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MANGTULAL BAGARIA v. UPENDRA MOHAN PAL CHAUDHURI.

GHOSE J.

preparing Exhibits 11 and 12 of the respondents' portion of the paper-book must be excluded, as they have already been printed by the plaintiff.

The property will be now sold in terms of the decree of the lower court.

Let the records be sent down without delay.

PANTON J. I agree.

Appeal dismissed.

R. K. C.

APPELLATE CIVIL.

Before Mukerji and Mallik JJ.

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Feb. 27.

AKSHAY KUMAR SHAHA
v.
BHAJAGOBINDA SHAHA.*

Injunction—Co-owner—Joint estate—Co-sharer—Permanent building—Sole occupation—Justice—Equity—Good conscience.

In the Calcutta High Court, it has been held that there is no such broad proposition that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction.

The Shamnugger Jute Factory Co., Ld. v. *Ram Narain Chatterjee* (1) followed.

Najju Khan v. *Imtiaz-ud-din* (2) dissented from.

In Bengal, the courts of justice, in cases, where no specific rule exists, are to act according to justice, equity and good conscience; and if, in a case of share-holders holding lands in common, it should be found that one co-sharer is in the act of cultivating a portion of the lands, which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work or to allow any other share-holder to appropriate to himself the fruits of the other's labours or capital.

Watson & Company v. *Ramchund Dutt* (3) followed.

The courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners, though they will do so in a proper case.

Lachmeswar Singh v. *Manowar Hossein* (4) followed.

In the matter of injunctions, there is a considerable distinction between a case in which the other co-sharers, acting with diligent

*Appeal from Appellate Decree, No. 2216 of 1926, against the decree of G. C. Sankey, District Judge of Mymensingh, dated July 8, 1926, affirming the decree of Jnanendra Mohan Das, Subordinate Judge of Mymensingh, dated April 11, 1923.

(1) (1886) I. L. R. 14 Calc. 189.
(2) (1895) I. L. R. 18 All. 115.
(3) (1890) I. L. R. 18 Calc. 10; L. R. 17 I. A. 110.
(4) (1891) I. L. R. 19 Calc. 253; L. R. 19 I. A. 48.

watchfulness of their rights, seek by an injunction to prevent the erection of a permanent building, and a case in which, after a permanent building has been erected at a considerable expense, they seek to have it removed.

Nocury Lall Chuckerbutty v. *Bindabun Chunder Chuckerbutty* (1) referred to.

Unless there is ouster or other substantial injury, no restraint should be pnt and no injunction should be granted. Sole occupation by itself is not ouster, unless it is attended by an assertion of a hostile title.

Basanta Kumari Dassya v. *Mohesh Chandra Shaha* (2) referred to.

SECOND APPEAL by Akshoy Kumar Shaha, plaintiff.

The facts of the case, out of which this Second Appeal arose, appear fully in the following extracts from the judgment of the lower appellate court :—

"This appeal is directed against the judgment of the lower court, "dismissing plaintiff's suit for a declaration that the defendants "have no right to erect a permanent structure on the lands in suit "and also for a mandatory injunction. The facts of the case are "as follows. The land in suit measures ·68 of an acre and is a part "of settlement plot No. 869 within the four annas share of *kismat* "Babnaparha *diha*. The original estate, to which this land belongs, "was a *zemindari* No. 11. This estate is divided into 4 numbers: "11, 5151, 5152 and 5153. The plaintiff is the *patnidar* of the "estate No. 5151. His case is that the defendants hold the land in "suit as tenants at will and have no right to erect a permanent "structure on it without the consent of the landlords. The defen- "dants began to erect a double-storied building on this portion of "plot No. 869. The plaintiff, when he came to hear of it, instituted "the present suit. He also applied for a temporary injunction on "the defendants to prevent them from completing the building. "This injunction was refused by the learned Subordinate Judge "and the appeals against his decision before the District Judge "and the High Court were dismissed. The plaintiff's case is that he "would be substantially injured if this building were permitted to "be completed."

