

## [APPELLATE CIVIL JURISDICTION.]

*Before Mr. Justice West and Mr. Justice Pinhey.*

JAMNA'DA'S SHANKARLA'L AND VRIJBHUKHIAN SHANKARLA'L (DEFENDANTS, APPELLANTS) v. ATMA'RA'M HARJIVAN (PLAINTIFF, RESPONDENT).\*

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July 11.

*Ancient lights—Obstruction—Notice—Delay—Acquiescence—Mandatory injunction—Damages—Demolition of building—Professional assistance.*

The re-erection of his house by the defendant, notwithstanding notice from the plaintiff, so as to darken some of the principal rooms of the plaintiff's house, making them unfit for occupation during the day without artificial light, is an injury which cannot be adequately redressed by an award of damages, and against which the court will grant relief by issuing a mandatory injunction, directing the defendant to pull down so much of the house as is necessary to stop the injury.

The probability of the defendant suffering a greater loss by the demolition of his house than the plaintiff, if his claim could be reduced to money, would suffer by being awarded a money compensation, is no ground for depriving the plaintiff of a mandatory injunction in his favour, except under special circumstances.

To determine what demolition of the house is necessary, the court executing the decree was directed to employ a professional man agreed on by the parties if they could agree, or nominated by the court if they could not.

Circumstances constituting delay and acquiescence discussed.

THIS was a special appeal from the decision of E. Hosking, Assistant Judge at Tháná, confirming the decree of Ráo Sáheb Mangeshráv Balwant, Subordinate Judge of Tháná.

The plaintiff and the defendants are owners of neighbouring houses in the town of Tháná. In the beginning of February 1872 the defendants pulled down their house, and digging a new foundation began to re-build it. On the 14th of February 1872 the plaintiff served a notice on the defendants, stating that he understood they were going to build their house higher than before, and warning them not to obstruct the access of light and air to his house. On the 9th of March following, the plaintiff, in a second notice, again warned the defendants that they would be answerable for any injury to the plaintiff's house. Notwithstanding this, the defendants went on building their house with the space of one foot between it and that of the plaintiff, but raised it higher than the plaintiff's house, and higher than their own/former house.

Special Appeal No. 39 of 1876.

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The roof of the new house thus overhung a part of the plaintiff's roof, and to make room for their roof, the defendants cut some of the rafters of the plaintiff's roof. The defendants, in digging the foundations of their new house, also caused some damage to the plaintiff's walls. The defendants also opened some windows looking into the plaintiff's house. The plaintiff, on the 7th of October 1873, *i.e.*, about a year after the completion of the defendants' house, brought this suit to obtain a mandatory injunction, directing the defendants to pull down their house which had completely darkened some of the large rooms of the plaintiff's house, to obtain damages for injury done to the plaintiff's roof and wall, and to have the newly-opened windows closed up.

The defendants denied that any injury had been caused to the plaintiff.

The Subordinate Judge found that the plaintiff's uninterrupted enjoyment of light and air for a period of forty years had been obstructed, his principal rooms having become uncomfortably dark, and that the digging of the new foundation by the defendants had caused damage to the plaintiff's wall. He was further of opinion that to grant adequate relief to the plaintiff the defendants' house should be pulled down to its former height. He, therefore, gave a mandatory order to that effect and awarded 300 rupees damages.

The Assistant Judge agreed with him generally, and confirmed his decree.

*Macpherson* (with him *Pándurang Balibhadra*) for the special appellants:—The principles on which a mandatory injunction is granted, are fully discussed in *Smith v. Smith*,<sup>(1)</sup> and *Bottlewalla v. Bottlewalla*.<sup>(2)</sup> The Assistant Judge, in disposing of this case, mainly relies on the decision of Lord Westbury in the case of *Jackson v. The Duke of Newcastle*,<sup>(3)</sup> but this is not of general application. As pointed out in *Vishnu Lakshmán Bhagát v. Balakrishna Vithal Bhagát*,<sup>(4)</sup> "it does not follow that, because the plaintiff has a legal right to the removal of the building erected by the defendant over the joint wall, a court of equity will, therefore,

<sup>(1)</sup> L. R. 20 Eq. 500.

<sup>(2)</sup> 8 Bom. H. C. Rep., 181, O. C. J.

<sup>(3)</sup> 33 L. J. Ch. 698.

