CIVIL RULE

Before Mookerjee and Beachcroft, JJ.

ISRAIL

v.

SHAMSER RAHMAN.*

1913

Aug. 27

Temporary Injunction—Conditions of grant of temporary injunction—Co-owners—Building by co-owner—Undue advantage—Revision by High Court—Charter Act (24 & 25 Vict., c. 104), s. 15.

Where plaintiffs who were joint owners with defendants in respect of the property in suit sued them for declaration of title thereto and applied for an injunction to restrain the defendants from building on the land, and the lower Appellate Court set aside the temporary injunction granted by the Court of first instance:

Held, that sole occupation by one co-sharer did not necessarily constitute ouster of the other co-owners. But a co-owner who was, with the tacit or express consent of his co-sharer, in sole occupation of a portion of joint property, was not entitled to change the nature of that possession or to use the property in a mode different from that in which it had previously been used.

Dwijendra Narain Roy v. *Purnendu Narain Roy* (1) followed.

Held, further, that in granting an *interim* injunction what the Court had to determine was whether there was a fair and substantial question to be decided as to what the rights of the parties were.

Moran v. *River Steam Navigation Co*, (2) followed.

The real point was, not how these questions ought to be decided at the hearing of the cause, but whether the nature and difficulty of the questions was such that it was proper that the injunction should be granted until the time for deciding them should arrive.

Walker v. *Jones* (3) followed.

*Civil Rule, No. 1138 of 1913, against the order of Jogendra Nath Bose, Subordinate Judge of Khulna, dated Aug. 5, 1913, reversing the order of S. C. Mitter, Munsif, Khulna, dated June 26, 1913.

(1) (1910) 11 C. L. J. 189. (2) (1875) 14 B. L. R. 352, 357.
(3) (1865) L. R. 1 P. C. 50, 61.

Held, also, that under circumstances like these the matter for consideration at that stage was, where did the balance of convenience lie, was it desirable that the *status quo* should be maintained or was it right that defendants should be allowed to continue to alter the character of the land.

Jones v. *Pacaya Rubber and Produce Company, Ld.*, (1), *Aynsley* v. *Glover* (2), *Currier's Company* v. *Corbett* (3), *Newson* v. *Pender* (4) referred to.

Held, further, that in a case of this description (Where a substantial portion of the building had been erected after the defendants had become aware of the institution of the suit and of the application for temporary injunction) the Court would, if necessary, proceed not only to grant a temporary injunction restraining the further erection of the building but also to direct that the building already erected be taken down.

Daniel v. *Ferguson* (5), *Von Joel* v. *Hornsey* (6) referred to.

Held, that the High Court was competent to interfere under s. 15 of the Charter Act (24 & 25 Vict., c. 104) in view of the conduct of the defendants which amounted to a defiance of the authority of the Court.

RULE granted to Israil and others, the petitioners.

The facts of the case, as appear from the judgment of the lower Appellate Court, were as follows. "The plaintiffs alleged that the disputed land belonged to one Ibrahim Sheikh, the predecessor of the parties, and that the defendant No. 2 alone was constructing a building in such a way as to interfere with the right of joint possession. The defendant No. 2 claimed to be the sole owner in his own right, and contended that even if the property be joint, the plaintiffs could get no remedy without partition. Both parties filed affidavits. The defendants' affidavit showed that Ibrahim Sheikh left many properties including lands even in the town of Khulna more valuable than the disputed land and that the defendant No. 2 had all along been in exclusive possession of the disputed

(1) [1911] 1 K. B. 455.
(2) (1874) L. R. 18 Eq. 544, 553.
(3) (1865) 2 Drew. & Sm. 355, 360.
(4) (1884) 27 Ch. D. 43.
(5) [1891] 2 Ch. 27.
(6) [1895] 2 Ch. 774.

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land. In the plaintiffs' affidavit, there was nothing to contradict these statements. It did not even appear that the plaintiffs had ever objected to the exclusive possession of the defendant No. 2."

The Court of first instance granted an injunction restraining the defendants from proceeding with the erection of the building during the pendency of the suit.

