by the plaintiff would be permitted. But the question of right has not been duly considered by the Judge. If the windows are not new, or are mere substitutions for former openings which had long existed, the defendants may have a right to the access of light and air by their means. The Judge has not found whether the apertures are old or new. If they have-been recently made, we think that it follows almost necessarily that they are injurious to the plaintiff. The plaintiff's right (supposing the house to be one used by him and his family as an occasional place of residence, and the place adjacent to the windows to be a place where the female members of the family pass to and fro) must to some extent be affected. It may be that the injury and inconvenience is slight. On the other hand, any infringement of privacy of the description may affect very seriously the comfort and value of a place of residence. Unless the defendant can establish some right from long usage to the apertures, we think that he cannot, merely because the comfort and ventilation of his own building is increased, claim to have them open, and that the burden of erecting a screen to secure the privacy, to which he is already entitled, cannot be imposed on the plaintiff. It is suggested that from the defendant's building, as well

as from other points, a view is commanded of the place in question. But even if this be true, the immediate opening, close adjacent to the road, may be a serious injury. Whatever maybe the extent of the injury, if the plaintiff has a right to be exempted from this invasion of his, privacy, and if the Court is satisfied that privacy is invaded, the plaintiff is entitled to the relief claimed, namely, the closing of the windows. The case is remanded to the Judge for a new trial.'

8. In *Ram Baksh v. Ram Sookh*, N.-W. P. H. C. 1868, p. 253, which was an appeal to this Court from the decree of the Principal Sadr Amin of Moradabad, amending the decree of the City Munsif of Moradabad, the grounds of appeal to which reference is made in the judgment were as follows.

1. That the said decision is contrary to the principles of jurisprudence, in that, the plaintiff has no right to put restrictions to defendant's enjoyment of his proprietary rights, to suit the imaginary convenience of the former.

2. That the said decision is contrary to law, in that, the defendant has a prescriptive right to use the three windows which are in existence for the last 20 years in the same manner as he hitherto did.

3. That the said decision is contrary to law, in that, the Lower Appellate Court, having found that the parda system does not prevail among the caste to which the parties to the suit belong, should not have ordered any restrictions as to the use of the windows by the defendant.'

9. The judgment of Roberts and Person, JJ., delivered in 1868, was as follows.

10. 'It is contended that the injury alleged to have been caused to the plaintiff' by the invasion of his privacy, is a sentimental grievance, rather than a substantial injury, for which relief can be claimed at law. Such a contention may be countenanced by English law; but the doctrine contended for is scarcely in accordance with the feelings or suited to the habits of the natives of this country, and is not shown to have received judicial sanction from the Indian tribunals. On the contrary, we find that the first Bench of this Court on the 17th June last, in a case No. 742 of 1867, *Gar bass v. Manohar Dass*, N.-W. P. H. C., 1867, p. 269,

maintained the opposite view. We are not therefore prepared to allow the first plea in appeal. The second plea in our judgment fails, inasmuch as the lower Courts have not directed the three windows referred to, which have been used by the defendant for more than 20 years to be entirely closed, but have merely provided that they shall not be used differently from heretofore, in such a manner as to be prejudicial to the plaintiff's privacy.

11. 'As to the third plea, the remark that the parties to the suit or the members of the caste to which they belong do not observe a strict parda, is not sufficient to deprive the plaintiff of the right to object to an innovation by which his comfort and that of his family is affected.'

12. I infer from that judgment that the law in England as to easements had been discussed in the course of the arguments. I am unable to ascertain whether or not the Madras case of *Kamathi v. Gurunada Pillai*, 3 Mad. H. C. R., 141, had been referred to. As I read that judgment, Roberts and Pearson, JJ., had not at the time when it was delivered any doubt of the existence of a right of privacy in this part of India, or that for a substantial interference with such a right, an action could be maintained.

13. The next case in this Court, so far as I can ascertain, in which the question of a right of privacy arose was *Khudorun Lal v. Jagannath Prasad*, unreported, S. A. No. 545 of 1869. That was a suit brought in the Court of the Munsif of the city of Jaunpur for permission or a declaration of a right to build in muhalla Mucharhatta in Jaunpur a two storied house, notwithstanding a Magistrate's order which apparently had prohibited the building of the house. I infer from the judgment of the Munsif that the defence was that on the site in question a one-storied house originally stood, but by an alleged usage the plaintiff was not entitled to erect on the site a two-storied house, that the plaintiff was prohibited by an order of a Magistrate from building a two-storied house on the site, and that the two-storied house, if erected, would invade the privacy' of the defendant's house. On the question of privacy the Munsif found that 'no inconvenience will be caused to the defendant, nor will the female apartments be exposed or the ventilation of his house stopped by the plaintiff's construction of the second story of his house, for it

appears from the statement of the plaintiff's witnesses, from the tenor of that of the defendant's witnesses, and also from a local inspection made by myself, that the existing windows of the defendant's house are at a distance from the road [365] and fields and from the roofs of the one-storied house of the defendant, and also from the other roof of the plaintiff's house and of that of the other persons living in that quarter: so that if the females of the defendant's house will themselves come at the windows, they will of course be seen by all and their privacy destroyed, but if they do not, they will not be seen and their privacy will be preserved.'

14. The Munsif decreed the plaintiff's claim. The District Judge of Jaunpur on appeal, reversed the decree of the Munsif. The plaintiffs appealed to this Court from the decree of the District Judge. The judgment of the District Judge is not with the record, and I am unable to ascertain what were his reasons for dismissing the suit.

15. In delivering judgment in the plaintiff's special appeal to this Court, Pearson and Turner, JJ., said: 'We are of opinion that the claim of the defendant is unreasonable. By the raising of the plaintiff's roof as proposed the defendant will not be deprived of light and air. His only complaint is that the plaintiff will be thereby enabled to look through a window, which window lights the women's apartments. But against this the defendant can easily protect himself by a screen or curtain, or if he holds that protection insufficient, it seems not impossible to procure light and air by the opening of a window on either side of the house, which would not be accessible from the plaintiff's roof;' and they decreed the appeal. The judgment of Pearson and Turner, JJ., was delivered on the 19th of July 1869. I infer from that judgment either that those learned Judges adopted the Munsif's findings of fact, or considered that the erection by the plaintiff of a second story would not cause any material or appreciable interference with the privacy of the female apartments of the defendant. That case does not throw much light on the question. It has not been reported.

