Allahabad High Court
Rameshwar Dayal vs Maharaj Charan And Anr. on 20 January, 1922
Equivalent citations: (1922) ILR 44 All 343
Bench: G Mears, P C Banerji
JUDGMENT Grimwood Mears, C.J. and Pramada Charan Banerji, J.

1. We are of opinion that the decree of the lower appellate court must be affirmed, because we are unable to see upon what principle it has been decided that the statutory right, which the plaintiff had as owner of house No. 2 to discharge his water into the drain of the defendant's house No. 3, has been extinguished. It is true that the plaintiff was a wrong-doer when, having built on house No. 2 a new privy, he connected that up with the drain which had hitherto carried water from one privy alone in house No. 2 to house No. 3. The method by which he connected up the new privy with the old drain was, in one sense, permanent and, in another sense, not permanent, because it was capable of being blocked or cut away in a very short time. It is clear law that if a man has, for instance, a right to walk across a certain field, he does not lose that right of walking across that field merely because he commences to drive across it in a carriage, that is, he is not penalized and deprived of his right of using the land by walking over it because he has asserted and wrongfully exercised the right to pass over it in a carriage. The remedy open to the owner of the servient tenement is to proceed against the person who claims the wrongful enlarged user and, on his refusal to desist from his conduct, to take proceedings for an injunction. At one time it was thought that the right to ancient lights could be lost by pulling down a building which had acquired a right to lights and that the newly erected building did not have the privilege attaching to the ancient lights in the previous building. That, however, is not Saw to-day, and indeed on this question of abandonment of ancient rights there have been several recent cases mainly relating to light and air. The case of Harris v. Flower and Sons (1905) 91 L.T. 816 is a case in point on the question of abandonment.

2. Reliance has been placed upon Section 43 of the Indian Easements Act, but we question whether the permanent change referred to in this section does not mean such a change as, for instance, the construction of a building with 12 or 14 large windows in place of 3 or 4 smaller ones. Than is a permanent change in the dominant heritage and the owner of the servient tenement cannot reduce the burden without interfering with what undoubtedly was the prior right of the owner of the building, namely, to have light and air to the smaller number of windows. If, therefore, whatever steps the servient tenement can take must necessarily interfere with the lawful enjoyment of the original arrangement and the additional burden cannot be reduced, then his easement is extinguished. Here, however, the burden can be reduced without difficulty to its original limits. The connection between the new privy and the drain from No. 2 that passes into No. 3 can be blocked up or cut away and the parties will, in all respects, be reverted to their original position as it was before the plaintiff wrongfully connected up the new privy with the old drain. We, therefore, think that the decree made by the court of first instance, which was affirmed by the lower appellate court, was a proper decree and this appeal must be allowed. We, accordingly, set aside the decree of the learned Judge of this Court and restore that of the lower appellate court. We direct the parties to bear their own costs.