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The learned District Judge, although he agrees with the Munsif in holding that the plaintiff was at the time of the election duly qualified both as voter and candidate, gives no reason for refusing to the plaintiff the relief to which he was entitled on the basis of that finding, and for setting aside the decree of the Munsif. In our opinion the decree of the Munsif is correct and must be restored so far as the defendants other than the Magistrate are concerned. We have already said that the appeal as regards the Magistrate must be dismissed. But we think that in this litigation, particularly for the reason that the plaintiff has failed to obtain a declaration that he was duly elected to be a Municipal Commissioner, which was the main object of this suit, the right order to make is that each party do bear his own costs.

The result is that the decree of the lower Appellate Court is set aside and that of the first Court restored so far as concerns the defendants other than the Magistrate. As regards the Magistrate this appeal is dismissed, except that the decree of the lower Appellate Court is altered by setting aside that portion of it which orders the plaintiff to pay the Magistrate's costs, the costs throughout being borne by the parties respectively.

S. C. C. *Appeal allowed.*

ORIGINAL CIVIL.

Before Mr. Justice Ameer Ali.

DHORONEY DHUR GHOSE *v.* RADHA GOBIND KUR.*

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AUG. 11 & 19.

Practice—Inspection of Property—Civil Procedure Code (Act XIV of 1882), section 499—Judicature Acts, Order 50, Rule 3—Form of order for inspection.

The plaintiff brought an action against the defendant for damages alleged to have been caused to his house by the erection by the defendant of an adjoining house. On an application by the defendant for an order allowing him or his agents 'to enter into the house of the plaintiff for the purpose of inspecting, examining and surveying the alleged injuries and for the purpose of examining the materials employed therein and the formations thereof and to dig excavations for the purpose of exposing the foundations,' it was objected by the plaintiff that the Court had no jurisdiction to make the order, as the

* Application in Original Civil Suit No. 475 of 1895.

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house of which inspection was sought was not the 'subject of the suit' within section 499 of the Civil Procedure Code, and that if the order could be made for inspection of the house it could not be made for inspection of the house including the zenana apartments, and further that no order could be made for the excavation of the foundations.

Held, that the house and premises of the plaintiff formed the "subject of the suit" within the meaning of section 499, and under that section the Court had power to make the order applied for. *Held*, also, that this was a case in which the order should be made.

THE suit in which this application was made was instituted for the recovery of Rs. 5,000 as damages for certain injuries alleged to have been sustained by the plaintiff's house No. 110-2, Shambazar Street, by the manner in which the defendant constructed his house No. 110/4, Shambazar Street. The application was made on notice by the defendant for an order that the defendant or his agents might be at liberty to enter into the house of the plaintiff for the purpose of inspecting, examining and surveying the injuries alleged to have been sustained by the plaintiff's house, and also for the purpose of examining the materials employed therein and the formations thereof, and to dig excavations for the purpose of exposing such foundations. The defendant stated in his affidavit that he had frequently applied to the plaintiff to allow him inspection of his house for the purpose of examining the nature and extent of the damages alleged to have been sustained, and that the plaintiff had refused to do so; that he denied that any injury had been caused to the plaintiff's house by any act or omission or negligence on his part in constructing his house No. 110/4 Shambazar Street; that the plaintiff had built his house in a careless and unworkmanlike manner without proper foundations or a proper bed of concrete over a loose soil; and that it would be unsafe for the defendant to go to trial without evidence as to the nature of the alleged injuries and the nature of the construction of and materials employed in the plaintiff's house.

The affidavit of the plaintiff was to the following effect: That the defendant had made excavations close to the wall of the plaintiff's house by which the land and buildings of the plaintiff were deprived of necessary support; that such excavations were carried out in a negligent and careless manner, and that by reason thereof the plaintiff's house was injured, its foundations

sank and an archway fell; that he denied that he had built his house in a careless or unworkmanlike manner; and that his house was used as a family dwelling house, and it would put him and the female members of his family to considerable trouble and inconvenience if the defendant or his agents were permitted to enter his house.

Mr. *Dunne*, for the defendant, applied for an order in the above terms.

Mr. *Pugh* and Mr. *R. N. Mittra*, for the plaintiff, opposed the application.