16. In the case of Joogul Lal v. Musammat Jasoda Beebee, H. C. R., N.-W. P., 1871, p. 311, in which the plaintiff sought to close a door recently opened by the defendant, the judgment of Morgan, C. J., and Spankie, J., delivered in 1871, on

appeal from the decree of the District Judge of Allahabad, so far as it is material, was as follows.

17. 'We think that in no view of the law can the plaintiff be held to be entitled to the relief sought for. Her house is one of several houses ranged lit would seem from the terms of the Munsif's judgment and from the pleader's statement here) on either side of a narrow road or lane. Already it, in the portion of it with which we are concerned, is within range of view from the opposite (that is, the defendant's) side of the way; for one at least of the adjacent houses commands it from the roof. It is said that the defendant has not only so altered or constructed and added to the upper part of his house as to command a view of the plaintiff's apartments, but that he has also made provision in the place newly constructed for persons to sit. No improper obstruction of light or air is stated to be occasioned. The case is really one in which a house-owner in a street, having changed the arrangement or construction of the upper part of his house in a manner otherwise consistent with his joint rights of enjoyment, is sought to be restrained, not by the holder of an adjacent house, but by a neighbour living on the other side of the road, who can allege against the defendant no more substantial cause of suit than this, that the newly-constructed place admits of persons who may temporarily occupy it seeing portions of the interior of the plaintiff's house through his windows. Even if this is so, it is no more than others may admittedly do. There can be no question in such case of loss of privacy. And the mere fact that the alteration gives to the defendant a wider range of vision than before can constitute no legal right of suit in the plaintiff.'

18. That judgment has been cited as an authority for the contention that no right of privacy, for the interference with which a suit could be maintained, exists or can in law exist in this part of India. As I read the judgment, the learned Judges did not in it inferentially or otherwise lay down any such proposition. They were dealing with the facts of the case before them, and if any inference is to be drawn from what they said as to what might be the rights and liabilities of parties under other circumstances, I think it is that where a house does enjoy substantial and real privacy, a substantial interference with that privacy might afford the owner a good cause of action. In the case before them, these learned Judges apparently found,

that there was, owing to the position of the house and the way in which it was overlooked, no privacy to be maintained, and consequently no privacy to be interfered with. If those learned Judges held in 1871 a view of the law different to that which they had expressed in 1867 in their judgment in *Goor Dass v. Manohar Dass*, H. C. R., N.-W. P., 1867, p. 269, I would have expected that they would have referred to their judgment in that case and explained why they no longer considered that case as an authority, and in what respect and for what reasons they considered that the view of the law which they then held was erroneous.

19. Another unreported case decided by Pearson and Turner, JJ., in 1874, is that of *Musammat Kohla v. Purbhoo Dial*, Unreported S. A. No. 1090 of 1873. In that case the plaintiff sued the defendant for an injunction to compel her to close certain newly-opened windows in her house which interfered with the privacy of the female apartments of the plaintiff's house. As I gather from the judgment in first appeal of the District Judge of Cawnpore, the Munsif of Cawnpore, who tried the suit, following the rulings of the High Court at Calcutta in *Mahomed Abdur Bahimand others v. Briju Sahu*, 5 B.L.R., 676; *Ramlal v. Mahes Baboo*, *Ibid.*, 677 note; *Sheikh Golam Ali v. Kazee Muhammad Zahur Alum*, 6 B.L R., App. 76, and of this High Court in *Ram Buksh v. Ram Sookh*, N.-W.P. H. C. Rep., 1868, p. 253; *Kasim Ali Khan v. Brij Kishore*, N.-W. P. H. C., 1870, p. 182, and *Joogul Lal v. Musammat Jasoda Bebee*, H.C.R., N.-W.P..1871, p. 311, dismissed the suit. From that decree the plaintiff appealed to the District Judge of Gawnpore. In the judgment which the District Judge delivered he said: 'One of the pleas adverts to the custom of the country and its particular observance in the town of Gawnpore, where the parties dwell, that no one is allowed to open out doors in newly-erected buildings which will expose the privacy of their neighbours. There is nothing on record to show that the custom prevails in Gawnpore more than any other place in India. The custom is undoubtedly respected and observed throughout this country and indeed among all oriental races, and if it were left to the Court to enforce a custom founded on long social usage, there would be no difficulty in doing so; but the introduction of principles of English law, and the decisions of superior tribunals founded thereon, made it necessary to abide by the directions laid down therein for guidance. Had the suit been an ordinary one to have the newly-opened windows closed because of the want of privacy caused thereby, there would be no

other course than to treat it as a sentimental grievance for which no relief could be granted, the right of privacy having been adjudged to be not of the nature of a legal right.'

20. I infer from the judgment of the District Judge and the judgment of this Court on appeal here that the plaintiff's windows had been then recently opened and his verandah recently constructed. The District Judge of Cawnpore, however, allowed the appeal and decreed the plaintiff's claim on the ground that, as the defendant carried on the business of a prostitute in her house, the opening of the windows in question, would under the circumstance cause a nuisance to the plaintiff. From that decree the defendant brought a special appeal to this Court. On that appeal the judgment of Pearson and Turner, JJ., was as follows.

21. 'We cannot recognise the ground on which the Judge has considered that, in this case, he is at liberty to depart from what is now the established law, with regard to the opening of windows. The circumstance that the owner of the house opposite to that of the respondent is a courtesan does not deprive her of the ordinary rights of a proprietor. If persons who frequent her house conduct themselves in such a manner as to occasion a public nuisance, proceedings can be taken to put a stop to their misconduct; but so long as they merely look out of the windows of the house, using the windows as any other persons might use them, they cannot be interfered with, although the result may be that they disturb the respondent's privacy. He has, however, his remedy; he may, as has been suggested, block up the windows which he has himself recently opened'; and they allowed the appeal and dismissed the suit.

22. Those learned Judges cited no authority for the opinion which they expressed as to 'what is now the established law with regard to the opening of windows.' Pearson, J., had been one of the Judges who had delivered judgment in *Ram Buksh v. Ram Sookh*, H. C. R., N.-W. P., 1868, p. 253, in which it was held that an invasion of privacy by the opening of windows was a substantial injury for which relief could be claimed at law; in which case also the decision of Morgan, C.J., and Spankie, J., in *Goor Dass v. Manohar Dass*, H. C. R., N.-W. P., 1867, p. 269, was followed apparently with approval. Pearson, J., did not refer to either of those

authorities, nor, indeed, to any other authority. It is not apparent from this judgment, whether they considered that such a custom or usage, as the District Judge of Cawnpore stated to exist in Cawnpore, must be bad in law, or that no right of privacy could be acquired, or, if such a right could be acquired, that it had not been acquired under the circumstances of the case, or whether they treated the decree of the District Judge as being solely based on the possibility of those who might use the defendant's house causing a nuisance to the plaintiff.

