APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and C. C. Ghose J.

1932

Jan. 5.

JAHARMULL CHIMANLAL & CO.

v.

ISHWARDAS AGARWALLA.*

Damages—Injunction—Enquiry as to damages—Discretion of court.

In order to get an enquiry as to damages, a person, against whom an injunction had been obtained, must show that the injunction prevented him from doing something which otherwise he would have been able to do and that he had suffered loss thereby.

While the discretion of the court, both in giving damages and in ordering an enquiry, is a wide discretion, it is controlled by the ordinary principles applicable to the award of damages.

Smith v. *Day* (1) relied on.

APPEAL by the plaintiff.

The facts of the case appear fully from the judgment of Costello J., which was as follows :—

COSTELLO J. This is an application made on behalf of Ishwardas Agarwalla, the defendant, in a suit brought against him by the firm of Jaharmull Chimanlal, for an order that an enquiry be held as to whether the defendant has sustained any and, if so, what damages, by reason of an injunction granted by an order made in that suit and dated the 6th day of February, 1930, which the plaintiff firm ought to pay according to an undertaking given by them and embodied in the said order and for a further order that the plaintiff firm do pay to the applicant the amount which will be certified or reported by the officer making the enquiry and the costs of the said enquiry and also the costs of the present application.

The only question which I have at present to decide is whether, in the circumstances of this case, the applicant is entitled to the enquiry which he seeks.

The suit, out of which the matter arises, was instituted by Jaharmull Chimanlal & Co. against Ishwardas Agarwalla on the 6th February, 1930, and on that day an *interim* injunction was granted to the plaintiff firm upon an *ex parte* application. That injunction was granted by Mr. Justice Lort-Williams and it prohibited and restrained the defendant from dealing with or disposing of or alienating any of the moveable or immoveable properties belonging to him except as regards the moveable properties in the usual course of business.

*Appeal from Original Decree, No. 64 of 1931, in Suit No. 283 of 1930.

(1) (1882) 21 Ch. D. 421.

It is to be observed at the outset that the injunction was one of a class frequently and in some cases perhaps too easily obtained upon an allegation to the effect that the defendant was dishonestly dealing with his property or business assets with a view to defeat in advance and to save himself from the effect of any decree which the plaintiff in the suit might subsequently obtained. The order for the *interim* injunction was made on the basis of the plaintiff firm giving an undertaking to the Court to be answerable for any damages the defendant might sustain by reason of the making of the injunction. I need not say anything as to the subsequent history of the interlocutory proceedings in connection with the injunction except to state that, on the 5th March, 1930, the injunction was in fact dissolved on terms arrived at by consent of the parties. The position, therefore, was that the *interim* injunction fettering the actions of the defendant was in operation from the 6th February, 1930, until the 5th March, 1930. The subsequent history of the suit itself is not of importance in connection with the present application.

On the 5th April, 1930, the present applicant filed a suit, being suit No. 735 of 1930, against the firm of Jaharmull Chimanlal & Co., in which he claimed against that firm damages said to have been sustained by him by reason of the existence of the *interim* injunction which, according to the allegations of the applicant, had been improperly and indeed fraudulently obtained by Jaharmull Chimanlal & Co. There was also a claim for damages for slander alleged to have been uttered by Jaharmull Chimanlal & Co. against Ishwardas Agarwalla either in the course of the proceedings for the *interim* injunction or otherwise in connection with it.

On the 18th June, 1930, there was an application on the part of Jaharmull Chimanlal & Co. attacking the plaint in that suit brought against them by Ishwardas Agarwalla and asking for it to be taken off the file. It was said that the plaint disclosed no cause of action. It was said that there was no ground for the recovery of damages for slander as no action would lie for the malicious procuring of the injunction and that in the circumstances of the case there could be no slander. It was contended that the right procedure to be adopted by the person, against whom the injunction had been granted, if he had a grievance in the matter, was for him to make a substantive application to the Court in the suit in which the injunction had been granted. That application on the part of Jaharmull Chimanlal & Co. came before Mr. Justice Lort-Williams on the 22nd July, 1930. The learned Judge decided in favour of Jaharmull Chimanlal & Co., made an order staying the suit, but, at the same time, directing that the matter should be treated as if a proper application for an enquiry as to damages had been made. He further ordered that an enquiry as to damages should in fact take place. In the course of his judgment, given on the 22nd July, 1930, Mr. Justice Lort-Williams said :—

"I direct that the plaint and particulars herein as against the first defendant be treated as an application in the suit in which the injunction was granted, for an enquiry as to the sum to which the plaintiff is entitled as damages for loss caused to him by the injunction granted on the 6th February, 1930, and that such enquiry be held by the official referee—*quo ad ultra* the suit will be dismissed as against the first defendant. The costs including the costs of this application will be costs in the enquiry. The suit will be dismissed as against the first defendant."