<sup>(4)</sup> Special appeal No. 375 of 1875, decided by Melvill and Kembal, JJ., on 13th June 1876, p. 89 of printed judgments for 1876, not reported.

order its removal." The plaintiff in this case did not sue till a year after the completion of the defendants' building. There was, therefore, such a delay on his part as deprived him of his right to an injunction. He had thus acquiesced. As to the comparative loss to the parties, there is no doubt that the defendants' loss will be much greater than that of the plaintiff.

*Shántarám Náráyán* for the special respondent:—The principle laid down by Lord Westbury in *Jackson v. the Duke of Newcastle*<sup>(1)</sup> has been widened by more recent decisions to possible prospective cases. There was neither delay nor acquiescence on the plaintiff's part, as he took steps immediately after the defendants began their house. It was their own fault in persisting after notice by the plaintiff: *Bhuban Mohan Banerji v. Elliott*.<sup>(2)</sup> When a term of limitation is prescribed by law, that term is not to be abridged by equitable considerations. The plea of acquiescence is applicable to suits for which a fixed term of limitation is prescribed by law, but mere delay does not constitute acquiescence: *Uda Began v. Imám-ud-din*.<sup>(3)</sup> The reason that the pulling down of the building will cause greater loss to the defendants, does not hold good where the building is proceeded with after protest: *Senior v. Pawson*.<sup>(4)</sup>

*Macpherson* in reply:—A distinction exists between delay and acquiescence. Every case must be decided on its own merits: *Isenberg v. East India House Estate*.<sup>(5)</sup> If the court does think fit to grant a mandatory injunction, the court will direct that a professional man may be called in to state how much of the defendants' house should be demolished.

The judgment of the court was delivered by

WEST, J.:—The defendants Jamnádás and his brother being minded to rebuild their house, which lay contiguous to that of the plaintiff, commenced the requisite works in January or February 1872. The plaintiff Atmárám being apprehensive of injury to his house, through an obstruction to his upper windows, delivered to the defendants the notices, Nos. 34 and 35, dated, respectively, the 14th February and 9th March 1872. The defendants proceeded

(1) 33 L. J., Ch. 698.

(2) 6 Beng. L. R. 85.

(3) I. L. R. 1 All. 82.

(4) L. R. 3, Eq. 330.

(5) 33 L. J., Ch. 392.

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notwithstanding these notices to re-erect their house at a distance of one foot from Atmárám's, and carrying it up beyond its former height, they have so obstructed the plaintiff's windows that "the two central rooms on the east side of his house, on the second floor, have been made unfit for occupation in the day time without artificial light." The Assistant Judge holding that the plaintiff's property had thus been rendered "in a material degree unsuitable for the purposes to which it is now applied," followed Lord Westbury in *Jackson v. The Duke of Newcastle*,<sup>(1)</sup> in pronouncing the injury one that did "not admit of being measured and redressed by damages," and directed the defendants to reduce their new structure to such a height as should prevent its interfering with the plaintiff's ancient lights. In this court the injury and the right to redress have not been disputed; but it has been urged, first, that the injury was in its nature such that the proper remedy was an award of damages, or, at any rate, that the finding of the lower court was not distinct that such an award would not satisfy the justice of this particular case; and, secondly, that, even if a mandatory injunction might originally have been with propriety demanded and granted, yet the delay of the plaintiff in not filing the present suit until the 7th October 1873, almost a year after the completion of the defendant's house, was of itself such an encouragement to the defendants to proceed with their building and to retain the advantage they had thus gained; that at the present stage, at any rate, an injunction ought to be refused; thirdly, it has been urged that the much greater injury that will arise to the defendants from the demolition of their building than to the plaintiff from his being compelled to accept pecuniary compensation, is an additional and strong reason for the court's awarding damages only.

As to the first point, we think that the injury, as described by the Assistant Judge and the Subordinate Judge after an inspection of the premises, was clearly such that we cannot for a moment say that their findings on that subject are opposed to the facts proved in the case or unsupported by evidence. The complete darkening of some of his principal rooms is a serious injury to the plaintiff, and one which he cannot, with any justice, be forced to

(1) 33 L. J., Ch. 698.

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submit to in consideration of some money compensation guessed at by the courts as a possible equivalent. The principle of law, which the Assistant Judge has applied to the facts, appears to have been widened, but in no respect narrowed by more recent decisions.<sup>(1)</sup> The case is one, we think, which falls within the ruling in special appeal 293 of 1873, and many others to the same effect in this court, and one, therefore, in which a mandatory injunction was the proper relief for the plaintiff to seek.