23. Another unreported decision of this Court, to which we have been referred, is that in Saiyid Amjad Ali v. Reyat Husain, unreported S. A. No. 576 of 1877. In that case, so far as the present question is concerned, all that Stuart, C. J., and Oldfield, J., in 1877, decided was that the plaintiff was not entitled to an injunction compelling the defendant to close certain windows, which had been recently opened by him and which looked into a private lane of the plaintiff's, but did not disturb the privacy of the plaintiff's family within his house. The lane there in question was apparently used merely as a lane or passage.

24. Another unreported case which has been cited, decided in this Court in 1878, is that of Lachmi Shankar v. Chet Ram, unreported S. A. No. 60 of 1878, In that case the Munsif of Moradabad had found that the doors and windows, which the plaintiff sought to have closed up, were old doors and windows, and that the plaintiff had*not objected at the time when they were opened or until a dispute had arisen between the plaintiff and the defendant concerning a stair. The Munsif dismissed the suit so far as it related to the closing of the doors and windows. The Subordinate Judge on appeal found that the windows had been recently opened, and decreed the claim of the plaintiff to have them closed. On appeal to this Court, the vakil of the plaintiff must, for some reason which is not stated, have admitted that the portion of the Subordinate Judge's decree which ordered the doors and windows to be closed could not be supported. The judgment of this Court on the question as to the closing of the doors and windows does not assist me on the question under consideration. That portion of the judgment is as follows: 'The decree of the Lower Appellate Court, so far as it orders the closing of the doors and windows, it is admitted, cannot be sustained, and in this respect the decree of the Lower Appellate Court must be reversed and that of the Munsif restored with

costs.'

25. Another unreported case decided in this Court in 1882 is that of Musammat Begam-ul-nissa v. Mahant Hardeo Das, unreported S. A. No. 1476 of 1881. The judgment of Straight and Brodhubst, JJ., so far as it is material to this point, is: 'There is nothing in the judgments of the lower Courts to justify them in interfering with the legal rights of the defendants to open a door in their own wall. This they were fully entitled to do, and the plaintiffs had no cause of action against them.' The Munsif of Muttra had found that the door in question was a new one, and that 'the house of the defendants is so large that there is no necessity of this new door for the admission of air or light, but it encroaches upon the privacy of the plaintiff's house, and certainly it is a source of inconvenience to him.' The Subordinate Judge of Agra, on appeal, adopted so much of the Munsif's judgment as found that the door had been recently opened and was an inconvenience to the plaintiff. He did not find whether or not the opening of the door had interfered with the privacy of the female portion of the plaintiff's house, and on this point the finding of the Munsif was of the vaguest description. Neither the Munsif nor the Subordinate Judge found in what way the opening of the door would cause inconvenience to the plaintiff or to what extent such inconvenience would be caused.

26. I think the judgments of Straight and Mahmood, JJ., when they made the order of remand in Matta Prasad v. Behari Lal, unreported S. A. No. 8 of 1886, show that they considered, that in these Provinces at least, a material interference by the opening of windows with the privacy of the premises occupied by the females of a neighbour, might afford that neighbour, a good cause of action. In that case, my learned brothers, considering that the District Judge had not on the appeal to him really tried the case, remanded the case under Section 562 of the Code of Civil Procedure for a trial on the merits. My brother Straight in delivering his judgment said: 'Upon the statements of the plaintiff and upon the answers made by the defendants, the substantial issue to be tried between the parties was, whether there had been by the act of which the plaintiff complained on the parts of the defendants an interference with the privacy of the plaintiff: and in order to arrive at a conclusion upon that point, it was essential for the Courts below, very specifically to find in what way and in respect of what right of privacy the defendants had

interfered with the plaintiff's right. Upon a clear and distinct finding in respect of that point, then, the question of law would properly have arisen and could have been properly argued, namely, whether, looking to the findings of fact, such a right subsisted in the plaintiff at the time the wrongful act was alleged to have been done, that the plaintiff had a right to maintain the suit and had a cause of action to maintain the same.' In that case (sic) infer from the judgment of the Munsif of Allahabad that the plaintiff alleged in his plaint that the defendants, with the object of depriving the plaintiff of the privacy of his house situate in muhalla Pan Dariba in the city of Allahabad, had recently, and contrary to the old custom and usage prevailing in parts inhabited by respectable persons, opened these doors from a room in his house on to a terrace.

27. In the case of Lachman Prasad v. Jamna Prasad, Weekly Notes, 1887, p. 295, the plaintiffs, according to the judgment of the Munsif of Cawnpore, who tried the suit in the first instance, alleged that the defendant in rebuilding his house had opened a door in the western wall of his house in the second story, by reason of which there had been an invasion of the privacy of the plaintiffs, and claimed to have the door closed. The Munsif in his judgment said: 'It has been repeatedly held by the Honourable High Courts that a suit cannot be maintained to oblige the defendant to close doors recently opened in his house on the ground that they overlooked the zenana of the plaintiff--vide Mahomed Abdur Rahim v. Briju Sahu, 5 B. L. R., p. 676, Sheikh Golam Ali v. Kazi Mahomed Zahur Alum, 6 B. L. R., App., 76, Jogul Lal v. Musammat Jasoda Bebee, N.-W. P. H. C. R., 1870, p. 311. The issue is accordingly decided against the plaintiffs.'

