

(1914) 04 CAL CK 0024
In the Calcutta High Court
Case No : Rule NISI No. 266 of 1914

Hemanta Kumar Roy and Another

APPELLANT

Vs

Baranagore Jute Factory Company

RESPONDENT

Date of Decision : 01-04-1914

Acts Referred:

Citation : (1914) 04 CAL CK 0024

Judgement

1. We are invited in this rule to consider the propriety of an order by which the District Judge, in concurrence with the Subordinate Judge, has refused an application for the grant of a temporary injunction during the pendency of a suit for partition of joint immoveable property. The case for the Plaintiffs is that they are some of the superior landlords of the disputed property; that the Defendant company have obtained a permanent lease of a two-thirds share of the property (which comprises two plots) from some of the co-sharers of the Plaintiffs : that the Plaintiffs have been in direct possession of a portion, corresponding approximately to one-third of the property; and that the Defendants, who were in occupation of the remainder, have commenced to dig the foundations for an extension of their factory house. The Plaintiffs allege that they protested against the action of the company and that negotiations for an amicable settlement have failed. They have consequently been driven to sue for partition, in order to effect a division of the two plots of land as between themselves on the one hand, and the Defendant company on the other. Immediately after the institution of this suit, the Plaintiffs applied to the Subordinate Judge for the issue of a temporary injunction to restrain the Defendant company from proceeding with the erection of the extended factory house during the pendency of "the litigation. The Plaintiffs allege that although the company had notice of this application, they expedited the erection of the premises.

2. The application was heard by the Subordinate Judge, who came to the conclusion that the injunction should be refused, as the company which had arranged to erect valuable machinery in the new buildings might be seriously prejudiced by delay. He added that any inequality in the distribution of land at

the time of partition might be compensated by a money-payment to the Plaintiffs. He further stated that this order was made, as the Defendant company undertook TO build at their own risk.

3. The Plaintiffs appealed to the District Judge. He agreed with the Subordinate Judge, that in all the circumstances of the case, the injunction should be refused. But before him it was pointed out by Counsel for the Defendant company, that they could not understand the precise meaning of the expression used by the Subordinate Judge in his judgment, namely, that " the Defendants undertook to build at their own risk." The District Judge thereupon held that the application for an injunction must be refused absolutely, and not conditionally upon the Defendants undertaking to build at their own risk. This order we are now invited to set aside at the instance of Plaintiffs.

4. A sketch of the locality has been produced before this Court, and it transpires from an examination of it, that the disputed property consists of two parcels of land, and that the Defendant company have left vacant on the roadside an area of 7 cottahs, 3 chittacks approximately out of the total area of the two parcels, 1 bigha, 16 cottahs and 8 chittacks. There is a controversy between the parties as to whether the Defendant company have acquired an interest, as permanent lessees, to the extent, of two-thirds or five-sixths of the land. If it be assumed that the case of the Plaintiffs is well founded, namely, that the interest of the Defendant company is limited to a two-thirds share, it is plain that the area left vacant would not be sufficient to cover the share of the Plaintiffs.. In other words, upon partition, if the Plaintiffs are allotted the vacant portion to the south of the building in course of construction they would not obtain the quantity of land which corresponds to their share.

5. It has been urged before us on behalf of the Plaintiffs, that if the Defendant company are allowed to proceed with the erection of the building, the result would be that the suit for partition would be practically infructuous, as the Defendant company would inevitably be placed in possession of the portion occupied by their building and the Plaintiffs would have to accept the area left vacant by them. It has been argued that the Defendant company should not be allowed to continue their building operations, as it would mean the determination of the partition suit at their pleasure; and reliance has been placed on the following passage from the judgment of Sir George Jessel, M. R., in *Krehl v. Burrell* 7 (h. D. 551,554) (1878.: "If with the notice of the right belonging to the Plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich Defendant is to be entitled to build up a house of enormous proportions at an enormous expense, and then to say in effect to the Court, you will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right, that simply means that the Court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision. If I acceded to this view I should add one more to the number of instances which we

have from the days in which the Bible was written until the present moment, in which the man of large possessions has endeavoured to deprive his neighbour, the man of small possessions, of his property, with or without adequate compensation." This exposition of the law is applicable to cases in this country : Benode v. Soudaminey I. L. R. 16 Cal. 252 (1888), Dhunjibhoy v. Lisboa ILR 13 Bom. 253 (1888).

6. On behalf of the Plaintiffs it has further been urged that, as laid down in Anand v. Parbati 4 C.L.J. 198 1906, and Dwijendra v. Purnendu 11 C. L. J. 189 (1910), the remedy of the Plaintiffs against their co-owners, or the tenants of their co-owners, is by partition, that they cannot claim relief either by way of ejectment or joint possession, and that if the Defendant company are left free to expedite building operations at their choice, while the Plaintiffs are diligently pursuing the only remedy open to them by way of a partition suit, their rights as co-owners would be essentially defeated.

7. We are clearly of opinion upon all the circumstances of the case, that an injunction should be granted to a limited extent. [Israil v. Samser 18 C. W. N. 176 : s. c 19 C. L. J. 47 (1913),] Upon an examination of the plan, it is fairly clear that, on partition, the Plaintiffs cannot conveniently be allowed any share of the plot marked holding No. 275. They must be limited,, unless some very exceptional reason is assigned to an allotment out of the plot marked holding No. 277. It is consequently desirable that this latter holding should be retained in statu quo so that the Court may be free hereafter to grant such relief as it may think proper. If the injunction is not granted even to this limited extent, and the Defendant company are left free to hasten the completion of the extensive building which they have undertaken to erect, the distribution of the land in the partition proceedings will no longer be in the unfettered discretion of the Court, but will practically be in their hands. For though instances, are known in which a Court has issued a mandatory injunction for the demolition of buildings [Daniel v. Ferguson [1891] 2 Ch. 27, Von Joel v. Hornsleyo [1895]2 Ch. 774.], the reluctance of a Court to take, what may be deemed a strong and extreme measure is by no means rare [Currier's Company v. Corbett 2 Dr. and Sm. 355 (360) (1865)]. Indeed, in this very case, the Courts below have already expressed a preference for a considerate treatment of the Defendants. There is a substantial question in controversy between the parties, and pending its determination the status quo should be maintained to the necessary extent : Aynsley v. Glover L. R. 18 Eq. 514 (1874), Newson v. Pender 27 (h. D. 48 (1884), (12, [1911] 1 K. B. 455., Jones v. Pacaya [1911 I k.b. 455.

8. We accordingly make the rule absolute, discharge the orders of the Courts below, and as stated in the order passed by us on the 10th March 1914 (which will be deemed part of this judgment) grant a temporary injunction restraining the Defendant company from building on the holding No. 277 for a period of one month (during which the partition is to be tried out). We may add that a question was raised before us as to the competency of this Court to interfere in the

exercise of its revisional jurisdiction. We do not propose to consider the validity of this objection, because as pointed out in the case of *Israil v. Samser Rahman* (6), it is open to the Court to give the necessary directions under sec. 15 of the Indian High Courts Act. In that case, as here, it is perfectly plain that the Defendant company, notwithstanding notice of the application for an injunction, have not only not abstained from building operations, but have, on the other hand, expedited the erection of their building, so as practically to make it extremely difficult, if not impossible, for the Court to grant an injunction. In a case of this description, it is essential that this Court should interfere to prevent what may otherwise place one of the litigating parties in an unfairly advantageous position and thus turn out, in the end, to be the cause of an irreparable injustice to the other.