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under section 34 require more. Entries in accounts may in the same suit be relevant under both sections as here, and where that is so, it is clear that, inasmuch as they are relevant under section 32 (2), corroboration is not required by the Act. The learned Judge was in error in supposing that the requirements of section 34 applied to the accounts, though they were relevant under section 32 (2).

An error in law therefore has been committed and we cannot allow the decree to stand.

At the same time we wish it to be distinctly understood that though the accounts, which are relevant under section 32 (2), do not as a matter of law require corroboration, the Judge is not bound to act on them without corroboration; that is a matter on which he must exercise his own judicial discretion as a Judge of fact. In what I have said I have in no way limited the discretion of the Judge as a Judge of fact in determining whether or not he will act on the accounts without corroboration, the only point being that the law does not require corroboration.

Therefore the decree must be reversed and the case be remanded for determination on the merits.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

1904. *January*, 25.

JETHALAL HIRACHAND VAKIL (ORIGINAL PLAINTIFF), APPELLANT, *v.* LALBHAI DALPATBHAI SETH (ORIGINAL DEFENDANT), RESPONDENT.*

Injunction—Encroachment on land—Building over a dhora*—Compensation not proper remedy.*

The defendant encroached on an abutment (*dhora*) of the wall of the plaintiff, which stood on a piece of ground belonging to the plaintiff. The wall divided the properties belonging to the parties. The abutment was on the defendant's side of the wall. The Lower Appellate Court awarded compensation for this encroachment, on the ground that there was a merely technical encroachment on the part of the defendant because only a foot or so of the plaintiff's ground was covered thereby.

* Second Appeal No. 566 of 1902.

Held, that relief by way of injunction was the proper remedy in such a case, for to allow compensation would be to let a trespasser put a value or money's worth on another man's property and deprive him of it against his will.

Goodson v. *Richardson*[1] followed.

SECOND appeal from the decision of S. L. Batchelor, District Judge of Ahmedabad, reversing the decree passed by Vadilal T. Parekh, Subordinate Judge of Ahmedabad.

Suit for injunction.

The plaintiff brought a suit against the defendant wherein he prayed that the defendant be restrained from interfering with his right to light and air, and that he (defendant) should be compelled to remove the superstructure that covered his *dhora* (abutment) which was attached to his house (prayer 3).

The contentions put forward by the defendant were that the plaintiff had not acquired a prescriptive right to an easement of light and air, that the *dhora* (abutment) was made recently on the plaintiff's land, and that the construction complained of was not injurious to the *dhora*.

The Subordinate Judge decreed that "the defendant do remove the structure of his rooms that obstruct light and air passing into the plaintiff's house through the four *jalis* (windows) in suit at 45° degree angle." As regards *dhora* his finding was: "It (*dhora*) is old and is still in existence. It is tapering at the top. The *dhora* is kept intact and the defendant had made superstructure. I think no relief can be granted in respect of the *dhora*."

On appeal the District Judge, finding that the plaintiff's claim in respect of light and air was not established, so far dismissed the plaintiff's suit: his opinion about the encroachment on the *dhora* was expressed as follows:—

"The alleged encroachment on the *dhora*, if it exists, is very insignificant, the *dhora* being nothing more than a slight thickening of the base of the plaintiff's wall on the defendant's side. The *dhora* is apparently itself an encroachment and cannot, I think, be allowed to interfere with defendant's right to build on his own land up to the plaintiff's wall."

The plaintiff appealed to the High Court.

(1) (1874) L. R. 9 Ch. 221.

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The High Court (Chandavarkar and Jacob, JJ.) recorded the following interlocutory judgment on the 23rd September, 1903.