Mr. *Pugh*.—The Court has no jurisdiction to make the order asked for under section 499 of the Civil Procedure Code, and if an order can be made for the inspection of the house it cannot be made for inspection of the zenana apartments. No order can be made allowing the defendant to make excavations for the purpose of inspecting the foundations. The house is not the 'subject' of the suit within section 499. That section is taken from order 50, rule 3 of the Rules of the Supreme Court, 1883, but is not identical in terms with it. The words in order 50, rule 3 are "order for the detention, preservation, or inspection of any property or thing being the subject of such cause or matter or *as to which any question may arise therein.*" The terms there are much wider than in section 499. That section deals with an order for the inspection of any 'property' being the subject of the suit; sub-sections (*b*) and (*c*) deal with an order authorising any person to enter upon any land or building for the purpose of taking samples or trying experiments. The section does not apply to a case like this. No such order as this could have been made in England before the Judicature Acts. *Ennor* v. *Barwell* (1). Since the Judicature Acts it is otherwise—*Lumb* v. *Beaumont* (2). In the case of the *Nawab of Murshidabad* v. *Hurdut Dass* (3) inspection was refused. Daniell's Chancery Practice, 6th Ed., Vol. II., p. 1804, was also referred to.

AMEER ALI, J.—The suit in which this application is made has been brought by the plaintiff to recover Rs. 5,000 for

(1) 1 De. G. F. & J., 529. (2) L. R., 27 Ch. D., 356.
(3) Unreported. HILL, J., 16th July 1891.

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damages alleged to have been caused to his house 110-2, Shambazar Street, in Calcutta, by the construction by the defendant of his premises now numbered 110-4.

The plaintiff states in substance that owing to the manner in which the defendant's house has been built the foundations of his house have sunk, and one at least of the arches has given way, and various cracks have appeared in his premises, for the repairs of which he has been put to considerable expense, and he estimates his damages at Rs. 5,000. The defendant's case, as stated in his written statement, is that the plaintiff erected his house on a defective foundation, and that the cracks which have appeared are primarily due to that circumstance and also to defective workmanship. He denies *in toto* that any damage has been caused to the plaintiff's premises in consequence of or as resulting from the house which he has built. As early as May 1895 the defendant applied to the plaintiff's attorney to allow him inspection of the plaintiff's premises with the object of testing how far his case as to the cause and extent of the alleged damages was correct. This was not complied with and the defendant has been compelled to seek the assistance of the Court. In a matter like this I should have expected that the plaintiff would have been advised to allow the inspection asked for readily and unhesitatingly, for obviously any objection or hindrance would be regarded with suspicion, and be likely to operate against the plaintiff. That the plaintiff and his advisers should have taken up an attitude from which it might be inferred that inspection would not suit their purpose is to say the least ill-advised.

Mr. Pugh, who appeared to oppose the application, did so on the ground that this Court had no jurisdiction to make a compelling order for inspection. That is a proposition which seemed to me to be opposed to the practice of the Court, and upon enquiry made by the Registrar at my request it appeared that orders for inspection had been made without objection, and that one had been made so recently as the 10th September 1895 by Sale J. in the case of *Greesh Chunder Seal* v. *Zemin*.

In that case the jurisdiction of the Court was not questioned.

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It has now been questioned, and it is necessary to consider what the Court's jurisdiction is in regard to this matter. The application is made under the provisions of section 499 of the Civil Procedure Code, which is as follows: "The Court may, on the application of any party to a suit, and on such terms as it thinks fit—(*a*) make an order for the detention, preservation or inspection of any property being the subject of such suit; (*b*) for all or any of the purposes aforesaid, authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and (*c*) for all or any of the purposes aforesaid, authorize any samples to be taken or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. The provisions hereinbefore contained as to execution of process shall apply *mutatis mutandis*, to persons authorized to enter under this section." This section is taken from and is similar to rule 3 of Order 50 of the Rules passed under the English Judicature Acts. That rule runs thus: "It shall be lawful for the Court or a Judge, upon the application of any party to a cause or matter and upon such terms as may be just, to make any order for the detention, preservation or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence."

In section 499 of the Civil Procedure Code the words are "inspection of any property being the subject of such suit." In the English rule the words are "inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein." The words are disjunctive.

Mr. Pugh contended that the last words not being contained in section 499 the powers contained in rule 3 were not intended to be given by the Code. I entirely differ from that view. It seems to me that the words "or as to which any question

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may arise therein" were omitted because it was thought words "the subject of such suit" were sufficiently compr to cover all matters in issue in the suit. Now, it is that the house of which inspection is sought is not the su of the suit. Damages are sought in respect of alleged injuries constructive trespass on premises belonging to the plainti which inspection is asked. The damages sought to be reco must relate to some thing existing in substance which in r would form the subject of the suit. In my mind it woul wrong to say that the house is not the subject-matter of the If the substance is kept in view the meaning of the secti perfectly clear, *i.e.*, that the matter in dispute is damages alleged to have been caused to the premises of the plaintiff in consequence of the acts of the defendant. The cases in England under the English rule clearly lay down the principle under which orders of this kind are made, and it seems to me that those cases are applicable to cases arising here. In the case of *Bennitt* v. *Whitehouse* (1) inspection was sought by the plaintiff of the defendant's premises on the ground that without ascertaining the correct manner in which the defendant was working the colliery it would be impossible for the plaintiff to go to trial. The application was opposed, and the Master of the Rolls in giving his judgment stated that "it is established by the cases, that if a person is making use of his property to the injury of the property of his neighbour, the latter is entitled to an inspection in order to ascertain the extent of the injury."

