

Lakshmi NaraIn Banerjee Vs. Tara Prosanna Banerjee

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Court : Kolkata

Decided On : Jun-28-1904

Reported in : (1904)ILR31Cal944

Judge : Geidt and; Mookerji, JJ.

Appellant : Lakshmi NaraIn Banerjee

Respondent : Tara Prosanna Banerjee

Judgement :

Geidt and Mookerji, JJ.

1. The plaintiffs and the defendants are adjoining land-owners. 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 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 NO. 3-12 and in addition granted a perpetual injunction in respect of those trees. The defendants have appealed to this Court.

2. It cannot be disputed that the owner of 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: *Lemmon v. Webb* [1895] A.C. 1, *Hari Krishna*

Joshi v. Shankar Vithal (1894) I.L.R. 19 Bom. 420. 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 (1613) 1 Roll. Rep. 393. 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.' Baton's Case (1610) 9 Rep. 393. Consequently as every owner is under an obligation not to 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 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 Co. [1895] 1 Ch. 287. 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 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.

3. Now let us consider those 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 plaintiff's 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 (1875) L.R. 20 Eq. 500. 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 down in Bindu Basini Chowdhriani v. Jahnabi Chowdhriani (1896) I.L.R. 24 Calc. 260 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 Special Belief Act; we hold that the portion of the decree, which makes an order for such removal, is correct and must be affirmed.

4. 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 servo. 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 tire 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.

5. 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.

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

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