28. The Subordinate Judge of Cawnpore on appeal said: 'I hold that although the door affects the privacy of the plaintiff's house, yet as the defendant has set it up in his own wall, the plaintiffs have no right to have it closed. The remedy is in the hands of the plaintiffs. They can raise their wall so high that the door may not affect their privacy.' The case came up on appeal to this Court. There were cross objections. On the 25th May 1886, Oldfield and Mahmood, JJ., remitted an issue to the Subordinate Judge for a finding, as to how and to what extent, the door affected the privacy of the plaintiff's. The Subordinate Judge on the remand found that the window in dispute overlooked the whole of the plaintiff's house, and in

particular those portions which were reserved for females. Upon the return of this finding the defendant filed objections under Section 567 of the Code of Civil Procedure, to the effect that the plaintiffs were not entitled to restrain him from opening and using his window on the ground of interference with their privacy in the absence of proof of twenty years' uninterrupted user. The case came on to be heard, on the return to the order of the remand, before Oldfield and Brodhurst, JJ., and they ordered a further remand, saying, 'We think it desirable that an issue be tried whether by local custom, there is any right of easement, by which the plaintiffs have a right to have the privacy of their apartments maintained by the removal of the door and window.' The Subordinate Judge on that further remand found that the existence in the mohalla where the parties lived of a customary easement of privacy was proved. On the return to that last remand, as Oldfield, J., had retired from the Bench, the case came before my brother Brodhurst and myself to be disposed of. In my judgment I said that 'the findings on remand show that the plaintiff is entitled to have his right of privacy observed and to have a mandatory order to compel the appellant to permanently close the door or window complained of;' and my brother Brodhurst agreeing with my view of the law, we decreed accordingly.

29. I now come to the cases relating to rights of privacy, decided by the High Court at Calcutta. In *Sreenath Dutt v. Nand Kishore Bose*, 5 W.R., 208, on appeal from the decree of the Judge of Hooghly, Rayley and Shumbhunath, JJ., in 1866, in their judgment say: 'We further notice that the plaintiff is said to have built an upper story to his house, overlooking the inner apartments of the defendant. Defendant on this built the wall which it is said has deprived the plaintiff of light and air. Even if it were shown that the light and air had long been enjoyed by the plaintiff and have now been cut off by the defendant's wall, still, as plaintiff had no right to build an upper story, with reference to the circumstances of domestic life in India, so as to intrude on the privacy of the females of the defendant's family, the plaintiff would have no relief in this respect, as he was the first and greater wrong-doer.'

30. Those learned Judges could at that time have had no doubt that a right of privacy existed.

31. The next reported case in which the question as to a right of privacy arose which came before the High Court at Calcutta, so far as I have been able to ascertain, was that of *Mahomed Abdur Rahim v. Birju Sahu*, 5 B. L. R., 676; S. C. 14 W. R., 103. In the arguments and in the judgment in that case, amongst others, some unreported cases decided at Calcutta are referred to. In that case the Subordinate Judge on appeal had held that, according to the usage of this country, if the privacy of any house occupied by *parda-nashin* women be intruded upon, the parties thus injured could lay claim to the removal of such injury, and passed a decree ordering the windows complained of to be closed, and the defendant's verandah to be so screened as to prevent an exposure of the female apartments, and that in default thereof the verandah should be demolished. Judgment was delivered by Markby, J., Bayley, J., concurring.

32. The most important point which struck me on reading that judgment is that those learned Judges in deciding the appeal, which was a second appeal, either overlooked or ignored the finding of the Subordinate Judge as to the usage of the country, and decided the appeal as if no such usage or custom of privacy had been found. They considered that a right of privacy could not be an inherent right of property in this country, and they allowed the defendant's appeal and dismissed the suit. I cannot ascertain from the judgment whether or not those learned Judges considered that there could be no valid custom of privacy in this country. They pass by the two Bombay cases, *Manishanker Hargovan v. Trikam Narsi*, 5 Bom. H. C. Rep., 42, and *Kuvarji Premchand v. Bai Javer*, 6 Bom. H. C. Rep., 143, with the observation that in those cases the right of privacy had been maintained on the express ground of a local usage in Guzerat. They also said: 'It is remarkable that in the cases in which the right is upheld nothing is said of gaining by prescription a right to prevent your neighbour from building his house so as to overlook your premises, but the right of privacy is spoken of as if it was an inherent right of property, and the invasion of privacy is spoken of as something like a trespass. And in the present case the Subordinate Judge considers that intrusion on the privacy of the female apartments is an injury which the law will prevent.' They apparently overlooked the fact that in an unreported case decided by Kemp and Seton-Karr, JJ., two Judges of the High Court at Calcutta, to which they in this judgment refer, Kemp and Seton-Karr, JJ., had said: 'Both the Judges of the lower

Courts have visited the spot and have satisfied themselves that the opening of the windows complained of is a violation of the privacy to which the plaintiff has a right. There is nothing contrary to the law in this finding, and it is certainly in conformity to the usage of the country.' I do not know whether or not that judicial statement of Kemp and Seton-Karr, JJ., was founded on the findings of fact or the admission of the parties in the case before them, or upon a well-recognised custom of which they took judicial notice. Markby and Bayley, JJ., expressly did not dissent from the decision of Bayley and Shumbhunath, JJ., in *Srinath Dutt v. Nand Kishore Bose*, 5 W. B., 208. In fact, in reference to that case Markby, J., said: 'I think that the opening of new windows affecting a neighbour's privacy may very possibly give him a right, according to the usage of the country, of protecting his privacy by any erection which he chooses to put upon his own land; and that a person who has opened these new windows cannot complain that such erection interferes with his light and air.' The proposition of law from which Markby and Bayley, JJ., were not prepared to dissent was this;--'The defendant, on this, built the wall which, it is said, deprived plaintiff of light and air. Even if it were shown that light and air had long been enjoyed by the plaintiff, and have now been cut off by the defendant's wall, still, as plaintiff had no right to build an upper story, with reference to the circumstances of domestic life in India, so as to intrude on the privacy of the females of the defendant's family, the plaintiff would have no relief in this respect, as he was the first and greater wrong-doer.' The plaintiff in that case could not have been treated as a wrong-doer, if the defendant had no right the violation of which constituted a wrong. It is not easy to understand how Bayley, Shumbhunath, and Markby, JJ., could have thought that the commission of a wrong by the plaintiff in that case excused the commission of another and a distinct and different wrong by the defendant, unless those learned Judges were of opinion that the principle of the plea of son assault demesne to an action of assault applied to the case before them. Markby and Bayley, JJ., in the case the decision in which I am now considering, appear to have thought that there can be no inherent right of property the interference with which would be an actionable wrong, unless such interference were a trespass. They apparently overlooked the existence of inherent rights of property known, at least, to the law of England, as for instance, the right of lateral support for adjoining land.