The learned Subordinate Judge of Khulna, on appeal, modified the order of the first Court observing as follows :—

"There are many properties *ejmali* between the parties and the defendant No. 2 is in exclusive possession of this plot of land all along without any objection on the part of the plaintiff or other co-sharers and so there is either implied consent or at least acquiescence on the part of the other co-sharers. The prayer is therefore by a person out of actual possession against a co-sharer who is in exclusive possession of the land either under implied consent or at least acquiescence on the part of the other co-sharer. In this view the plaintiffs are not entitled to the injunction prayed for, the more so, as by the construction of the building no injury is being done to the property, and even according to the plaintiffs it is no case of injury to the property. The plaintiffs wanted to make out a case of personal injury but that has hardly been made out. The plaintiffs filed a statement showing at what stage the injunction was granted. It will appear from that statement that the building is nearly complete. If there is any inconvenience to the access of the back part of the building, that inconvenience will not be removed by the injunction or even by a decree for joint possession inasmuch under the decree the present construction will not be demolished. If a temporary or permanent injunction is given it will not benefit the plaintiffs in the least but cause injury to the defendants, since a considerable amount spent in constructing the building will remain unprofitable. So under no consideration should an injunction be granted restraining the construction of the building."

Thereupon the plaintiffs moved the High Court and obtained this Rule.

Babu Nilmadhab Bose (with him *Babu Haripada Chatterjeee*), for the petitioners. It is necessary to begin with the facts of this case which are clearly

set forth in the petition. The petitioners are co-sharers and in joint possession with the defendants opposite party, except defendant No. 1, the lands in dispute being 5 cottahs in area situated in the town of Khulna. On 24th May 1913 plaintiffs filed this suit for declaration of their joint title and possession and for the issue of a permanent injunction.

The defendants Nos. 1 and 2 (opposite party) having maliciously begun to dig the foundations of a permanent building on 11th May 1913, the petitioners applied for the issue of a temporary injunction on 24th May 1913, which was granted and issued on 26th June 1913. The defendants, who were already aware of the institution of this suit and were served with the summons about a week after its institution, hurried on the construction of the intended building employing a very large number of workmen though at the time of the institution of these proceedings they had merely dug the foundations but had not commenced the construction of the building. And with a view to defeat the purpose of the injunction prayed for, they hurried on the work of construction so rapidly that they had built up to a considerable height when they received the order of injunction from the Court of the Munsif.

Under these circumstances the decision in *Moran* v. *River Steam Navigation Company* (1) is applicable, and defendants are not therefore entitled to any relief in the High Court and ought not to be allowed to go on with the construction of the building.

Babu Ram Chandra Majumdar (with him ***Babu Narendra Nath Sen***, ***Babu Bhudar Haldar***, and ***Maulvi A. K. Fazlul Huq***), for the opposite party. I submit there is no question of want of jurisdiction and in consequence the High Court cannot interfere. A

(1) (1875) 14 B. L. R. 352, 357.

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substantial portion of the building was not erected after notice of the suit or application for injunction. The High Court cannot under its revisional jurisdiction interfere with the findings of fact arrived at by the learned Subordinate Judge and grant a temporary injunction which had been refused on the merits.

Babu Nilmadhab Bose, in reply. The High Court has ample jurisdiction under s. 115 of the Code of Civil Procedure.

I find from the petition that the application is made also under s. 15 of the Charter.

Cur. adv. vult.

MOOKERJEE AND BEACHCROFT, JJ. The petitioners are plaintiffs in a suit for declaration of title to immoveable property and for an injunction to restrain the defendants from building on the land. The plaintiffs and the defendants are joint owners in respect of this property, but the defendants alone have been in actual occupation of the land with the consent of their co-owners. On the 11th May 1913, the defendants began to dig for the foundation of a substantial building which they intended to erect on the land. On the 24th May, the plaintiffs commenced this action and applied for a temporary injunction. Notice of this application was served on the defendants on the 7th June, and on the 26th June, the Court granted an injunction by which the defendants were restrained from proceeding with the erection of the building during the pendency of the suit. The Court found that the plaintiffs had come before the Court in proper time, and that it was impossible to deny that the greater portion of the building had been raised since the institution of the suit, apparently with full knowledge of the proceedings. The matter was then taken by the defendants on appeal to the Subordinate Judge,

who, on the 3rd August, modified the order of the primary Court. His order is ambiguous and its precise effect has been the subject of discussion before us. The Subordinate Judge has held that the defendants would not be entitled to make any new construction, save the construction of a staircase to the north of the small projection of the building, for reaching the projection; that no equity will arise in favour of the defendants for completing the building, over and above what, if any, they may be entitled to claim by reason of the construction already made; and that the defendants would be entitled to improve the condition of the existing huts to make them fit for kitchen and for use by servants, but they would not be entitled to construct any new hut. The formal order, as embodied in the decree which was drawn up in the case, however, does not embody these conditions; it records merely that the appeal is allowed. The plaintiffs have now applied to this Court, and on their behalf it has been contended that the order made by the Subordinate Judge is manifestly erroneous and should be discharged.