"The case for the defendants is that they hold the land in suit "and other lands with permanent right under all the four shares "of the *zemindari*. In this *jote*, there have been, for many years, per- "manent and semi-permanent structures, which they have built and "occupied without any protest on the part of the landlords. The "present building is merely a replacement of a previous semi- "permanent building on the same site. It does not, in any way, "injure the plaintiff and does not diminish the value of the land. "They contend that they are justified in erecting it by virtue of "their rights as tenants on the land. Their second claim is that, "in 1298 B.S., their predecessors obtained a permanent tenure for a "three annas 4 *gandas* share from the *zemindars* of estates 5151 "and 5152. These plots have been specifically assigned to this tenure. "In 1327 B.S., the defendants obtained *patni* settlement of a 5 annas "and odd share from the *zemindars* of estates 5151 and 5152. These "plots have been specifically assigned to this tenure. In 1327 B.S.,

(1) (1882) I. L. R. 8 Calc. 708. (2) (1913) 18 C. W. N. 328.

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"the defendants obtained *patni* settlement of a 5 annas and odd "share from the *zemindars* of estates 11 and 5153. They, therefore, "claim to be co-sharers with the plaintiff in the superior right to the "extent of 9 annas and odd. In this capacity also, they assert their "right to erect the building in question. The third contention put "forward by the defendants is that the Subordinate Judge was "right in holding that the *jote* in question was a culturable one and "that they are settled *raiyats* in the village and by that right also "are entitled to build. All these three points have been decided in "favour of the defendants by the learned Subordinate Judge and "for this and other reasons he has dismissed the plaintiff's suit."

* * * * * * *

"We, therefore, find that the 4 conditions laid down in *Abdul* "*Hakim Khan Chowdhury* v. *Elahi Baksha Saha* (1) exist in the "present case. The holding, therefore, may be presumed to be a "permanent one and on such a holding the tenant has the right "to erect a permanent structure. It is clear, therefore, that, from "this point of view also, the plaintiff has no right to obtain a "mandatory injunction. It does not seem to be necessary in the "circumstances to discuss the other points raised in this appeal. "The learned Subordinate Judge has, in my opinion, decided the "suit rightly. The appeal is, therefore, dismissed with costs."

Being aggrieved by these decisions, the plaintiff preferred this Second Appeal.

Sir B. C. Mitter, *Dr. Bijankumar Mukherji*, *Mr. Satyendrakishore Ghosh* and *Mr. Pashupati Ghosh*, for the appellant.

Mr. H. D. Bose and *Mr. Pareshchandra Mitra*, for the respondents.

Cur. adv. vult.

MUKERJI AND MALLIK JJ. This appeal arises out of a suit, which was instituted by the plaintiff, for a declaration that the defendants had no right to erect a permanent structure on the land in suit, for a mandatory injunction directing the demolition of the structure to the extent that it had been erected and for other reliefs. During the pendency of the suit, a temporary injunction was issued against the defendants, restraining them from proceeding with the erection of the structure, but it was eventually withdrawn, it being ordered that the defendants were at liberty to erect the building at their own risk.

The land in suit is a part of C. S. *dag* No. 869, which appertains to a 4 annas *hisya* of *kismat* Babnaparha *diha*. The *kismat* lies in 4 *touzis*, Nos. 11, 5151, 5152 and 5153. The plaintiff has taken a *patni*

(1) (1924) I. L. R. 52 Calc. 43.

of *touzi* No. 5151, and has thus acquired a 4 annas share of the 4 annas *hisya* of the *kismat*. His case was that the defendants are in occupation of the said C. S. *dag* No. 869 as tenants-at-will.

The defendants resisted the claim upon three main grounds: They alleged that they hold a permanent tenancy under the plaintiff and the other co-sharers *patnidars* in respect of the said C. S. *dag* No. 869 and also several other plots, and that they had as such tenants erected permanent and semi-permanent structures without any protest from their landlords, which had been in existence from a long time, and that the present structure was but in replacement of an old one. Nextly, they alleged that in 1298 B. S. their predecessors obtained a *mirash taluk* to the extent of 3 annas 4 *gandas* share from the *zemindars* of *touzi* No. 5152, and that C. S. *dag* No. 869 is one of the plots specifically allotted to them in that share; and also that in 1327 B.S., they obtained a *patni* settlement of 5 annas odd share from the *zemindars* of *touzis* Nos. 11 and 5153; and that they are thus co-sharers with the plaintiff to the extent of 9 annas and odd share. Thirdly, they say that they are settled *raiyats* in the village and in that capacity too they are entitled to erect permanent structures.

