Before Mr. Justice Banerji.

HAJI SYED MUHAMMAD (DEFENDANT) *v.* GULAB RAI (PLAINTIFF).*

1898 *March* 23.

Injunction—Discretion of Court as to granting mandatory injunctions—Delay on the part of the plaintiff in bringing his suit.

A plaintiff brought his suit for proprietary possession of a plot of land, and, secondly, for a mandatory injunction to demolish certain buildings which the defendant had erected on such plot. The suit, however, was not brought until upwards of two years from the time when the buildings complained of were completed. It was found that the plaintiff was not entitled to proprietary possession of the land claimed by him, but that he had a right of user over it, and that the defendant was not entitled to build upon the land. The Court, however, on account of the plaintiff's delay in bringing his suit declined to grant the mandatory injunction asked for. *Benode Coomaree Dossee* v. *Soudaminey Dossee* (1), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Maulvi *Ghulam Mujtaba* for the appellant.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satish Chandra Banerji*) for the respondent.

BANERJI, J.—This appeal and the connected appeal No. 16 of 1897 arise out of two cross-suits brought by one party against the other. They relate to two plots of land adjacent to each other on which each party has made certain constructions. The claim of Gulab Rai, who brought the suit out of which this appeal has arisen, was that the land on which the defendant Haji Syed Muhammad had built certain buildings was his (Gulab Rai's) property, and that Haji Syed Muhammad had no right to build on it. Haji Syed Muhammad, on the other hand, alleged himself to be the proprietor, not only of the piece of land on which he had built the buildings complained of by Gulab Rai, but also of the adjacent plot of land on which Gulab Rai had built certain shops. Gulab Rai claimed to be the proprietor of that piece of land also. Each party, in addition to the claim

* Second Appeal No. 17 of 1897, from a decree of Rai Sanwal Singh, District Judge of Agra, dated the 29th September 1896, reversing a decree of Babu Hari Mohan Banerji, Munsif of Agra, dated the 10th June 1896.

(1) I. L. R., 16 Calc., 252.

1898

HAJI SYED MUHAMMAD v. GULAB RAI.

for possession, has prayed for the removal of the buildings. Both parties relied on a decree of the 31st of August 1846. The Court of first instance construed that decree to have declared that the land claimed in the two suits was the property of Haji Syed Muhammad. It accordingly dismissed the suit of Gulab Rai and decreed that of Haji Syed Muhammad. The lower appellate Court reversed the decree of the Court of first instance. It placed on the decree and judgment of 1846 a construction different from that put on it by the Court of first instance. It is evident that there was some confusion in the mind of the learned Judge of the lower appellate Court as to what was determined by the decree of 1846. In one part of the judgment the learned Judge says that "the decree of 1846 shows that the ancestor of Haji Syed Muhammad was declared to be the owner of all the lands on the north of a line drawn from the said platform towards the west to the shop of the ancestor of Gulab Rai and towards the east to his own shop adjoining the eastern of the four shops built." He evidently meant that the land now in dispute which lies to the north of the line referred to above had been declared by the judgment of 1846 to be the property of Haji Syed Muhammad. A few lines lower down he says that the judgment of 1846 shows that the whole of the land lying to the north of the line referred to above was the land of Gulab Rai. It is difficult to account for this inconsistency, except on the assumption that the learned Judge never carefully perused the judgment of 1846. As both the parties rely on that judgment, and as it is common ground that their right to the land in suit was determined by it, the first question to be decided in this appeal is what is the true construction to be placed on that judgment and what are the rights of the respective parties declared by it. It appears that the suit in which the judgment was passed was instituted by Ali Raza, the ancestor of Haji Syed Muhammad, against the predecessor in title of Gulab Rai for a declaration of his right to a piece of land on which he had erected certain buildings. That suit was compromised by the parties and the