That was with reference to a plaintiff's right, but it would, it seems to me, apply equally to a defendant's case. A defendant when he comes into Court is entitled to be in a position to test the statements of the plaintiff made in his plaint, and obviously the defendant in the present case cannot do so unless allowed to see the alleged cracks, &c. To refuse inspection would seriously prejudice the defendant at the trial. To allow inspection cannot possibly injure the plaintiff's case, if true. The grounds on which the application is opposed are contained in the last two paragraphs of the plaintiff's affidavit. In one of them he says he would be inconvenienced, as he is living in the house with his

(1) 28 Beav., 119.

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family. In the other he says that if excavations are made they might injure the house. The Courts have always taken precautions against injury or inconvenience, and Mr. Dunne at the very outset offered to be put on conditions. In the case of *Lumb* v. *Beaumont* (1), which seems to me very analogous to the present case except that the application there was made by the plaintiff, and the order was made notwithstanding the objection of the defendant's Counsel that under the circumstance the Court ought not to make the order, Pearson, J., held that the case of *Ennor* v. *Barwell* (2), which Mr. Pugh also cited, had no application, nor in my opinion has it any application to the present case. The unreported case referred to by the learned Counsel for the plaintiff has not been found. In the case of the *Nawab of Murshidabad* v. *Hurdut Dass* (3) referred to by Mr. Mitter the circumstances were totally different. The plaintiff had administered interrogatories to the defendant to compel him to give particulars of the land claimed by the plaintiff. Having failed in that he applied under section 499 for inspection, but Hill, J., thought that he ought not to give the plaintiff the order to enable him to obtain particulars which he had failed to get by interrogatories. There was in that case no question of jurisdiction. The only question was whether the Court in its discretion should make the order. I, therefore, hold that the Court has power under section 499 to make an order for inspection whenever it thinks that inspection should be had of the premises in suit, and that there is nothing in the objection which has been taken. I propose, therefore, to make this order: That leave be given to the defendant to inspect the premises of the plaintiff so far as the cracks and damages alleged by the plaintiff are concerned upon giving forty-eight hours' notice to the plaintiff; such inspection to be made by the defendant or his agents with the assistance of any expert he may employ, and on three several occasions at such hours as would not put the family of the plaintiff to any inconvenience and when they are not employed in the necessary duties appertaining to a Hindu family; the defendant in making any excavations he may be advised to make for the purpose of inspecting the foundations will abide by the opinion of

(1) L. R., 27 Ch. D., 356. (2) 1 De. G. F. & J., 529.
(3) Unreported. Hill, J. 16th July 1891.

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any expert of the plaintiff that they should not go further; the cracks and openings in the walls and excavations made by the defendant to inspect the foundations to be put right at once at the defendant's expense, and the costs of the expert employed by the plaintiff to be paid by the defendant.

Costs of this application will be costs in the cause.

Attorneys for the plaintiff: Messrs. *Remfry & Rose.*

Attorney for the defendant: Babu *B. N. Bose.*

F. K. D.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep and Mr. Justice Pigot.

1896 *Jan.* 8.

A. YULE & Co. *v.* MAHOMED HOSSAIN AND OTHERS.[a]

Contract—Sale of unascertained goods—Appropriation by vendor—Passing of property—Breach of Contract—Power of resale—Contract Act (IX of 1872), section 107—Measure of damages.

The contract was for sale by description of 15 bales of grey shirtings (to arrive) at an agreed price. It was found that the 15 bales which were tendered by the plaintiff did answer the description, but the defendants refused to accept them, alleging that they were wrongly marked. Under the contract of sale the plaintiffs had an express power of re-sale. After giving notice to the defendants they had the goods re-sold at auction and bought them in themselves as the highest bidders. Then they brought an action for the difference between the contract price and the price realized at the re-sale, framing the suit as for loss on re-sale, and not for damages for breach of the contract.

Held, the defendants having refused to accept the goods, the property in them remained in the vendors (plaintiffs), and the re-sale had no effect whatever. To such a case as this neither section 107 of the Contract Act nor the proviso for re-sale in the contract itself can have any application. Such power is required when the property in the goods has passed to the purchaser subject to the lien of the vendor for the unpaid purchase money. The plaintiffs were entitled to receive only the difference between the market price of the day and the contract price, and that was the true measure of damages.

This was a reference by the Second Judge of the Calcutta

[a] Small Cause Court Reference No. 1 of 1895.