The courts below have dismissed the suit. Hence this appeal by the plaintiffs.

To take, first, the defence of the defendants on the footing of their being co-sharers of the plaintiff. The courts below have concurrently found that the defendants are in actual possession of far less land than they would be entitled to if the property were partitioned. The appellant has challenged this finding on the ground that the learned District Judge has given no reasons in support of it, and also on the ground that the trial court proceeded on the assumption, which is said to be erroneous, that the predecessors of the defendants acquired 3 annas 4 *gandas* share in the entire *touzi* 5152, while the fact is that they acquired such share in only 8 *pakhis* of land. Now the plaintiff's case in the plaint was that C. S. *dag* No. 869

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consists of 1·3 acres, of which the defendants have taken exclusive possession of ·68 acres. The Subordinate Judge found that the entire quantity of land in the four *touzis* is 141·94 acres, of which the defendants are entitled to have 48 acres, and the quantity of land in C. S. *dag* No. 869 is 1·3 acres, of which the defendants are entitled to ·60 acres, and the plaintiff to ·26 acres. He also found that the defendants were in fact in possession of only 22 acres in the entire block and that the building in question occupies much less than ·60 acres. The dimensions of the building have been proved in the evidence, and from that the learned Subordinate Judge came to the above conclusion. These conclusions were not challenged by the plaintiff in his appeal to the District Judge: not only has the learned District Judge not noticed any such contention in his judgment, but there was even no ground to that effect in the plaintiff's memorandum of appeal to the lower appellate court. Our attention has been drawn to ground No. 35, as being one, which was intended to raise this contention, but that ground, in our opinion, was taken for quite a different purpose. These conclusions are conclusions of fact and we think we are in the circumstances bound by them.

The question then arises, whether, taking the conclusions as correct, the plaintiff is entitled to the reliefs that he has asked for. Now, the view of the Allahabad High Court that one of several joint owners of land is not entitled to erect a building upon the joint property without the consent of the other joint owners, notwithstanding that the erection of such building may cause no direct loss to the other joint owners [*Najju Khan* v. *Imtiaz-ud-din* (1), *Shadi* v. *Anup Singh* (2)], has been expressly dissented from in this Court in the case of [*Fazilatunnessa* v. *Ijaz Hassan* (3)], as not being consistent with the line of decisions by this Court. In this Court, it has been held that there is no such broad proposition that one

(1) (1895) I. L. R. 18 All. 115. (2) (1889) I. L. R. 12 All. 436.
(3) (1903) I. L. R. 30 Calc. 901.

co-owner is entitled to an injunction restraining another co-owner from exceeding his rights absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction [*The Shamnugger Jute Factory Co., Ld.* v. *Ram Narain Chatterjee* (1)]. This principle has been consistently recognized in later decisions [*Joy Chunder Rukhit* v. *Bippro Churn Rukhit* (2), *Fazilatunnessa* v. *Ijaz Hassan* (3)]. In the case of *Watson & Company* v. *Ramchund Dutt* (4), their Lordships of the Judicial Committee observed: "In Bengal the court of "justice, in cases where no specific rule exists, are to "act according to justice, equity, and good conscience, "and if, in a case of share-holders holding lands in "common, it should be found that one co-sharer is in "the act of cultivating a portion of the lands which "is not being actually used by another, it would "scarcely be consistent with the rule above indicated "to restrain him from proceeding with his work, or "to allow any other share-holder to appropriate to "himself the fruits of the other's labours or capital." Quoting this passage, their Lordships in their later decision in *Lachmeswar Singh* v. *Manowar Hossein* (5), observed that "the courts should be very cautious "of interfering with the enjoyment of joint estates as "between their co-owners, though they will do so in "proper case." In the matter of injunctions there is a considerable distinction between a case in which the other co-sharers, acting with diligent watchfulness of their rights, seek, by an injunction, to prevent the erection of a permanent building, and a case, in which, after a permanent building has been erected at a considerable expense, they seek to have it removed [*Nocury Lall Chuckerbutty* v. *Bindabun Chunder Chuckerbutty* (6)]. In view of the proceedings and order relating to the temporary injunction, the present

(1) (1886) I. L. R. 14 Calc. 189.
(2) (1886) I. L. R. 14 Calc. 236.
(3) (1903) I. L. R. 30 Calc. 901.
(4) (1890) I. L. R. 18 Calc. 10; L. R. 17 I. A. 110.
(5) (1891) I. L. R. 19 Calc. 253; L. R. 19 I. A. 48.
(6) (1882) I. L. R. 8 Calc. 708.