Against that judgment of Mr. Justice Lort-Williams, Jaharmull Chimanlal & Co. appealed and, on the 10th March, 1931, the order of Mr. Justice Lort-Williams was set aside by the appeal court consisting of the Chief Justice and Mr. Justice Buckland.

1932

Jaharmull Chimanlal & Co. v. *Ishwardas Agarwalla.*

The learned Chief Justice in the course of his judgment said :

"This suit will be dismissed altogether. Liberty is given to the plaintiff to apply for enquiry as to damages in the other suit by notice of motion, the first defendant in the present suit undertaking to give notice of motion."

In pursuance of the liberty given to him in that judgment, Ishwardas Agarwalla now comes before me after having given the requisite notice of motion. There is, in my opinion, upon the authorities, no doubt that, in a matter of this kind, normally the right course is for the application for the enquiry to be made to the Judge who actually tries the suit in which the injunction was granted, and that such an application should be made at the conclusion of the suit or at any rate without any unreasonable delay [See *Ex parte Hall. In re Wood* (1)]. The suit, out of which the matter arises, however, did not come on for final determination until the 12th May, 1930, that is, something like a month after the suit for damages in respect of the making of an injunction had alreay been launched by Ishwardas Agarwalla. The institution of the latter suit may, therefore, in a sense, be said to have diverted the matter of damages in connection with the injunction away from the Judge who tried the original suit. It has been said that the ground for the jurisdiction of the Court to make an order for the assessment of damages is that the party who gives the undertaking puts himself in the power of the Court not only in the suit alone, but actually and wholly independent of the suit ; the undertaking being an absolute one that he will be liable in a particular event, for any damages that may be sustained—See *Newby* v. *Harrison* (2). So far as any question of delay is concerned that was anticipated and provided for in the order of the learned Chief Justice to which I have just referred. Upon me, therefore, falls the responsibility of exercising a discretion and determining whether or not the applicant is entitled to the enquiry which he now seeks. The relevant authorities in England and a previous judgment of the Chief Justice of this Court in the case of *Imperial Tobacco Co.* v. *Bonnan* (3), as well as the decision of the appeal court above referred to, indicate the course which a party, feeling himself aggrieved by the making of an interlocutory injunction, has to take in order to secure compensation, and the holding of an enquiry is the procedure prescribed whereby the amount of compensation to which such a party may be entitled is to be ascertained. It seems equally clear from the authorities, however, that the holding of such enquiry is not altogether a matter of right. There is always a discretion in the Judge before whom the matter comes as to whether or not, in the peculiar circumstances of each individual case, it is right that an enquiry should be held. In order to determine that question, one has to consider, I think, whether the applicant has made out *prima facie* case of his having suffered loss of such a character in regard to which damages are in law recoverable. That means to say the applicant must show a *prima facie* case of having suffered damage which is neither too remote to be recoverable under the general principles applicable to the recovery of damages nor too trivial in its nature or extent to make it justifiable to impose upon the other side the burden and expense of having to undergo what, in the end, may prove to be a very protracted and possibly involved investigation.

In dealing with the applications of this kind, I think one has to bear in mind, in the first place, that there would seem to be a fundamental distinction between an injunction of the kind obtained in this case, which is by way of being in the nature of a preliminary and anticipatory step in the machinery of execution against the defendant, as compared with an ordinary

(1) (1883) 23 Ch. D. 644. (2) (1861) 30 L. J. Ch. 863.
(3) (1927) 46 C. L. J. 455.

interlocutory injunction granted either in this country or in England the purpose of which is solely to reserve the *status quo* in order that the plaintiff before the trial of the suit may not be irreparably prejudiced by same action on the part of the defendant in direct connection with the actual subject matter of the dispute itself. An injunction of the kind granted in the present instance is, in its effect, to some extent the parallel of an attachment of the defendant's property and the granting of it is invariably based upon allegations on the part of the plaintiff that the defendant is a person of no substance and of little or no commercial credit and is a debtor of the kind who is likely, if he possibly can, fraudulently and dishonestly, to endeavour to defeat the just claims of his creditor, the plaintiff, and to prevent him from securing the benefit of any decree he may obtain. As was pointed out by Mr. Justice Lort-Williams in the course of the judgment to which I have already referred :

" Conditions in this country are such and the ease with which dishonest " debtors can dispose of or conceal quickly their assets is so great, that " applications for attachment and injunction before judgment are granted " necessarily, with much more freedom and frequency than would be conceiv- " able by English Judges.