judgment referred to above was passed in accordance with the compromise. It is abundantly clear that the dispute between the parties to the litigation of 1846 related to the plots of land in respect of which the present suits were brought. The property claimed in that suit was a plot of land lying to the north of an enclosure belonging to Haji Syed Muhammad's ancestor up to a public road, and that is the land claimed in the two suits before me. It was distinctly stated in the judgment of the 31st August 1846 that the land then in dispute had been declared by the compromise to be the property of the plaintiff Ali Raza. The judgment further declared that Ali Raza was to construct buildings towards the north up to a line drawn from the western end of his existing shop on the one side to the eastern extremity of the buildings of Gulab Rai's ancestor on the other; that the land lying to the north of that line as far as the road was to be used by Gulab Rai's ancestor as *phar* land, that is, as land on which he was to stack his grain, and that neither party was to build on that land. There can be no doubt that this is what the decree of 1846 declared. Under that decree the ownership of the land now in suit was, as I have said, determined to exist in Haji Syed Muhammad, but Gulab Rai's predecessor in title was granted the right of using the land for the purpose of stacking grain, and neither party was to build on it. That being so, the suit which Haji Syed Muhammad brought against Gulab Rai to which Second Appeal No. 16 of 1897 relates was bound to succeed. Gulab Rai is not the owner of the land claimed in that suit, and he has no right to build on it. As regards the other suit, namely, that brought by Gulab Rai against Haji Syed Muhammad, Gulab Rai was not entitled to be declared the owner of the land claimed by him. A further question, however, arises in that case, namely, whether Gulab Rai is entitled to the mandatory injunction he seeks in that case for the demolition of the buildings erected by Haji Syed Muhammad. It is contended on his behalf that under the decree of 1846 he was granted the right to use the land as *phar* land and Haji

1898

HAJI SYED MUHAMMAD v. GULAB RAI.

Syed Muhammad's ancestor was declared not to have the right to build on it, and consequently Gulab Rai was entitled to ask for the removal of the buildings erected by Haji Syed Muhammad. It is urged on behalf of Haji Syed Muhammad that Gulab Rai is not entitled to the mandatory injunction claimed by him for two reasons. First, that he claimed the demolition of the buildings on the basis of a proprietary title, and he has not been able to prove that he has such a title; secondly, that as the buildings were upon the showing of Gulab Rai himself completed upwards of two years before the institution of his suit, the Court in the exercise of the discretion which it possesses in the matter of granting mandatory injunctions should not grant the injunction he prays for. I am of opinion that the contention raised on behalf of Haji Syed Muhammad must prevail. It is true that if a plaintiff asserts a proprietary right but can only prove a right of easement or any other inferior right which entitles him to the relief he seeks, such relief should not ordinarily be refused to him, but when the granting of such relief on the basis of a right not originally asserted depends upon the determination of of issues of fact which were never raised in the Court of first instance, an appellate Court should not allow the plaintiff to change front in such a way as to prejudice the defendant. If in this case the plaintiff had asserted a right of easement in the Court of first instance, that assertion might have been traversed on various grounds, the determination of which might involve the decision of several issues of fact. Further, it is alleged in the plaint that the buildings of which the plaintiff seeks the demolition were constructed in January 1893. He did not bring his suit till November 1895. It is thus clear that the plaintiff has not brought his suit or sought legal proceedings at the earliest opportunity, but has waited till the building has been completed. If under such circumstances he seeks to have the building removed, a mandatory injunction will not be granted except under special circumstances. This was laid down in the authorities quoted in the judgment of the Calcutta High Court in *Benode*

Coomaree Dossee v. *Soudaminey Dossee* (1). No special circumstances have been alleged or shown to exist in this case, and therefore the plaintiff was not entitled to the mandatory injunction which he prayed for. A case like this is different from a suit in which a mandatory injunction is sought for the removal of buildings erected by one of several co-sharers on joint land. The plaintiff's suit ought to have been dismissed in its entirety. The result is that I allow the appeal with costs, and, setting aside the decree of the lower Appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

Before Mr. Justice Burkitt.

THAKUR PRASAD (PLAINTIFF) *v.* GAYA SAHU AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 *(Transfer of Property Act) section* 52—*Transfer pendente lite—Lease of property in respect of which a decree for sale had been made under section* 88.

Held that a lease of property made by a judgment-debtor against whom a decree for sale had been made under section 88 of the Transfer of Property Act for sale of that property came within the purview of section 52 of the Transfer of Property Act.

THE facts of this case are as follows:—

The plaintiff Thakur Prasad was the mortgagee of a 4 pie share in a certain village from one Chandi Prasad, under a mortgage executed in April 1885. In January 1892 Thakur Prasad obtained a decree for sale on that mortgage. On the 9th of March 1893 Chandi Prasad, the mortgagor, gave a lease of a portion of the mortgaged property to one Gaya Sahu. On the 20th of September 1893 Thakur Prasad executed his decree for sale, and, having caused the mortgaged property to be sold, purchased it himself. He was, however, unable to get possession of

* Second Appeal No. 1008 of 1896, from a decree of Babu Nil Madhab Roy, Officiating District Judge of Gorakhpur, dated the 12th September 1896, confirming a decree of Maulvi Ahmad Ali Khan, Munsif of Gorakhpur, dated the 31st March 1896.

(1) I. L. R., 16 Calc., 252.