APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Shah.

RASUL KARIM AND ANOTHER (ORIGINAL DEFENDANTS), APPLICANTS, *v.* PIRUBHAI AMIRBHAI (ORIGINAL PLAINTIFF), OPPONENT.*

1914. *January* 16.

Civil Procedure Code (Act V of 1908), Order XXXIX, Rule 2—Interlocutory injunction—Mandatory injunction—Power of Court to grant, pending trial.

The defendants erected on their own land a screen for blocking up the openings which the plaintiff had made in his wall. The plaintiff filed a suit to have the screen removed ; and pending the suit applied for and obtained a mandatory injunction directing the defendants to remove the screen. The defendants applied to the High Court.

Held, setting aside the order, that the lower Court had acted illegally and with material irregularity in the exercise of its jurisdiction, in granting the mandatory injunction.

Quære : Whether a mandatory injunction can be considered as a "temporary" injunction under Order XXXIX, Rule 2 of the Code of Civil Procedure ?

THIS was an application under the civil extraordinary jurisdiction of the High Court, against an order passed by P. J. Taleyarkhan, District Judge of Broach, confirming an order passed by Mohanrai Dolatrai, First Class Subordinate Judge of Broach.

The defendants owned a house in Broach to the east of which was a *chhindi* (an open piece of land). To the east of this *chhindi* was the plaintiff's house, which was built in 1899, and in which plaintiff had opened new doors and windows overlooking the *chhindi*.

The defendants filed a suit against the plaintiff in 1899 to have the openings closed. The Court ordered in that suit that the defendants could not compel the plaintiff to close up the openings, but that they were at

* Civil Extraordinary Application No. 230 of 1913.

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liberty to block them up by any construction on their land.

In 1913 the defendants erected a screen of corrugated iron sheets to block up the openings. The plaintiff filed a suit against the defendants to have the screen removed and pending the suit obtained a mandatory injunction from the Court directing the defendants to remove the screen.

On appeal the District Judge upheld the order granting the injunction.

The defendants applied to the High Court under its extraordinary civil jurisdiction.

G. N. Thakore, for the applicant :—The Court has no power to grant a mandatory injunction under Order XXXIX, Rule 2 of the Civil Procedure Code. The Specific Relief Act (I of 1877) treats a mandatory injunction as distinct from other injunctions (sections 54, 55). The English Law is different: see The Judicature Act, 1873, section 25; Order L, Rule 6: *Gale* v. *Abbot*[1]; *Johnstone* v. *Royal Courts of Justice Chambers Company*[2].

G. K. Parekh, for the opponent :—The grant of a mandatory injunction is justified by Order XXXIX, Rule 2. The defence will not be prejudiced, as we undertake to restore the erection at our expense if the decision goes against us. The grant of injunction is within the discretion of the Court. This Court cannot interfere with the exercise of that discretion under section 115 of the Civil Procedure Code, 1908.

BEAMAN, J. :—I think this is a proper case for the exercise of this Court's revisional powers. The question raised is one of some general interest depending upon a principle. The manner in which the question is

(1) (1862) 8 Jur. (N. S.) 987 at p. 988. (2) [1883] W. N. 5.

raised is this. The plaintiff brought a suit the object of which was to obtain an order directing the defendant to pull down an erection consisting of corrugated iron sheets which the plaintiff alleged obstructed and invaded his easement of ancient light and air. That being the nature of the suit an interlocutory application was made and acceded to by the learned Subordinate Judge who ordered the defendant to pull down the erection he had put up, and this order was confirmed on appeal by the learned District Judge. It has always been, in my opinion, a very open question whether in strictness a mandatory injunction can properly be made on interlocutory applications. In England whatever doubts may have existed on this point may be said to have been removed by section 25 of the Judicature Act, and it has long been a common-place in the text-books that the Courts indubitably have the power to make mandatory injunctions on interlocutory motions.

An examination of the case-law upon which this dictum rests is very interesting, and it confirms my impression speaking generally that there can hardly be a case of a true mandatory injunction which could be given upon an interlocutory application without virtually prejudging and deciding in anticipation a part or whole of the suit according to the extent and scope of the mandatory injunction. For example, in one of the earliest cases, that of *Robinson* v. *Lord Byron*[1], upon which I think most of the succeeding cases as well as the passages in accredited text-books rely, the Lord Chancellor, Lord Thurlow, after considerable doubt and hesitation as to the appropriate language, thought that before the hearing he might issue a mandatory injunction to the defendant Lord Byron. But the facts of that case were rather peculiar, and in truth, looking to the form the Lord Chancellor's injunction took, it

[1] (1785) 1 Brown C. C. 588.

