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[944] APPELLATE CIVIL.

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*Before Mr. Justice Geidt and Mr. Justice Mookerjee.*

LAKSHMI NARAIN BANERJEE *v.* TARA PROSANNA BANERJEE.*

[21st, 28th June, 1904.]

*Injunction—Mandatory injunction—Perpetual injunction—Trees overhanging neighbour's land—Continuing nuisance—Threatened damage—Specific Relief Act (I of 1877), s. 55.*

As every owner of land is under an obligation not to allow the branches of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbour's land to the detriment of the latter, in case of breach of such an obligation it is open to the Court to grant a mandatory injunction for the removal of the nuisance under s. 55 of the Specific Relief Act.

*Lemmon* v. *Webb* (1), *Hari Krishna Joshi* v. *Shankar Vithal* (2), *Norris* v. *Baker* (3), *Baten's Case* (4), *Shelfer* v *City of London Electric Lighting Company* (5) referred to.

A perpetual injunction restraining the defendant from planting trees, the roots of which are likely to penetrate the foundation of the plaintiff's building and wall, is held to be unworkable.

*Bindu Basini Chowdhrani* v. *Jahnabi Chowdhrani* (6), referred to.

[Ref. 3 N. L. R. 114. Foll. 28 I. C. 843.]

SECOND APPEAL by the defendants, Lakshmi Narain Banerjee and others.

The defendants planted certain fruit-trees within close proximity of the northern wall of the plaintiffs' masonry building, and as the trees grew larger and more luxuriant their branches overhung the plaintiffs' land causing damage to their wall, and the roots of some of the trees touched the foundation of the wall, threatening to do more injury in future. The plaintiffs repeatedly requested the defendants to cut down the trees, but this request [945] was not complied with ; thereupon they brought this action for the following reliefs :

(i) that an order be passed directing the defendants to cut down the trees in question and to destroy their roots ;

(ii) that a perpetual injunction be issued restraining the defendants from planting any trees on their land, which are likely to damage the foundation of the plaintiffs' wall and building.

The defendants pleaded, *inter alia*, that the trees mentioned in the plaint did not prove injurious to the plaintiffs' buildings, and that they had every right to use their land in any way they liked.

A commissioner was appointed to make a local investigation and to report in this matter ; and the learned Munsif found that the roots of some of the trees, if allowed to grow, would damage the plaintiffs' building, and he accordingly granted a mandatory injunction directing the removal of the trees, ten in number, but disallowed the prayer for a perpetual injunction.

On appeal, the learned District Judge affirmed the order of the Court of first instance for the removal of the trees, and in addition granted

* Appeal from Appellate Decree, No. 1517 of 1902, against the decree of K. N. Roy, Offg. District Judge of Bankura, dated April 3, 1902, modifying the decree of Nogendra Nath Chatterjee, Munsif of Kotulpur, dated Feb. 19, 1901.

(1) (1895) A. C. 1.
(2) (1894) I. L. R. 19 Bom. 420.
(3) (1613) I Roll. 393.
(4) (1610) 9 Rep. 58.
(5) (1895) 1 Ch. 287.
(6) (1896) I. L. R. 24 Cal. 260.

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a perpetual injunction in respect of those trees, relying on s. 54 of the Specific Relief Act.

Against this order the defendants appealed to the High Court.

Babu *Nalini Ranjan Chatterjee*, for the appellants. The Courts below are wrong in holding that merely because the roots of some of the trees have touched or threatened to damage the plaintiffs' wall, they should be cut down. As long as the roots are in my ground the plaintiffs have no right to remove them ; there being no finding that the roots have penetrated the wall, it is not necessary to cut down the whole tree ; only those branches that have overhung the plaintiffs' wall may be removed : see *Hari Krishna Joshi* v. *Shankar Vithal* (1). Section 54 or 56 of the Specific Relief Act does not contemplate any such relief as the removal of whole trees because the branches and roots of those trees have merely touched the plaintiffs' wall ; nor is there any authority for such a proposition. The order of the District Judge **[946]** for a perpetual injunction in respect of trees is also bad, for, if it means an order in respect of the very trees which had been ordered to be removed, it may not do much harm, but if it be an order restraining the defendants from planting any trees in future, there is no justification for it.

Babu *Dwarka Nath Mitter*, for the respondents. The finding of the learned District Judge amounts to this : that all the trees in question threaten damage to the plaintiffs' wall, and the branches are already causing damage to it, and further, that the roots of some of the trees have touched the foundation of the wall. The penetration of the roots of the trees, planted by the defendants, into the plaintiffs' wall would be an invasion of the plaintiffs' rights,—which is not at all improbable in this case. A reasonable probability of damage is a sufficient ground for granting an injunction : see Woodroffe on Injunctions (Tagore Law Lectures, 1897) pp. 420, 421. The defendants have no right to plant trees in such a way as to cause damage to my property : *Broder* v. *Saillard* (2). The defendant's act amounts to trespass, and no actual damage need be proved in such a case : see Mayne on Damages, p. 463. If the damage had been caused by the branches alone, the plaintiffs would have only been entitled to an order for lopping them off ; but as the roots are extending and are likely to penetrate the plaintiffs' wall, the nuisance cannot be effectually abated except by the removal of the whole trees,—which have been rightly ordered by the Courts below. Where structural injury was caused to a house by excavations made for the foundation of electric engines in an adjacent land, relief by way of a mandatory injunction was granted : see *Shelfer* v. *City of London Electric Lighting Company* (3) ; s. 55 of the Specific Relief Act.