33. The judgment delivered by Markby, J., and concurred in by Bayley, J., to which I am referring at present, and the judgments in some other cases apparently suggested a distinction between the legal effect of a general custom and that of a purely local custom. As I understand the judgments, in some of the cases it has been assumed that although a general custom of the country or of the province as to privacy has been found or judicially declared, such general custom is not to be given effect to, whilst a local custom of privacy may be treated as establishing the right. It appears to me that a general custom of the country or of a province ought to have as much effect as a local custom, unless the local custom curtails or extends the general custom which prevails over the larger area of which the smaller area of the local custom is a portion. I have always understood that the common law of England was, or was considered to be, founded upon the common custom of the realm, if it was not in fact the common custom of the realm judicially declared. The custom of Guzerat as to privacy, so far as I have been able to ascertain, appears to be applicable to all the towns in Guzerat and not to those towns only in Guzerat in which a local custom of privacy has been found to exist.

34. The next reported decision of the High Court at Calcutta on this subject which I have found is that of *Sheikh Golam Ali v. Kazi Mahomed Zahur Alum*, 6 B. L. R., App. 76, decided in 1870. It does not appear from the report of that case whether or not any custom of privacy had been found by the lower Courts. The judgment of Jackson, J., in that case was apparently based partly on a judgment delivered by himself and Steer, J., in an unreported case decided by them on the 18th June 1862, in which they said: 'We are not aware that where two owners of houses live contiguous, but separated by an intervening space, the Custom of the country requires that neither party shall make any improvement on his property, if such improvement has the effect of depriving the other of a certain degree of privacy. We should rather say that when the one opens a window which overlooks the other, it is the custom of the country that the other raises a screen or adopts some other contrivance to counteract the effect of the opening made in his neighbour's house.' This quotation I have taken from the judgment of Markby, J., in *Mahomed Abdur Rahim v. Birju Sahu*, 5 B. L. R., 676. Jackson, J., in that unreported case did not say that if a custom of privacy was established, a substantial interference with that right would, not give a cause of action. Jackson, J., in his judgment in the

case of Sheikh Golam Ali v. Kazi Mahomed Qahur Alum, 6 B. L. R., App. 76, also relied upon the view of the law expressed by Markby, J., in Mahomed Abdur Rahim, 5 B. L. R., 676, and stated that he adhered to the view of the law expressed by Markby, J., in that case. Consequently my comments on that case apply to the judgment of Jackson, J., in Sheik Golam Ali v. Kazi Mahomed Zahur Alum, 6 B. L. R. App. 76. The judgment of Glover, J., in Sheikh Golam Ali v. Kazi Mahomed Zahur Alum, 6 B. L. R. App. 76, was as follows: 'I concur. Privacy is not an inherent right of property like a right to ancient lights and air. In this case, moreover, the houses of plaintiff and defendant are separated by a public road and by the house of a third party.' As to this judgment, it is only necessary to observe that he differentiated the right of privacy claimed from a right to ancient lights and air, on the ground, that the latter was an inherent right of property. So far as I am aware, a right to light and air is a right which can only be acquired by grant, prescription, or estoppel: it may certainly be reserved, but it is not in any sense an inherent right of property. If a right of privacy can be acquired, I fail to see how the fact that a public road and the house of a third party intervenes between the house of a plaintiff and defendant can prevent a plaintiff having or acquiring in respect of his house as against a defendant a right of privacy.

35. The next reported case decided by the High Court at Calcutta on this subject is that of Kalee Pershad Shaha v. Ram Pershad Shaha, 18 W. R., 14, decided in 1872. In that case, Glover, J., in delivering the judgment of the Court (Kemp and Glover, JJ.), said: 'At the same time we agree with the Subordinate Judge in thinking that the right of privacy is not an inherent right; and that if it exists at all, it must be shown to exist by some local usage, by special permission, or by grant, and in this case there is no such local usage, permission, or grant proved; and the decision in the case of Mahomed Abdur Rahim v. Birju Sahu, 5 B. L. R., 676, lays down what we consider to be the right view of the law in deciding questions of this sort; and following that decision, we must uphold the judgment of the Subordinate Judge.' That case as reported in 14 Weekly Reporter 103, merely gives the judgment. If the attention of Kemp and Glover, JJ., had been drawn to the report of that case in the 5 Bengal Law Report, they would have found it stated at p. 677 that 'on appeal, the Subordinate Judge held that the females of the plaintiff's family were parda-nashin women; and that, according to the usage of this country, if the

privacy of any houses occupied by parda-nashin women be intruded upon, the parties thus injured could lay claim to the removal of such injury.' Further, Kemp, J., was one of the two Judges (Kemp and Seton-Karr, JJ.) who on the 10th of August 1865, had held that 'the opening of the windows complained of is a violation of the privacy to which the plaintiff has a right. There is nothing contrary to law in this finding, audit is certainly in conformity to the usage of the country.' Kemp, J., did not explain what it was which had caused him to alter his opinion between 1865 and 1872. In the decision which he in 1872 relied upon and followed, the Judges had overlooked or ignored a similar finding by the Subordinate Judge. I infer from the judgment of Kemp and Glover, JJ., in *Kalee Pershad Shaha v. Bam Pershad Shaha*, 18 W. R., 14, that they did not consider that a right of privacy could be acquired by prescription, although they considered that it might be acquired by a local usage, by a special permission, or by grant. If such a local usage was valid, I cannot see why the usage of the country ' or the usage of this country 'to the same effect should not be valid.

36. The only reported decision on the question of a right of privacy of the Courts at Madras of which I am aware is that of *Kamathi v. Gurunada Pillai*, 3 Mad. H. C. R., 141, which was decided on the 30th of June 1866, by Holloway and Tnnes, JJ. Those learned Judges, applying the law of Westminster Hall and the House of Lords, dealing with a case of the rights of parties in England, and ignoring the decisions of the Courts in India on the subject, held that there is in India, no right of privacy, the interference with which, is a wrong, for which a remedy is given. It does not, however, appear from the report of that case that the right of privacy was claimed by reason of any custom, grant, prescription, acquiescence, or estoppel; but I think it may be inferred from the judgments in that case that those learned Judges would have held that no such right could be acquired by custom, prescription, or otherwise. It was correctly said by Markby, J., in his judgment in *Mahomed Abdur Rahim v. Birju Sahu*, 5 B. L. R., 676, that 'in *Kamathi v. Gurunada Pillai*, 3 Mad. H. C. R., 141, the Madras High Court held that there was no right of privacy, but the question, for reasons which do not appear upon the face of the judgment, was discussed with reference to European and not with reference to Hindu or Muhammadan law.' He might have added that it was decided not according to European law, but according to the law of England. For

all that, it appears to me that that decision of the Madras High Court may have had a considerable influence on those Judges who subsequently held that a right of privacy did not exist in India.