" For the same reasons, the grounds for granting such applications are " well-known and understood by the Indian commercial community, and " damage to credit and reputation is involved, almost necessarily, thereby."

The last sentence of that paragraph I endorse and emphasise. It seems to me clear beyond doubt that the mere granting of an injunction of this character will of itself have or at any rate is likely to have the effect of causing damage to the credit and reputation and the commercial standing of the person against whom it is granted. In the present case, the applicant specifically alleges in the petition now before me (in paragraph 16) :—

" That as a result of the said injunction and of the circulation of the same, your petitioner's business was practically stopped on the 11th day of February, 1930, till after the 5th day of March, 1930, and your petitioner has not yet been able to get over the effect of the said injunction. The nature of your petitioner's business is such that it is impossible to carry it on if there be any doubt or suspicion created about the financial stability, credit or reputation or the proprietor thereof."

He had made a similar averment in the plaint in the suit under review by Mr. Justice Lort-Williams on the 22nd July, 1930. I am bound to say that it does seem to me that if an injunction of this class is secured by a plaintiff, it is not unreasonable to suppose that the defendant may very well have suffered some damage, always assuming of course that he was not in fact so financially involved or so dishonestly or fraudulently minded as the plaintiff has succeeded in establishing before the Court which granted the injunction.

For the purpose of determining an application like the present, it is not necessary for me to decide one way or the other whether the injunction was in fact fraudulently, maliciously or in any way improperly obtained by the plaintiffs. All I have to decide is whether or not there is in the affidavits put forward in support of the application a sufficient *prima facie* case made out that damage was sustained by the defendant. There is, it is true, a passage in the judgment of the Master of Rolls in the case of *Smith* v. *Day* (1) which does seem to suggest that the applicant, in order to succeed herein, must show that the injunction was improperly obtained. In that case Sir George Jessel M.R. said " The Court has a discretion, and before

(1) (1882) 21 Ch. D. 421, 425.

1932

Jaharmull Chimanlal & Co. v. *Ishwardas Agarwalla.*

"it will grant damages it must be satisfied that the injunction was im-"properly obtained." That opinion was not shared, however, by the other members of the Court in their judgments in the appeal, and in the subsequent case of *Griffith* v. *Blake* (1), Lord Justice Baggallay said :—

"I cannot concur in the opinion expressed by the late Master of the Rolls "in *Smith* v. *Day* (2). It was a *dictum* distinctly dissented from by the Lord "Justice Cotton at the time, and the present Master of the Rolls declined to "give any opinion on the point. I cannot adopt the view of the late Master "of the Rolls. If the defendants turn out to be right, it appears to me that "they can, under the undertaking, obtain compensation for all injury sus-"tained by them from the granting of the injunction." Lord Justice Cotton (at p. 477) said :—"The defendants refer to *Smith* v. *Day* (2) as being an autho-"rity the other way. The late Master of the Rolls there expressed an "opinion that there ought not to be an enquiry as to damages unless the "plaintiff had been guilty of some default in obtaining the injunction. Prob-"ably he did not mean his remarks to apply to a case like this, where, if the "injunction was improperly granted, it would be not because the Judge made "a mistake, but because the plaintiff's evidence was not true. But I am of "opinion that his *dictum* is not well founded, and that the rule is that when-"ever the undertaking is given, and the plaintiff ultimately fails on the "merits, an enquiry as to damages will be granted unless there are special "circumstances to the contrary." I need hardly say that the observation in the latter part of that passage as regards the plaintiff ultimately failing on the merits refers, of course, to a case where there is a claim for an injunction which is part of the relief asked for in the suit itself, and, therefore, has no direct application to a case like the present one, where, as I have already pointed out, an injunction was obtained solely with the design of assisting the plaintiff in execution proceedings. The English cases dealing with the question of a defendant's right to an enquiry were commented on by the Chief Justice of this Court and the English judicial view of the matter adopted by him in his judgment in *Imperial Tobacco Co.* v. *Bonnan* (3). The reason why a plaintiff's conduct and attitude towards the defendant and his *bona fides* in connection with the obtaining of the injunction are immaterial upon the question was whether or not an enquiry shall in fact take place is because the granting of an injunction is a judicial act on the part of the Court itself. Nevertheless, the plaintiff's conduct and their *bona fides* and the question whether or not they were guilty of fraud or malice or the fact that they may have suppressed the truth to obtain the injunction are matters which may be relevant, when the enquiry is actually held, for the purpose of determining whether the defendant is entitled to receive something over and above simple compensation for the loss actually sustained by him which would give him altogether damages by way of punishing the plaintiff for his misconduct in connection with the obtaining of the injunction in question.

