
(1896) 07 CAL CK 0015
In the Calcutta High Court

Dhoroney Dhur Ghose

APPELLANT

Vs

Radha Gobind Kur

RESPONDENT

Date of Decision : 19-07-1896

Acts Referred:

Citation : (1897) ILR (Cal) 117

Hon'ble Judges : Ameer Ali, J

Bench : Single Bench

Judgement

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

2. 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 expence, 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.

3. 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 Bale, J., in the case of Greesh Chunder Seal v. Zemin.

4. In that case the jurisdiction of the Court was not questioned. 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 (sic), 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."

5. In Section 499 of the CPC 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.

6. 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 (sic) I entirely differ from that view. It seems to me that the words "or (sic) which any question may arise therein" were omitted because (sic) thought that the words "the subject of such suit" were sufficiently comprehensive to cover all matters in issue in the suit, Now, it is said that the house of which inspection is sought is not the

subject of the suit. Damages are sought in respect of alleged injuries to or constructive trespass on premises belonging to the plaintiff of which inspection is asked. The damages sought to be recovered must relate to some thing existing in substance which in reality would form the subject of the suit. In my mind it would be wrong to say that the house is not the subject-matter of the suit. If the substance is kept in view the meaning of the Section is 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 oases 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* 28 Beav. 119 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 Bolls 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."

7. 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 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* I L. R. 27 Ch. D. 356 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. Harwell* 1 De. G. F. & J. 529 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* unreported. Hill J. 16th July 1891 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 u/s 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 u/s 499 (sic) make an order for inspection whenever it thinks that inspection should be (sic) of the premises in suit, and that there is nothing in the objection which (sic) been taken (sic) propose, therefore, to make this order : That leave be given (sic) 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 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.