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would be hard to say that it really went much beyond an ordinary prohibitory injunction which of course can always be granted in such suits. The facts as far as I remember them were that Lord Byron had the control of large quantities of water and by means of sluices and dams he continually overflowed or starved the plaintiff's mill. The plaintiff brought a suit for an injunction restraining Lord Byron from thus playing fast and loose with the water-supply; and it was admitted on affidavits at the hearing of the interlocutory motion that the defendant was acting in this manner with the deliberate intention of extorting money from the plaintiff. Thereupon the Lord Chancellor framed an injunction the effect of which was that Lord Byron was restrained from using his power over the water in any other manner than he had been doing prior to the suit. Now it is clear that this is a very unusual injunction and when properly analysed its effect might be restricted to future acts, which is the effect of all true interlocutory prohibitory injunctions. But I admit that the line is drawn very fine, for practically in obeying the injunction it might be that Lord Byron would have had to open some sluices he had already closed or close some sluices he had already opened.

Now the difficulty which the learned English Judges always appear to have felt about the form of an interlocutory injunction which was intended to be mandatory is also fully exemplified in the case of *Allport* v. *Securities Company Limited*[1]. There the plaintiff occupied a room in a certain building and the defendant had removed a staircase leading up to this room. The plaintiff accordingly brought a suit complaining that he was shut off from all access to his room except by a comparatively inconvenient back staircase, and asked the Court to direct the defendant to reconstruct the staircase and to

[1] (1895) 72 L. T. 533.

refrain in future from any such interference with the plaintiff's right. The case was tried, before North, J. : and that very learned Judge on an interlocutory application was thoroughly satisfied that a grievous injury had already been done to the plaintiff and needed immediate remedy. So that he framed his injunction, in what I cannot help thinking, regarding it merely as a grammatical composition, this remarkable manner, "an injunction to go against the defendant to refrain from allowing the staircase to continue removed". Now in so far as any future operation could be given to any negative form of that kind, it appears to me that the injunction was meaningless, but of course its operation was exactly the same as though the learned Judge had positively ordered the defendant to rebuild the staircase. And that was prejudging and deciding the whole suit. This was virtually conceded by the learned Judge who said that although the matter was only before him on affidavits he was perfectly satisfied that the defendant could make out no better case at the hearing. In these circumstances it certainly appears to me that there was little use in having a further hearing at all.

Then again in another very instructive case decided long before the one I have last mentioned, I mean the case of *Hervey* v. *Smith*[1], there was certainly a real instance of a mandatory injunction required and granted very closely resembling the injunction with which we are dealing in this case. There stood between the parties a wall which was alleged to be a party wall containing flues for smoke to pass from the rooms in the adjoining tenements, and the defendant apparently suddenly placed tiles on the tops of the chimneys with the result that very great inconvenience was caused to the plaintiff. On an interlocutory application the Vice

[1] (1855) 1 K. & J. 389.

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Chancellor, Page Wood, held that having regard to the great inconvenience occasioned to the plaintiff, and the numerous and delicate equities involved in the case, there could be no harm in directing the defendant upon this interlocutory application immediately to remove the tiles. I think that this is really referable to a doctrine, which I believe was long prevalent in England, that the issue of mandatory injunctions on interlocutory applications could most properly be made in matters of nuisance, where the continuing nuisance even up to the hearing might affect the health or life of the plaintiff. Analysis shows that this doctrine is infected with the same illogicality for the issue of the mandatory injunction presupposes the success of the plaintiff in the suit and is precipitated for the reason that deferring the remedy may be dangerous ; but suppose the defendant succeeds. it is clear that the ground would be cut away from under this principle and the plaintiff would have to put up with the nuisance however dangerous.

However that may be there can be no question but that in this case, although the form in which the injunction was given was negative, the injunction itself was mandatory, and as I have said, was in many respects much akin to the injunction with which we are now dealing, for the removal of these tiles although a definite and completed act was one which could have been done in a few minutes and really entailed no great expense upon the defendant.