37. The usage of Guzerat relating to the right of privacy which the Bombay Courts held to be established and to be valid was by Tucker and Gibbs, JJ., in 1867, in *Manishankar Hargovan v. Trikam Narsi*, 5 Bom. H. C. R., A. C. J. 42, stated thus: 'A series of decisions extending over a long number of years have settled the question that, in accordance with the usage of Guzerat, a man may not open new doors and windows in his house, or make any new apertures, or enlarge old ones, in a way which shall enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation, and in this manner to intrude upon that neighbour's privacy; and that an invasion of privacy is an infraction of a right, for which the person injured has a remedy at law.' Tucker and Gibbs, JJ., declined to follow the decision of the Madras High Court in *Kamathi v. Gurnada Pillai*, 3 Mad. H. C. R., 141.

38. In *Kuvarji Premchand and others v. Bai Javer*, 6 Bom. H. C. R., A. C. J., 143, decided in 1869, Warden and Lloyd, JJ., say: 'We see no cause to interfere with the decision of the lower Court that the privacy of the plaintiff is invaded by the newly-opened windows. The existence of a public road between the houses makes no difference according to the custom of Guzerat.'

39. All that was decided by Melvill and Kembball, JJ., in 1871, in *Keshav Harkha v. Ganpat Hirachand*, 8 Bom. H. C. R., A. C. J. 87, was that the opening by the defendant of a window which looked, not into the plaintiff's private apartments, but into an open courtyard outside his house, was not an invasion) of the plaintiff's privacy which would entitle him to have the window closed.

40. In the case of *Shrinivas Udpirav v. Reid and others*, 9 Bom. H. C. R., A. G. J., 266, decided in 1872, the plaintiff, whose house was in Dharwar, had been prevented by a Magistrate's order from opening a window in a wall of his house.' The Acting Judge of Dharwar found on the evidence that it was the custom in Dharwar that a person could not make a new aperture, which might invade the privacy of his neighbour, without his permission, and that, as a matter of fact, the

plaintiff making an opening in his wall would expose to view the women of the household of one of the defendants when they bathed at a well in the compound. The case came up in first appeal before Gibbs and Lloyd, JJ. Their judgment, so far as it is material to the point under consideration, was as follows: 'It may be taken to have been correctly found by the Judge that the window complained of would, to a certain extent, make the third defendant's compound less private than heretofore, but it is within the power of the defendant to adopt; some arrangement by which the inconvenience arising therefrom, if any, may be avoided; and it is more reasonable that the defendant should protect himself, than that the plaintiff should be deterred from improving his own house, for, as was observed by Mr. Justice Markby in the case reported at p. 676 of 5 B. L. R., 'to hold that privacy is a right and the invasion of it an injury would lead, as it appears to me, to the most alarming consequences to the owners of house-property in towns.' It has been recently held by this Court (S. A. Nos. 307 of 1871 and 339 of 1871) that the mere opening of a door in a person's own premises does not constitute a cause of action, and after consulting all the authorities that have been referred to, we think, unless we can coincide with the Judge that the local custom has been established, the plaintiff should succeed. With reference to this alleged custom, it must be observed that it was not set up in the written statement, and though certain witnesses depose to the effect that it was not customary to allow doors and windows to be opened without permission, if the privacy of neighbours is thereby interfered with, it appears to us that their evidence is too vague, and that to establish the point it should be shown that the custom was approved or immemorial, or that it had been judicially recognised. The various decisions quoted by the Judge refer solely to a custom prevailing in Guzerat, and this Court, as has been said, would be very unwilling to extend this exceptional privilege without the most satisfactory proof that it prevailed elsewhere.' The authorities which had been referred to in the arguments in that case were *Gibbon v. Abdur Rahman*, 3 B. L. R., 411; *Mahomed Abdur Rahim v. Birju Sahu*, 5 B. L. B., 676; *Kamathi v. Gurunada Pillai*, 3 Mad. H.C.R. 141, two unreported judgments of Melvill and Kemball, JJ.; *Kuvarji v. Bai Javer*, 6 Bom. H.C.R., A.C.J., 143, and *Mani Shankar v. Trikam Narsi*, 5 Bom. H. C. R., A. C. J., 42, Gibbs and Lloyd, JJ., apparently considered that a custom of privacy, if proved, would be valid.

41. In *Gibbon v. Abdur Rahman*, 3 B. L. R., A. C. J., 411, no question of privacy appears to have arisen. The females, if any, of the plaintiff's family, judging by his name, were not likely to have been *parda-nashin* women. It was an anticipated trespass, not an interference with a right of privacy of which the plaintiff complained.

42. Owing to the copies of the Punjab Record for 1869 and 1876 not being in the Library of this Court, I have been unable to examine the decisions of the Chief Court of the Punjab, 21 and 91 of Punjab Record, 1869, and 90 of Punjab Record, 1876, in which Sir Meredyth Plowden in his judgment in *Yasin v. Gokal Chand*, No. 19 of 17, Punjab Record, civil judgments 72, states that the right of privacy has 'beyond doubt been acknowledged.' I shall give two short extracts from that judgment. At page 72 Sir Meredyth Plowden says.

43. 'The object of this suit is to compel the defendant to build a screen on the top of the upper story recently added to his house, so that persons using the roof of the latter shall not command a view of the interior of the plaintiff's premises.' And at page 73 he says: 'When, therefore, a suit is brought to restrain the owner of a house from adding an upper story to his own house, or to compel him to make some addition for the protection of the plaintiff's privacy, it is only just to demand from the plaintiff strict proof, first, that the custom of domestic privacy is observed among that section of society of which he is a member, and in his own household; and secondly, that the domestic privacy of individuals is generally regarded among the community of the locality where the plaintiff resides, as being of so much importance that by common consent it is considered incumbent upon owners of land and houses either to abstain from elevating their houses, or to elevate them with precautions against the violation of such privacy.' And further on he says: 'This right when it exists is in its nature an easement, but I am not aware that any attempt has yet been made to define or describe it. Being founded upon local usage, it seems to me that the Courts are fully justified in demanding that the proof of the customary right shall extend to and include proof of the customary mode of recognition.'