The delay of the plaintiff in bringing his suit may be looked at from two points of view: Did it imply anything like acquiescence? Did it, apart from acquiescence, materially weaken the plaintiff's claim to the relief that he seeks? To the first question the plaintiff's whole course of proceeding furnishes an emphatic answer in the negative. The defendants having disturbed his foundations and upset the wall of his house, Atmárám took proceedings against them in the criminal court. He complained also of the rafters of his house having been cut by the defendants to make room for their new edifice. These proceedings were going on until December 1872, and the notices given at an earlier stage were not withdrawn or qualified. There was no acquiescence, therefore, on the plaintiff's part in the defendants' proceedings. They could not, at any moment before the completion of their building in October or November 1872, have said that they had been induced to do anything by an idea of the plaintiff's assent caused by his own acts or omissions; subsequently to that date there was no material change in the defendants' position which was induced or could have been induced by the plaintiff's omitting to pull down their new walls or to apply to the court to have them pulled down. In the language of Blackburn, J., in *Bennison v. Cartwright*,<sup>(2)</sup> "The interruption was acquiesced in so far as that the wall was allowed to remain standing, but . . . the plaintiff was protesting against his rights being interfered with," that is, there was no acquiescence at all; though there was, as to one kind of proceeding, acquiescence or forbearance which, in the absence of explanatory circumstances, might have been an impediment to the assertion of the plaintiff's right.

(1) See Bom. H. C. Rep. 184, O. C. J., *Smith v. Smith* L. R. 20 Eq. 500; *Aynsley v. Glover*, L. R. 18 Eq. 544.

(2) 33 L. J. Q. B. 137.

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Putting acquiescence, however, out of the question, has the plaintiff's delay disentitled him to the relief which he originally might have claimed? Down to October and even to December 1872 he appears to have been in a continual struggle with his encroaching neighbours. In the meantime their house had been completed. His legal right to relief would continue until it was barred by limitation, and the courts could not properly impose any shorter period for its assertion. All that is urged is, that the discretionary power of the court as to mandatory injunctions should not, on account of the subsequent delay, be exercised in his favour, or rather that it should be exercised in favour of the defendants. But it is not shown or suggested that this delay has in any way prejudiced them. The supreme importance of this consideration is insisted on by the Privy Council in the judgment in *Lindsay Petroleum Company v. Hurd*,<sup>(1)</sup> "Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable." Taking it as a point determined, that the plaintiff's delay down to the end of 1872 was sufficiently covered by the other proceedings in which he was engaged; his delay from that time, down to October 1873, does not, under the circumstances, afford any reason for curtailing his prior right to redress.<sup>(2)</sup> The defendants have had a somewhat longer enjoyment of their new building and of the luxury of annoying the plaintiff; but that is not a ground for refusing him the appropriate relief, where no new rights and interests have meanwhile come into existence.

It appears probable that the defendants will suffer more by the demolition of their house than the plaintiff, if his claim could be

(1) L. R. 5 P. C. 239.

(2) See *Durell v. Pritchard*, L. R. 1 Ch. 244.

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reduced to money, would suffer by being awarded merely a money compensation. But this is, except under special circumstances,<sup>(1)</sup> no ground for depriving a plaintiff of the relief to which he is otherwise legally or equitably entitled. Here the defendants knew that they were doing wrong. They chose to go on in spite of the plaintiff's notices. They ran the risk with their eyes open; they cannot complain if they suffer through an ill event which they deliberately courted. The plaintiff has sustained an injury which can be effectually remedied in only one way, and to that one way the defendants, as wilful wrong doers, must submit.

Mr. Macpherson has not been able, on behalf of the defendants, to adduce any instance amongst the numerous cases to which he has called our attention, in which, after full notice that the plaintiff would take legal proceedings in the event of an injury to his property, he has been deprived of any portion of his remedy against a defendant through a mere delay in bringing his suit, not being such as to induce a reasonable supposition of final acquiescence, or one in which, under the same circumstances, the mere comparative greatness of the defendant's loss was allowed to liberate him from the ordinary consequences of wilful encroachment and wrongdoing.

For these reasons we must confirm the decree of the Assistant Judge. We add only a direction that, in executing that decree, the court is to employ a professional man, agreed on by the parties if they can agree, but if not, then one nominated by itself, to determine what demolition is necessary to give effect to the decree in the way least injurious to the defendants.

Costs to be borne by the special appellants.

*Decree affirmed.*

(1) As in *Senior v. Pawson*, L. R. 3 Eq. 330.