An examination of this and many other cases which I have gone through, however, leaves me unshaken in the opinion that in strictness no mandatory injunction upon an interlocutory proceeding can ever be temporary. If we analyse the contents of any true mandatory injunction, where we get one relieved from all complicating details such as those which exist in Lord Byron's case, it would be found to involve the doing of a definite

act, whereas all true interlocutory prohibitory injunctions merely prevent the party enjoined from doing the act for a certain period. The latter are therefore all truly temporary while the former never can be. It is only by a loose use of language and a confusion of ideas that any true mandatory injunction compelling the performance of an act can be said to be temporary. The reason why this principle is not so easy to ascertain in Lord Byron's case is because the scope of the injunction went considerably beyond the doing of one definite act, and presupposing not only the possibility but the likelihood of a continuing set of acts of the like character in future practically prohibited those future acts from being done. But if we take the case of *Hervey* v. *Smith*[1], it will be seen at once that as soon as the defendant Smith was ordered to remove the tiles, although nominally they were only to be removed till the suit was heard, yet the moment the injunction was obeyed the act was done and nothing was left to do. The confusion, I think, arises out of the use of the word 'temporary' in its extended sense. It sounds as though an injunction might be temporary which orders a man to remove a tile or pull down a screen, as in the present case, for a month or until the hearing of the suit, but on examination it must become clear that no element of time in that sense enters into the injunction at all, and the true distinction between these classes of injunctions then comes into relief. That distinction I think may be made more commonly intelligible not by the use of such words as 'permanent' and 'temporary' but by the use of such words as 'provisional' and 'final'. To give a very homely illustration, you might properly enjoin a man to refrain from eating an apple for an hour, but you cannot order a man to eat an apple for an hour, that is to say meaning that at the end of the hour his condition

[1] (1855) 1 K. & J. 389.

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is to be the same as though he had not eaten the apple. Having once eaten it the act cannot be undone, and if apples do not agree with him his digestion may be permanently disarranged. And that is the same I believe in the case of every true mandatory injunction. The man who is ordered to remove tiles or pull down buildings, if he obeys the injunction, may after the hearing of the suit be allowed to replace or put them up again, but that is certainly not restoring him to the condition in which he was before the injunction was issued and obeyed. And the true intent of all interlocutory, that is to say temporary prohibitory injunctions, is one and the same, to maintain the subject-matter of the suit *in statu quo* until the Court at the hearing is in a position to decide finally the rights between the parties. I expect that the constant reiteration of the passage in the text-books is largely due to the sweeping and unqualified dictum of Fry, L. J., in the case of *Bonner* v. *Great Western Railway Company*[1], in which that learned Lord Justice says that no doubt can be entertained as to the power of the Court to issue a mandatory injunction in a proper case upon an interlocutory application. That case was decided in 1883, ten years after the passing of the Judicature Act, and as I have said in that Act Legislative sanction was conferred upon the old though not very confident opinion of the English Judges. But the object of my observations and criticism of these cases has been to emphasize a distinction which may exist in principle, and certainly does exist in language, between the provisions of the statute law in England and in India.

If we turn to Order XXXIX, Rules 1 and 2, which govern all the Courts of the moffusil in India, it will be observed that the issue of injunctions upon interlocutory applications is designedly confined to temporary injunc-

[1] (1883) 24 Ch. D. 1.

tions, and speaking for myself I do entertain some doubt whether the Courts in India have any right to assume that in this respect they are on the same footing as the Courts in England, and have the power and a discretion to issue mandatory injunctions upon interlocutory applications. It is obvious that if this were done the discretion would have to be constantly and narrowly scrutinized, for in every case of the kind, as I believe I have shown, the issue of such a mandatory injunction practically prejudges the suit, and there may be other practical inconveniences of a lesser degree, such as for example that by pulling down a structure of which the plaintiff complains before suit the Court might not be in a position to determine at the hearing whether such structure did or did not interfere with the easements which the plaintiff wished to have confirmed, or if it did interfere then to what extent so as to be able to decide whether the remedy should be by injunction or damages.