44. In that case Plowden and Brandreth, JJ., dismissed the plaintiff's appeal, being of opinion that the plaintiffs had failed to prove a custom in Basti Ghuzan, where the houses were, by which a proprietor was compelled to build a screen or desist from building. I infer from their judgments that in their opinion such a custom might be proved, or if proved, would be good in law.

45. The decisions of the Judges of the High Court at Calcutta on the question as to whether any right of privacy exists or can exist by custom or otherwise, or at all, are conflicting; but I think it may be inferred from some of those decisions that where a custom of privacy has been clearly proved, any substantial interference with it would be an actionable wrong, provided of course that such interference was not by the consent or acquiescence of the party complaining. The solitary decision of which I am aware of the High Court at Madras on the question of privacy apparently ignores the possibility in law of a right of privacy existing in India.

46. The High Court at Bombay has clearly recognised and given effect to the custom in Guzerat by which a right of privacy is enjoyed where that custom prevails.

47. The High Court at Bombay, in *Shrinivas Udpirav v. Reid and others*, 9 Bom. H.C.R., 266, recognised the possibility in law of a custom similar to that of Guzerat existing elsewhere, and in *Mani Shankar Hargovan v. Trikam Narsi and others*, 5 Bom. H. C. R., A. C. J. 42, refused to consider the decision of the High Court at Madras in *Kamathi v. Gurunada Pillai*, 3 Mad. H. C. R. 141, as an authority which could be followed, where, by the usage of the district, a right of privacy exists.

48. The Chief Court of the Punjab has acknowledged that a custom of privacy can exist and can be enforced.

49. I have consulted all the reports available to me of the cases in the High Courts at Calcutta, Madras, and Bombay, and of the Chief Court of the Punjab of which I am aware, which deal with the question of a right of privacy. Owing to the absence from our Library of the reports which contain the series of decisions referred to by the High Court at Bombay in *Mani Shankar Hargovan v. Trikam Narsi*, 5 Bom., H.

C. R. A. C. J. 42, as having settled the question as to the usage of Guzerat, I have been unable to ascertain whether that custom was first established by a finding of fact on evidence given in Court, or whether it was a well-known and immemorial custom of which the Judges of the High Court at Bombay or their predecessors took judicial notice.

50. Shortly put, the decisions of the Sadr Diwani Adalat of the North-Western Provinces and of this High Court where the question of the right of privacy has arisen may be summarized as follows.

51. In 1855, in a Delhi case, Begbie, Smith and Jackson, JJ., recognised the existence of a right of privacy.

52. In 1862, in an Allahabad case, Ross and Roberts, JJ., did not suggest any doubt that a right of privacy could exist.

53. In 1867, in a Benares case, Morgan, C. J., and Spankie, J., expressly recognised the existence of a right of privacy.

54. In 1868, in a Moradabad case, Roberts and Pearson, JJ., expressly recognised the existence of a right of privacy.

55. In 1869, in a Jaunpur case, Pearson and Turner, JJ., either adopted the finding of the Munsif that there would be no interference with the privacy claimed, or they may have thought that there would be no material interference. They did not expressly hold that there could be no right of privacy.

56. In 1871, in an Allahabad case, Morgan, C. J., and Spankie, J., decided the appeal apparently on the ground that there was in that case no privacy to be interfered with, and not on the ground that no right of privacy could exist.

57. In 1874, in a Cawnpore case, in which the District Judge of Cawnpore had in his judgment stated that the custom of the country recognised a right of privacy, Pearson and Turner, JJ., either ignored that finding or treated it as a finding of a custom which could not exist in law.

58. In 1877, Stuart, C.J., and Oldfield, J., merely decided that the right of privacy claimed in respect of a lane did not exist. They did not suggest that no right of privacy could exist in these Provinces.

59. In 1878, in a Moradabad case, the claim of privacy was on appeal abandoned for some reason which is not stated.

60. In 1882, in an Agra case, Straight and Brodhurst, JJ., apparently considered that a right of privacy might exist, but that the facts found did not show how any such right was interfered with.

61. In S. A. No. 8 of 1886, Straight and Mahmood, JJ., evidently considered that a right of privacy could exist in respect of a house in the city of Allahabad. In a Cawnpore case, Lachman Prasad v. Jamna Prasad, Weekly Notes, 1887 p 295, Oldfield and Mahmood, JJ., when making the first order of remand, evidently considered that a right of privacy could exist; and Oldfield and Brodhurst, JJ., when making the second order of remand, must have considered that such a right could exist by custom. On the second remand, the Subordinate Judge of Cawnpore found that such a custom was proved, and on that finding Brodhurst, J., and I decreed the relief asked for.

62. Owing to the destruction of records during the Mutiny of 1857 I am unable to ascertain whether the existence of a custom of privacy in this part of India had ever been proved or called in question prior to 1855; and owing to the same cause and to the absence from the report of the case of Nuth Mull v. Zuka-oollah Beg and Kureem-oollah Beg, S. D. A. N.-W. P. 1855, p. 92, of information on the point, I am unable to ascertain whether the Judges of the Sadr Diwani Adalat of the North-Western Provinces were in that case following the law as they found it existing, or were deciding that ease on facts found.

63. With the exception of the Jaunpur case in 1869 and the Cawnpore case in 1874, which were decided by Pearson and Turner, JJ., I have not found any case in which any Judge of the Sadr Diwani Adalat of the North-Western Provinces or this Court has expressed any opinion from which even an inference could be drawn that he considered that a right of privacy could not exist in law, or could not

be obtained by custom; indeed, with the exception of those two cases, the inference has been the other way. It is a matter worthy of notice that the finding of the District Judge of Cawnpore as to a custom of privacy which Pearson and Turner, JJ., in 1874, either overlooked, ignored, or treated as a finding of a custom which could not exist in law, has been supported by the finding of the Subordinate Judge of Cawnpore in *Lachman Prasad v. Jumna Prasad*, Weekly Notes, 1887 p. 295. If Pearson and Turner, JJ., in the cases decided by them in 1869 and 1874, meant to decide that there could be no custom and no right of privacy in these Provinces, they neither discussed nor referred to any authorities on the subject as I would have expected them to have done, having regard to the previous decisions on that point.