The Subordinate Judge has held that inasmuch as the defendants were in sole occupation of the land with the consent of their co-sharers, they were entitled to erect buildings thereon and that the plaintiffs were in no way prejudiced by the erection of such buildings, because in the event of a partition of the entire joint property of the parties, the plaintiffs might be awarded some other piece of land. In our opinion, the view taken by the Subordinate Judge is opposed to the well established rule applicable to cases of this description. As was pointed out by this Court in the case of *Dwijendra Narain Roy* v. *Purnendu N. Roy* (1), the mere circumstance that

(1) (1919) 11 C. L. J. 189.

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one co-sharer has taken possession of a portion of joint property, does not entitle the other co-sharers to claim joint possession; in other words, sole occupation by one co-sharer does not necessarily constitute ouster of the other co-owners. At the same time, it does not follow that because a co-owner is, with the tacit or express consent of his co-sharer, in sole occupation of a portion of joint property, he is entitled to change the nature of that possession or to use the property in a mode different from that in which it had previously been used. It is not necessary for our present purposes, indeed, it is not right, that we should further examine this point with reference to the special facts before us and thus anticipate the decision of the question in controversy between the parties, in the suit. What the Court has, at this stage, to determine is whether there is a *bonâ fide* contention between the parties, or, as was said by Mr. Justice Markby in *Moran* v. *River Steam Navigation Company*(1), whether there is a fair and substantial question to be decided as to what the rights of the parties are. To the same effect is the decision of their Lordships of the Judicial Committee in the case of *Walker* v. *Jones*(2) where Turner, L.J. observed as follows: "The real point is, not how these questions ought to be decided at the hearing of the cause, but whether the nature and difficulty of the questions is such that it was proper that the injunction should be granted until the time for deciding them should arrive." It is quite sufficient if the Court find a case which shows that there is a substantial question to be investigated and that matters should be preserved in *statu quo* until that question can be finally disposed of: *Jones* v. *Pacaya* (3). Now, upon the facts stated in the

(1) (1875) 14 B. L. R. 352, 357. (2) (1865) L. R. 1 P. C. 50, 61.
(3) [1911] 1 K. B. 455.

present case, there is no room for controversy that the Court has to decide a fair and substantial question as to what were the relations subsisting between the parties, and what were the rights and obligations flowing from those relations. Under circumstances like these, the matter for consideration at this stage is, where does the balance of convenience lie, is it desirable that the *status quo* should be maintained or is it right that the defendants should be allowed to continue to alter the character of the land? It is well settled that the Court will not refuse an injunction in a case of this description so as to give the defendants an undue advantage over the plaintiffs. If the defendants in the case before us were allowed to proceed to the completion of the building which has been erected by them on the land, it is indisputable that they will be placed in a position of undue advantage over the plaintiffs. In this connection, reference may be made to the judgment of Sir George Jessel in the case of *Aynsley* v. *Glover* (1) where that learned Judge observed as follows: "At all events, this being an interlocutory application, let me continue my building and I will undertake to pull it down if the Court shall so think fit." That is a very specious argument to address to the Court, but one must have regard to the effect of allowing such a proceeding. Supposing a defendant erects a building at great cost, when he comes to the hearing, he will say to the Court: Compare the injury to me, in pulling down the building with the injury to the plaintiff in allowing the building to remain. Ought or ought not the Court to give weight to such a representation? I think upon this point the observations of Vice-Chancellor Kindersley in the case of the *Curriers' Company* v. *Corbett* (2) are very important. The Vice-Chancellor says: "If the defendant's

(1) (1874) L. R. 18 Eq. 544, 553. (2) (1865) 2 Drew. & Sm. 355, 360.