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case, no doubt, falls within the former category. Even then, unless there is ouster or other substantial injury, no restraint should be put and no injunction should be granted. Sole occupation by itself is not ouster, unless it is attended by an assertion of a hostile title [*Basanta Kumari Dassya* v. *Mohesh Chandra Shaha* (1)]. Here, in the present case, there is no such question of the defendants' sole occupation depriving the plaintiff's enjoyment of an existing actual user of the land, as was the case *Soshi Bhusan Ghose* v. *Gonesh Chunder Ghose* (2). Nor has the present case any analogy to a case in which, on the eve of or after institution of a suit for partition, a costly building is about to be put up by a co-sharer with the evident object of forcing the hands of the court to allot to his share the land of its site, as was the case in *Hemanta Kumar Roy* v. *Baranagore Jute Factory Company* (3). As regards injury, it is singular that the plaint does not specify any. All that the plaintiff says, in his deposition, is that the land is near the *bazar*, the hospital and the school, and he desires to remove to the place and erect a homestead there. The advantages referred to cannot be claimed by the plaintiff alone for his own benefit, and, if they are to be taken into account, the defendants have as much right to avail of them as he; and if the defendants have not exceeded the quantity that would fall to their share, on division of the plot, the plaintiff cannot justly complain. Moreover, there is nothing to indicate that the plaintiff, on a partition, would be able to show anything in the nature of a better right to have the portion on which the building has been erected. Nor again are there any materials suggesting that the portion built upon is better in quality than the rest of the lands of the plot. It is true that, when a partition will have to be effected, the present possession of the parties will have to be respected, but the partitioning court will not be powerless to adjust any equities that may arise

(1) (1913) 18 C. W. N. 328. (2) (1902) I. L. R. 29 Calc. 500.
(3) (1914) 19 C. W. N. 442.

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for consideration in view of the fact that the defendants have erected the building without the plaintiff's consent and inspite of his protest. That, however, is a different matter.

As what we have said is sufficient to dispose of the appeal, we do not pronounce any opinion on the other defences of the defendants.

The appeal, therefore, is dismissed: but, as the conduct of the defendants has not been too fair and has afforded legitimate ground to the plaintiff to seek the intervention of the court, our order is that each party will bear his or their costs in this litigation throughout.

Appeal dismissed.

G. S.

CRIMINAL REVISION.

Before Mukerji J.

NIBARANCHANDRA BHATTACHARYA

v.

EMPEROR.*

1929

Jan. 29.

Conspiracy—Cognizance without sanction of Local Government—Trial of charges not requiring sanction along with charges requiring sanction—Indian Penal Code (Act XLV of 1860), ss. 120B, 384, 384/114—Criminal Procedure Code (Act V of 1898), s. 196A.

Where the object of a conspiracy was to commit an offence under section 384, Indian Penal Code, and no sanction had been accorded by the Local Government to the prosecution of the accused under section 120B of that Code for conspiracy, and the accused were tried and convicted both under section 120B, and sections 384 and 384/114 of the Code,

held that the court could not take cognizance of the offence of conspiracy without sanction and the convictions under sections 384 and 384/114 could not be maintained either, as it was likely to result in prejudice to the accused.

Held, further, that the trial held on charges, which did not require sanction, along with such as were not cognizable without sanction under section 196A, Criminal Procedure Code, could not be separated in that way.

CRIMINAL RULE obtained by Nibaran Chandra Bhattacharya and another, accused.

*Criminal Revision, No. 1246 of 1928, against an order of T. H. Ellis, Sessions Judge, Faridpur, dated Sep. 22, 1928, affirming an order of B. C. Sen, Deputy Magistrate of Madaripur, dated July 31, 1928.