64. In my opinion, the fact that there is no such custom of privacy known to the law of England can have no bearing on the question whether there can be in India an usage or custom of privacy valid in law. The conditions of domestic life in the two countries have from remote times been essentially different, and in my opinion, it is owing to that difference in the conditions of domestic life alone that a custom which appears to me to be a perfectly reasonable one in India should be unknown in England. In India, or at any rate in these Provinces, the custom of the parda has for centuries been strictly observed by all Hindus except those of the lowest castes, and by all Muhammadans except the poorest. It cannot be doubted that the male relations of a parda-nashin woman and the woman herself would consider it a disgrace were her face to be exposed to the gaze of male strangers, and whilst that is the view of those amongst whom the custom of the parda prevails, I think it is more reasonable that a neighbour should not be allowed to erect new buildings or to open or extend doors or windows in old buildings in such a way as would substantially interfere with those parts of his neighbour's house or premises which are used by parda-nashin women of the latter's family than to hold that the latter's only remedy is to build a wall on his own land, which, although it would maintain his privacy, might deprive his house of light and air and render it uninhabitable, or to screen his windows with probably the same result. We know as a matter of common knowledge that in these Provinces great numbers of parda-nashin women in the hot weather are, I may say, compelled from the severity of the climate to sleep in the open air, that is, either in the courtyards or

the verandahs of their houses. In such cases, where the privacy in fact exists and is or has been enjoyed, I can see nothing unreasonable in a custom that such privacy shall be protected.

65. I cannot see that by holding that a right of privacy may exist any such alarming consequences to the owners of house property in towns as apparently influenced the mind of Markby, J., in *Mahomed Abdur Rahim v. Birju Sahu*, 5 B. L. R. App. 678, will ensue. Every case must depend on its own facts. A primary question must in all cases be: Does the privacy in fact and substantially exist and has it been and is it in fact enjoyed? If it were found that no privacy substantially exists or is enjoyed, there would be no further question in an ordinary case to decide. If, on the other hand, it were found that privacy did substantially exist and was enjoyed, the next question would be: Was that privacy substantially or materially interfered with by acts of the defendant done without the consent or acquiescence of the person seeking relief against those acts? In the case of old buildings, what can an owner of one of the old buildings have to complain of, if a usage or custom exists, by which he cannot so alter his old building, as to deprive his neighbour's old building, of the privacy which has been enjoyed, and make it unavailable as a zenana, or, in other words, deprive it of all residential value and in this way depreciate its market value. Such a custom where it exists in India is merely an application of the maxims '*Sic utere tuo ut alienum non laedas*' and '*aedificare in tuo propria solo non licet quod alteri noceat*'.

66. I do not suggest that these maxims would, in a case like this, be applicable in England, where no such right of privacy is known to the law. In the case of a building for parda purposes newly erected, without the acquiescence of the owner of an adjacent building site, it appears to me, that a custom which would prevent the owner of such an adjacent site from building so as to interfere with the privacy of the first new building, would be an unreasonable, and consequently, a bad custom in law. If, however, the owner of such an adjacent building site, were without protest or notice, to allow his neighbour to erect, and consequently to incur expenses in erecting buildings or premises for the use of parda-nashin women, I think a custom which would prevent him subsequently interfering with the privacy of such new building, would not be unreasonable in this country.

67. Having given the best consideration which I can to this question, I am of opinion that such a right of privacy as that to which I have already referred exists, and has existed in these Provinces, apparently by usage, or, to use another word, by custom, and that substantial interference with such a right of privacy where it exists, if the interference be without the consent of the owner of the dominant tenement, affords such owner a good cause of action.

68. In the present case, the defendant in her deposition distinctly admitted that the southern doors of her newly-erected house, and, consequently her verandah, overlooked and intruded upon the privacy of the female apartments of the plaintiff's house. After that admission her vakil decided to call no further witnesses on her behalf. It was contended before us by the defendant's vakil that as the other portions of the plaintiff's house and part of the courtyard of his house were overlooked from the houses of other people, there could be no substantial interference with any privacy of the plaintiff's house. If the facts on which that contention is founded exist, then it appears to me that the doors and the verandah of the defendant's house, which interfere with the privacy which the defendant has admitted that the plaintiff's premises have enjoyed, must materially interfere with such privacy as has existed, and that the result of allowing that contention to be valid would be to deprive the plaintiff's house of all privacy.

69. I am of opinion that this appeal should be allowed with costs, the decree of the District Judge set aside with costs, and the decree of the Munsif restored.

Mahmood, J.

70. The learned Chief Justice has fully and exhaustively dealt with the difficulties which arise in this case owing to the conflicting nature of the case-law, and I agree with him so fully that it is not necessary for me to deliver a separate judgment.' But as a native of India myself, I may without hesitation say that in the territories subject to the jurisdiction of this Court the parda system prevails alike among Hindus and Muhammadans, and that both these sections of the community by immemorial usage and custom, regard invasion of privacy as actionable. Indeed, if we were to hold any view other than that which the learned Chief Justice has

expounded, we should really be reducing even the market value of thousands of houses inhabited by the female portion of the population, if not also the value of houses used by male members of the Hindu and the Muhammadan population of these Provinces. There is no statute-law applicable to these Provinces to govern the decision of a case such as this, and I fully concur with the learned Chief Justice in his opinion that the importation of the English law, as to the invasion of privacy being un-actionable, is not only not justified, but positively opposed to the customs, habits, and conditions of life of the populations living under the jurisdiction of this Court. Even in Europe, countries whose principles of law are derived from or founded on the civil law, recognise invasion of privacy as an actionable wrong, a doctrine which no doubt owes its origin to the conditions of life in those countries, regulated as their conditions must necessarily be by the climate and the social and religious habits of the population.

71. The parda system which in India is based both on religious and social notions may have its faults; but Judges take facts as they are, and we, sitting here as Judges with a duty to adjudicate upon such disputes, must take cognizance of those facts and administer justice between the parties.

72. The learned Chief Justice has pointed out that under conditions of life, such as they are in these Provinces, the custom that invasion of privacy is actionable is far from being an unreasonable custom, and the custom itself is so well recognised, that Mr. Moti Lai for the respondent in the course of his argument stated that it was wholly unnecessary to remand the case for ascertaining the custom.

73. I concur in all the views to which the learned Chief Justice has given expression. I have no doubt that those views will be greeted by the entire Hindu and Muhammadan population of these Provinces; and I hope that his Lordship's exhaustive judgment will place the law, as administered by this Court, upon a firm and ascertainable footing, rendering ineffective the rulings to the contrary, which have unfortunately done much to disturb the comfort of neighbours in towns, and have, I am afraid, encouraged unnecessary invasion of the immemorial right of privacy, and consequent litigation.