This aspect of the matter was fully dealt with by Lord Justice Brett in *Smith* v. *Day* (2) where, as regards the principle to be applied in assessing the damages, he says :—"In the present case there is no undertaking with "the opposite party, but only with the Court." (That is so in the matter now before me). "There is no contract on which the opposite party could "sue, and let us examine the case by analogy to cases where there is a con-"tract with or an obligation to the other party. If damages are granted at "all I think the Court would never go beyond what would be given if there "were an analogous contract with or duty to the opposite party. The rules "as to damages are shown in *Hadley* v. *Baxendale*. If the injunction had "been obtained fraudulently or maliciously the Court I think would act by

(1) (1884) 27 Ch. D. 474, 476, 477. (2) (1882) 21 Ch. D. 421, 425, 428.
(3) (1927) 46 C. L. J. 455.

"analogy to the rule in the case of fraudulent or malicious breach of "contract, and not confine itself to proximate damages, but give exemplary "damages."

That passage was accepted by the Chief Justice and incorporated in his judgment in *Imperial Tobacco Co.* v. *Bonnan* (1) to which I have already referred.

To sum up the matter, it comes to this. I have to ask myself and to decide, whether or not the applicant Ishwardas Agarwalla would appear to have suffered any damage of such a character as to be the natural and probable consequence of the injunction obtained by the plaintiffs. The damage that he is alleged to have suffered is specified under a series of headings in paragraph 17 of the petition. Mr. Banerjee, on behalf of Jaharmull Chimanlal & Co., the respondents to this application, has argued that all the damage alleged by Ishwardas Agarwalla is too "remote" to be recoverable at law in any event. No doubt some of the loss alleged bears the appearance of being to say the least of it of a nature somewhat difficult wholly to substantiate as being the immediate and natural consequence of the existence of the injunction. It has, however, been held that, even where the damage which may accrue to a defendant is of a vague and uncertain nature, the Court, before granting an injunction in respect of selling or dealing with chattels, will require for the plaintiff seeking such injunction an undertaking to make good any such damage—See *Adamson* v. *Wilson* (2). It may perhaps be the case that the defendant's sense of grievance has led him to colour, if not to exaggerate, the damage actually suffered by him as an outcome of the plaintiff's action. At the same time. however, there are undoubtedly matters mentioned in paragraph 17 which I think the defendant is entitled to have fully investigated by a proper enquiry. I do not think, however, that I should express any further opinion with regard to the merits of the claims set out in the paragraph or as to the liability of Jaharmull Chimanlal & Co. in connection therewith. It is sufficient for me to say that I am of opinion that, in all the circumstances of this case, it is right that an enquiry should take place. I am not uninfluenced in arriving at this conclusion by the fact that Mr. Justice Lort-Williams, who no doubt had sufficient material before him as regards the contentions of the defendant, clearly showed by his judgment of the 22nd July, 1930, that he thought this was an appropriate case for an enquiry, and in fact did order an enquiry. His order was, it is true, set aside, but solely upon a question of procedure and not on the facts of the defendant's position. Moreover, in the judgment of the learned Chief Justice, there is, it seems to me, some indication that the appeal court may not have differed from the view of Mr. Justice Lort-Williams as to this being a fit case for the holding of an enquiry. I accordingly, in the exercise of my discretion, direct that an enquiry do be made for the purpose of ascertaining what damages, if any, the firm of Jaharmull Chimanlal & Co. ought pursuant to the undertaking given by them to the Court to pay to the defendant Ishwardas Agarwalla. The order will be drawn up in the terms of the form set out in Seton on Judgments as was the case in *Hunt* v. *Hunt* (3). The defendant, that is, the present applicant, will have the costs of this application.

S. N. Banerjee (with him *K. P. Khaitan*) for the appellants. The order makes it clear that the defendant could not suffer damages, unless they can show that they wanted to and could dispose of the immoveable properties properly.

(1) (1927) 46 C. L. J. 455. (2) (1864) 10 L. T. 24.
(3) (1884) 54 L. J. Ch. 289.

1932

Jaharmull Chimanlal & Co. v. *Ishwardas Agarwalla.*

N. C. Chatterjee for the respondent. Conditions in this country must be considered. Injunction always makes a person lose credit in commercial circles.

[The following cases were cited :—

Smith v. *Day* (1); *Imperial Tobacco Co.* v. *Bonnan* (2)].