With regard to the perpetual injunction, the effect of the order made by the District Judge apparently is to restrain the defendants from planting trees, the branches and roots of which may cause damage to the plaintiffs' building and wall. The plaintiffs are entitled to a perpetual injunction to prevent the recurrence of such injury : *Rapier* v. *London Tramways* **[947]** *Company* (4). I also rely on Illustration (*r*), s. 54 of the Specific Relief Act.

Babu *Nalini Ranjan Chatterjee*, in reply. The order for removal of all the trees cannot be sustained. The case should at least go back for

(1) (1894) I. L. R. 19 Bom. 420.
(2) (1876) L. R. 2 Ch. D. 692.
(3) (1895) 1 Ch. 287.
(4) (1893) 2 Ch. 588.

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a distinct finding as to which of the trees are causing damage by their branches, and which by their roots.

*Cur. adv. vult.*

GEIDT AND MOOKERJEE, JJ. The plaintiffs and the defendants are adjoining landowners. The plaintiffs alleged that the defendants have planted near the boundary several trees, the branches of which have overhung the plaintiffs' land and caused damage to their wall and the roots of which have penetrated the foundation of their building and wall and effected cracks therein. The plaintiffs accordingly prayed for a mandatory injunction for the removal of the trees, and also for a perpetual injunction to restrain the defendants from planting any trees on their land near the boundary line, which might cause damage to the wall and the foundation of their building. The claim was resisted substantially on the grounds that the defendants were at liberty to use their land as they pleased, that the trees had existed for many years and were consequently not liable to be removed, and that as a matter of fact, the plaintiffs have suffered no damage. In the Court of first instance, a commissioner was appointed to make a local investigation and to report on the position of the trees. The learned Munsif relying upon the report of the commissioner and upon the other evidence, direct and circumstantial, held that the roots of the trees, if allowed to grow, would inevitably damage the building. He accordingly granted a mandatory injunction directing the removal of the trees Nos. 3 to 12, but disallowed the prayer for perpetual injunction on the ground that such an injunction was not warranted by the circumstances of the case. Against this decision, the defendants preferred an appeal to the District Judge, and the plaintiffs preferred a cross-appeal. The learned District Judge found that the trees were all situated **[948]** very close to the plaintiffs' wall, that the branches had already caused damage and that the roots of some of the trees have touched the foundation and threatened to damage it. In this view of the matter, he affirmed the order of the Munsif for the removal of the trees Nos. 3-12 and in addition granted a perpetual injunction in respect of those trees. The defendants have appealed to this Court.

It cannot be disputed that the owner of the land, which is overhung by trees growing on his neighbour's land, may without notice, if he does not trespass on his neighbour's land, cut the branches so far as they overhang and however long previously they have overhung his land; *Lemman* v. *Webb* (1), *Hari Krishna Joshi* v. *Shankar Vithal* (2). It is equally clear that no prescriptive right can be acquired to compel a man to submit to the penetration of his land by the roots of a tree planted on his neighbour's soil and a man may consequently abate any such encroachment upon his property by cutting the roots in the same manner that he may remove the overhanging branches : Gale on Easements, 7th edition, p. 445 ; *Norris* v. *Baker* (3). It follows, therefore, that the party, who is so affected, may ask for a mandatory injunction for, in the language of Lord Coke, " there are two ways to redress a nuisance, one by action, and that is to recover damages and have judgment that the nuisance shall be removed, cast down or abated, as the case requireth ; or the party grieved may enter and abate the nuisance himself :" *Baten's Case* (4). Consequently as every owner is under an obligation not to

(1) (1895) A. C. 1.
(2) (1894) I. L. R. 19 Bom. 420.
(3) (1613) 1 Roll. Rep. 393.
(4) (1610) 9 Rep. 53.

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allow the boughs of his tree to grow so as to overhang, or, the roots of his tree to extend so as to penetrate, his neighbour's land, to the detriment of the latter, in case of breach of such an obligation it is open to the Court to grant a mandatory injunction for the removal of the nuisance under section 55 of the Specific Relief Act. Section 55 of the Specific Relief Act provides that "when to prevent the breach of an obligation (which under section 3 includes every duty enforceable by law) it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion, grant an injunction to prevent the breach complained [949] of, and also to compel performance of the requisite act;" in other words, the Court may not only forbid the repetition of an injurious act, but also with a view to restore the *status quo* direct that what has been done be undone. That such an injunction is ordinarily the proper remedy in cases of continuing actionable nuisance is clear from the case of *Shelfer* v. *City of London Electric Lighting Company* (1). But it is argued by the learned vakil for the appellants that the proper injunction to be granted is one not for the removal of the trees, but for the removal of the offending branches and roots. We are of opinion that this contention ought not to prevail. When a mandatory injunction is granted under section 55 of the Specific Relief Act, two elements have to be taken into consideration ; in the first place, the Court has to determine what acts are necessary in order to prevent a breach of the obligation ; in the second place, the requisite acts must be such as the Court is capable of enforcing.