It is true that in the present case Mr. Thakore does not put a very high value upon the screens which have been put up, or contend that pulling them down would involve the defendant in heavy expense, and Mr. Gokuldas has volunteered to undertake that any expense so incurred should be refunded to the defendant by the plaintiff if the suit is finally decided in his favour. That of course might meet the requirements of a particular case, but it does not really touch the principle which I am considering. And it certainly appears to me most undesirable that what is ultimately to be decided at the hearing should thus be prejudged and relief given in anticipation, nor does the reasoning of the learned Judges below commend itself to me. They appear to think that because it is common ground that the plaintiff's windows have enjoyed light and air for fourteen years a presumption arises in his favour, and

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that no doubt has weighed very much with both the learned Judges below in granting in the first instance and afterwards confirming this mandatory injunction. It ought to be obvious however, though there is a singular instance of a like misapprehension in England in the case of *Bonner* v. *Great Western Railway Company* to which I have already alluded, that a party claiming easements of light and air upon an allegation of less than twenty years' enjoyment has no right at all, and therefore, if the admissions go no further back than fourteen years no presumption can possibly arise in the plaintiff's favour. Entertaining the doubt I do whether in any case the mofussil Courts have the power to issue mandatory injunctions on interlocutory applications, it appears to me that upon grounds of general expediency the proper course where applications of that kind are made would be rather to expedite the proceedings than to grant an injunction, and where the matter is really one of urgency as in the case of pestilent nuisances, and the Court feels that it ought to interfere at the earlier stage something like the procedure which I think is not infrequently adopted in England might be followed in this country, I mean that the order upon the interlocutory application might be treated as a decree in the suit. If that were done then the illogicality or most of it which infects every case I have examined on this point would of course be removed. But unless it is done there always will be this objection to the issue of any such order that in proportion to its scope it concludes the whole or part of the case, and that merely upon affidavits and before the hearing upon proper evidence. In the particular case I feel that it might be a real hardship to the defendant to order him thus summarily to pull down his screens and wait the result of the suit before being allowed to put them up again, and for that reason, particularly in view of the considerations which

influenced the learned Judges in granting and upholding this mandatory injunction, I think, that this Court could properly interfere in the exercise of its extraordinary jurisdiction. I gravely doubt whether the moffusil Courts of this country have any jurisdiction to grant mandatory injunctions before the hearing. For our legislature has restricted the power of these Courts to the making of temporary injunctions only upon interlocutory motions; and I hope I have shown that no true mandatory injunction can ever be "temporary". But assuming that there was the jurisdiction I still think that this was a case in which no such injunction ought to have been issued, and that not only upon the particular facts but with regard to general and far-reaching principles. So that it would not be an abuse of language to say that the Court in the exercise of its jurisdiction had acted in my opinion illegally and with material irregularity. We are therefore agreed that the mandatory portion of the injunction of which alone complaint has been made to us here ought to be set aside, and we think that all costs of this might well be made costs in the cause.

SHAH, J. :—I do not desire to decide the general question argued on this application, *viz.*, whether the Courts have power under Order XXXIX, Rule 2, to make an order restraining a defendant from committing the injury complained of, which may render it necessary for him to undo what may have been done by him before the suit. There can be no doubt that the English Courts have the power to grant mandatory injunctions on interlocutory applications (see Halsbury's Laws of England, Vol. XVII, para. 489). I am not sure that the Indian Courts have not similar powers under Rule 2 of Order XXXIX.

But assuming without deciding, that the Courts have the power to grant such temporary relief, it is clear that

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it must be exercised with great caution, and in strict conformity with the provisions of the Civil Procedure Code. In this case the mandatory injunction directing the defendant to remove the partition does not appear to me to conform to the provisions of the rule in question. Having regard to the pleadings, as also to the reasons given by the lower Courts for granting a mandatory injunction, I feel satisfied that there has been a material irregularity in making such an order.

I, therefore, agree in the order proposed by my learned brother.

Order set aside.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1914. *January* 22.

NARAYAN BALKRISHNA KULKARNI (ORIGINAL DEFENDANT 2), APPELLANT, *v.* GOPAL JIV GHADI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sections 2, 97, Order XXVI, Rules 11, 12 (2)—Dekkhan Agriculturists' Relief Act (XVII of 1879)—Redemption suit—Direction to a Commissioner to take account—The direction not a preliminary decree.

In a redemption suit tried under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the first Court, on the 15th August 1910, referred the taking of the account to a Commissioner and on the 30th August 1910 passed a decree for the plaintiffs for possession free from incumbrances, the defendants having received profits for 25 years after the debt had been paid off.

One of the defendants having appealed on the 10th October 1910, the appellate Court dismissed the appeal as time-barred on a preliminary objection taken by the plaintiff-respondents, namely, that the period of 30 days for the appeal ran from the date when the Court issued the commission to the Commissioner on the 15th August 1910 because the issue of commission constituted a preliminary decree within the definition of section 2 of the Civil Procedure Code (Act V of 1908).

* Appeal No. 138 of 1912.