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buildings had not been completed, there would have been ground for interference by injunction; but as they have been completed, the question is whether the Court ought to or would order the pulling down of the buildings, or give some compensation in damages. The defendant's new buildings are of considerable magnitude and importance, while the two houses of the plaintiffs are comparatively of small value and importance; and it has been decided that in such a case the Court will not, as a matter of course, order the defendant to pull down his new buildings, but will give to the party injured by the erection of those buildings compensation in damages. It appears to me that this is precisely one of such cases." Consequently the learned Vice-Chancellor considered "that the buildings being erected, the comparative values of the defendant's buildings and the plaintiffs were sufficient to induce him to refrain from granting an injunction in a case where, if the buildings had not been erected, he would have granted the injunction. If that is so, and if those considerations are to weigh with the Court upon the question of damages or injunction, I ought not to allow the defendant to proceed with his building, which will put him in such an advantageous position as regards the plaintiffs when the case comes to a hearing." To the same effect is the decision in *Newson* v. *Pender* (1). In the case before us, therefore, *prima facie*, the defendants should not to be allowed to proceed to complete the building which they have erected. But the case for the plaintiffs is materially strengthened when we bear in mind the conduct of the defendants. The Court of first instance found that there was good reason to hold that a substantial portion of the building had been erected after the defendants had become aware

(1) (1884) 27 Ch. D. 43.

of the institution of this suit and of the application for temporary injunction. In a case of this description, the Court would, if necessary, proceed not only to grant a temporary injunction restraining the further erection of the building, but also to direct that the building already erected be taken down. In *Daniel* v. *Ferguson* (1) the plaintiff filed a suit for an injunction restraining the defendant from building so as to obstruct his ancient light and gave notice of motion for an *interim* injunction. The defendant, thereupon, working day and night, ran up the wall to a height of 40 feet. Mr. Justice Stirling granted an injunction restraining future building and ordering the removal of the wall, and this order was confirmed on appeal. Similarly, in the case of *Von Joel* v. *Hornsey* (2) where the defendant had evaded notice of the writ in the action and continued to build until substituted service was effected, a temporary injunction was granted ordering the defendant to pull down all that had been built since the plaintiff had warned him of his intention to bring an action. In the case before us, the plaintiffs did not invite the Court to direct the defendant to take down so much of the building as had been erected after the 6th June 1913; they simply ask that the defendants should be restrained from proceeding with the building any further. In our opinion, upon the merits of the case, there is no room for controversy that the order made by the Subordinate Judge cannot possibly be supported. The only question for consideration is whether this Court is competent to interfere in the exercise of its revisional jurisdiction. We do not feel pressed by the objection suggested, because obviously it is competent to this Court to interfere under section 15 of the Charter Act; and in view of

(1) [1891] 2 Ch. 27. (2) [1895] 2 Ch. 774.

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the conduct of the defendants, which, in substance, amounts to a defiance of the authority of the Court, we are of opinion that this is a case in which ample ground has been made out to justify our interference.

The result is that this Rule is made absolute, the order of the Subordinate Judge discharged and that of the Court of first instance restored. The petitioners are entitled to the costs of these proceedings in all the Courts.

G.S. *Rule absolute.*

ORIGINAL CIVIL.

Before Jenkins, C.J., Stephen and Chaudhuri, JJ.

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Aug 29.

In re AN ATTORNEY.*

Sanction for prosecution—Discretion—Judicial decisions, application of—Criminal Procedure Code (Act V of 1898), ss. 4(l), 195, 476, 492—S. 195, scope of and practice under—Public Prosecutor.

Section 195 of the Code of Criminal Procedure vests in the Court an absolute discretion as regards granting sanction to prosecute: this discretion cannot be restricted by judicial decisions, but must be fairly exercised according to the exigencies of each case, the Court being astute to see that there is no abuse of the administration of criminal justice.

Gardner v. *Jay* (1) and *Saunders* v. *Saunders* (2) referred to.

Under section 195, no notice of the application for sanction need issue and the accused person need not even be named. The validity of the sanction cannot be questioned in the enquiring or the trying Court.

Per STEPHEN, J: Proceedings under section 195 should frequently and even usually be *ex parte*.

In re Parce Kunhammad (3), *Pampapati Sastri* v. *Subba Sastri* (4), *In the matter of Gauri Sahai* (5), *Ram Prosad Roy* v. *Sooba Roy* (6), *Radha*

* Application for sanction to prosecute under s. 195, Criminal Procedure Code.

(1) (1885) L. R. 29 Ch. D. 50, 58.
(2) [1897] P. 89, 95.
(3) (1903) I.L.R. 26 Mad. 116.
(4) 1899) I.L.R. 23 Mad. 210.
(5) [1883] I. L. R. 6 All. 114.
(6) (1897) 1 C. W. N. 400.