Now let us consider these tests in their application to the facts of the present case. It has been conceded by the learned vakil for the respondents that, if the nuisance and the damage of which the plaintiffs complain had been due solely to the overhanging branches, a mandatory injunction for their removal would have afforded sufficient protection to the respondents. But he contends, and we think rightly, that, inasmuch as injury has been and is likely to be caused by the penetration of the roots into the foundation of their building and wall, it is necessary within the meaning of section 55 of the Specific Relief Act to compel the defendants to remove not merely the roots, but the trees themselves. A mandatory injunction is granted generally upon the same principles and subject to the same conditions as a perpetual injunction: *Smith* v. *Smith* (2). Now if a perpetual injunction were granted restraining the defendants from causing the penetration of the foundations of the plaintiffs' building and wall, it would be obviously unworkable; the plaintiffs would not be in a position to discover whether the injunction had been disobeyed until their own property had been actually damaged. Moreover, this would be hardly consistent with the principle laid [950] down in *Bindu Basini Chowdhrani* v. *Jahnabi Chowdhrani* (3) that an injunction might be asked for and granted not merely when an injury had actually taken place, but also when it has been threatened; in other words, it might be granted to prevent not merely the recurrence, but also the occurrence of the injury. It appears to us, therefore, to be reasonably clear that a case has been made out for the grant of a mandatory injunction for the removal of the trees under section 55 of the Specific

(1) (1895) 1 Ch. 287.
(2) (1875) L. R. 20 Eq. 500.
(3) (1896) I. L. R. 24 Cal. 260.

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Relief Act; we hold that the portion of the decree, which makes an order for such removal, is correct and must be affirmed.

We now come to deal with the other portion of the decree which embodies a perpetual injunction in respect of trees 3 to 12. It is not very clear what this injunction means and what purpose it is intended to serve. In view of the mandatory injunction for the removal of the trees, it is at any rate superfluous, and we are of opinion that it ought to be expunged. It has been contended by the learned vakil for the respondents that the plaintiffs were entitled to a perpetual injunction under section 54 of the Specific Relief Act restraining the defendants from planting any trees, which are likely to damage the foundation of their building and wall. But the respondents have not taken any objection to the decree of the Lower Court under section 561, Civil Procedure Code: nor have we the materials before us, which would entitle us to hold that the plaintiffs have made out a case for the grant of a perpetual injunction. We are, therefore, unable to grant the prayer of the respondents.

The result, therefore, is that the appeal succeeds in part; the decree appealed against will be set aside only in so far as it grants a perpetual injunction with regard to trees 3 to 12 and will be affirmed in other respects.

As the appeal has substantially failed, the respondents are entitled to their costs of this appeal.

*Appeal allowed in part.*

31 C. 951 (=8 C. W. N. 725.)

## [951] ORIGINAL CIVIL.

*Before Mr. Justice Stephen.*

## JALIM SINGH KOTARY *v.* SECRETARY OF STATE FOR INDIA.*

[9th June, 1904.]

*Carriers—Indian Railways Act*, 1890 (*IX of* 1890), *s.* 72—*Delivery, meaning of—Railway Company, liability of, as carriers—Rules, bye-laws and conditions under ss.* 47, 54 *of Act IX of* 1890—*Reasonableness of.*

"Delivered" in s. 72 of the Indian Railways Act refers merely to a physical event and is a word devoid of any legal significance.

A Railway Company has cast upon it by s. 72 the duties of an ordinary bailee, but it may determine the conditions under which those duties may vest and in particular may specify the point of time at which they shall vest by rules under ss. 47 and 54.

These rules, however, must be consistent with the Act and reasonable. Where a consignor had delivered goods to a Railway Company for transmission and had had the forwarding note in respect thereof duly registered and marked by the Railway Company, but had obtained no receipt from the Railway Company and the goods were lost:—

*Held* that rules framed by the Railway Company under ss. 47 and 54, whereby goods were to stand at owner's risk and the Railway Company were not to be liable therefore until a receipt had been granted by them, were inconsistent with the Act and unreasonable and that the Railway Company were liable to pay compensation for the loss incurred.

[Foll. 76 P. R. 1908=139 P. W. R. 1908; **Ref.** 1 S. L. R. 77.]

IN this suit the plaintiff sued the defendant as representing the Eastern Bengal State Railway for the value of four bales of cotton piece-goods, which he alleged had been lost through the negligence of the

* Original Civil Suit No. 570 of 1901.