RANKIN C. J. In this case, it appears that the respondent, Ishwardas Agarwalla, was the defendant in a suit and that the present appellants obtained against him an injunction of which the terms are somewhat important. The order was made on the 6th of February, 1930, and the injunction, which was to take effect upon service of the order on the defendant, restrained him, his servants and agents from dealing with, disposing of or alienating any of the moveable or immoveable properties belonging to him and mentioned in the said petition except in the usual course of business so far as the said moveable properties were concerned. The injunction is a form of injunction that is sometimes made under the provisions of Order XXXVIII of the Civil Procedure Code and the question which is before us now is this : The defendant, having been served, very shortly after the date of the order, namely, 6th of February, appeared and the injunction was dissolved on the 5th of March, so that he suffered the disabilities of the injunction for a period of something like a month. After various proceedings, to which I need not refer in detail, it was arranged by a judgment of this Court that the defendant should be at liberty to apply by motion for an enquiry as to the damages caused to him by reason of the operation of this injunction. It was also directed that the defendant should state his case for damages and his claim and that the matter should be heard on the Original Side. The matter came before my learned brother Mr. Justice Costello, who has delivered a careful judgment and has directed an enquiry as to the damages. That certainly is a matter

(1) (1882) 21 Ch. D. 421, 427, 428. (2) (1927) 46 C. L. J. 455.

on which this Court would be most loath to interfere with the discretion of the learned Judge. In this appeal, however, Mr. Banerjee for the appellants points out that, while a long list of claims—some of them quite clearly highly coloured and exaggerated claims—is made in the petition of the defendant, not a single one of these claims can reasonably be supposed to be a claim that can be entertained as arising out of or caused by the injunction. It will be observed that what the injunction restrained the defendant from doing for the period of a month was, first of all, alienating or disposing of his immoveable properties or those of them mentioned in the schedule to the petition. It also prevented him from alienating or disposing of his moveable properties therein mentioned except in the usual course of business. If, therefore, it could be shown in some way that the defendant had lost the chance of a good sale of a house or if it could be shown that, apart from the usual course of his business, he lost a chance of dealing with others and getting some money for his moveables, no doubt that would found quite a sensible and reasonable claim worthy of being considered as the basis of the damages to be awarded to him. In that case, the injunction would have prevented him from doing something which otherwise he would have been able to do. But, in the present case, no suggestion is made that he had any intention or opportunity of dealing with his immoveable properties one way or the other; nor is there anywhere a suggestion that he lost an opportunity of dealing in some way with his moveable properties otherwise than in the usual course of business. What he has said is that this kind of injunction is a reflection upon his character and upon his business stability and that the moment this injunction was pronounced and as a consequence of it nobody entered into any dealings with him, that his friends, on the contrary, began to break their contracts and failed to do their duty. It is suggested, for example, that he had an agreement with certain people to open a shellac factory and that

1932

Jaharmull Chimanlal & Co. v. *Ishwardas Agarwalla.*

Rankin C. J.

this injunction so damaged him in the eyes of these people that they refused to start the said factory with him. He says that the firm of J. Thomas & Co., to whom he used to consign shellac instead of doing their duty and carrying on their business in the ordinary way, proceeded to put the shellac on the market at once. so that he lost enormous profits. He says that the people, who used to advance him money, did no longer advance him money as before; and he talks of costs, charges and expenses he has been put to in order to come down to Calcutta to contest the injunction.

The learned Judge has apparently been persuaded that this is the kind of thing that the Court will enquire into upon a motion of the present character and he has directed an enquiry to be held. In my opinion, a claim of the character made here is entirely novel and unfounded. I have never heard of a case where the Court of Chancery on materials of this sort has ordered an enquiry. It will not do to say that the fact that an injunction is made against a person damages his character and his business merely because it is an injunction at all or a kind of injunction that is granted under Order XXXVIII and for the purpose presumably of making sure that the plaintiff in the suit would get the fruits of the judgment if he is successful. While the discretion of the Court, both in giving damages and in ordering an enquiry, is a wide discretion, it is controlled by the ordinary principles applicable to the award of damages [*Smith* v. *Day* (1)] and the defendant here has no case whatever for an enquiry. In order to get an enquiry as to damages, he would have to show that he had suffered loss by his inability to do one or more of the things which the injunction restrained him from doing and until some sensible case of that sort is put forward, it is unnecessary, with all respect to the learned Judge, to direct an enquiry on materials of the character before us.

(1) (1882) 21 Ch. D. 421.

The appeal must be allowed and the motion as to the enquiry into the damages must be altogether dismissed with costs both before the learned Judge and in this Court.

GHOSE J. I agree.

Appeal allowed.

Attorneys for appellants: *Khaitan & Co.*

Attorney for respondent: *M. L. Mullick.*

S. M.