CHANDAVARKAR, J. :—The District Judge's decree as to light and air in favour of the plaintiff is objected to before us by the learned Advocate General appearing for the plaintiff on the ground that the District Judge has rejected the evidence of the plaintiff's account books on the erroneous view that they ought to have been produced with the plaint. We do not think that the District Judge's view is exactly that. As we understand his judgment, we take him to mean, not that the account books were inadmissible because they were not filed with the plaint, but that, having regard to the fact that the plaintiff is a pleader and knew the value of the account books, he would have produced them with the plaint, if he had attached to them at the time of its filing the value which he now attaches. Moreover, that is not the only ground on which the District Judge has declined to attach any weight to the account books; he refers to the specific nature of the entries as creating a suspicion. We are, therefore, bound by his finding, which is one of fact, as to the *jalis*. The objection raised by the learned Advocate General to the manner in which the District Judge has disposed of the plaintiff's right to the *dhora* and the alleged encroachment thereon must be allowed. The Subordinate Judge found distinctly that there was no encroachment; the District Judge does not find whether there has been any encroachment but merely says that "the alleged encroachment on the *dhora*, if it exists, is very insignificant." But if the *dhora* belong to the plaintiff and the defendant has encroached on it, however slightly, the plaintiff is either entitled to have the encroachment cleared, or under special circumstances, to damages. It may be that there has been no encroachment in the shape of a building on the *dhora* itself, but if it has been roofed in and that is what we understand to have been the case here, according to the plaintiff's allegation—the plaintiff has a right to complain as the space above the *dhora* would in law belong to the plaintiff and no one without title can trespass thereon. The District Judge says "the *dhora* is apparently an encroachment." If this means that the plaintiff has encroached upon it, no doubt he would have no right to it, but

it may be that the encroachment has stood for more than twelve years to perfect his title to it and make him its owner when he brought the present suit. The question relating to the *dhora* ought to be gone into more explicitly than the District Judge has done. We, therefore, while overruling the appellant's contention as to the *jalis*, send the case back for fresh findings on the following issues :—

1. Whether the plaintiff, by adverse possession or otherwise, has acquired a title to the ground on which the *dhora* stands ?

2. If so, whether he is entitled to have any superstructure of the defendant removed ?

3. If not, whether he is entitled to any other relief in respect of the encroachment ?

Findings to be returned within one month.

The District Judge found on the issues that the plaintiff had acquired a title to the ground on which the *dhora* stood ; that he was not entitled to have any superstructure of defendant removed ; and that he was entitled to nominal damages.

The plaintiff filed objections against the findings on issues Nos. 2 and 3.

Branson (with him *L. A. Shah*), for the appellant (plaintiff) :— The Lower Appellate Court is wrong in treating the encroachment as technical and trifling. The defendant had no right to build on our land and we are entitled to have our ground cleared of the encroachment unless the defendant can prove acquiescence or standing by on our part, which is neither alleged nor proved. On the contrary the plaintiff is shown to have promptly protested and brought the present action. There are no special circumstances disentitling us to a mandatory injunction and the District Judge has misunderstood the principles of law to be applied in such a case : see *Govind Venkaji* v. *Sadashiv Bharma Shet* [1], and *Premji Jivan Bhate* v. *Haji Cassum Juma Ahmed* [2].

Setalvad (with him *Bhaishankar*, *Kanga* and *Girdharlal*), for the respondent (defendant) :—This Court should not interfere with the discretion of the Lower Appellate Court. The plaintiff

(1) (1892) 17 Bom. 771. (2) (1895) 20 Bom. 298.

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did not bring the action until the encroachment was completed, and the relief by way of mandatory injunction is purely discretionary under the provisions of the Specific Relief Act I of 1877. The cases cited by the other side do not apply. The Court ought to be very slow in granting a mandatory injunction.

Branson was heard in reply.

CHANDAVARKAR, J.:—The District Judge has found on the evidence that the ground on which the existing *dhora* or abutment stands belongs to the plaintiff. In his plaint the plaintiff complained that the defendant had built his house so as to overhang a portion of the *dhora* and deprive him (the plaintiff) of his right to light and air; and there was a prayer for the removal of the portion of the defendant's superstructure which covered the *dhora*. The Subordinate Judge in the Court of first instance rejected that prayer on the ground that the defendant's house did not touch the *dhora*. In the findings which he has remitted to this Court on the issues sent down by it the District Judge has now held that the encroachment by the defendant can be adequately relieved by the award of compensation to the plaintiff; and he assesses it at Rs. 10 on the ground that, in his opinion, the plaintiff is entitled only to nominal damages.

It is no doubt the case that one of the issues sent down by this Court for determination was, whether the plaintiff was entitled to any other relief than by way of removal of the defendant's superstructure, in case he should be found not entitled to such removal. That issue did, as the District Judge points out, contemplate as a possibility the award of compensation by way of damages to the plaintiff. But the question is whether the grounds on which the District Judge holds that the plaintiff is not entitled to the removal are sufficient in law.

The decisions of this Court in *Govind Venkaji* v. *Sadashiv Bharma Shet* (1), and *Premji Jivan Bhate* v. *Haji Cassum Juma Ahmed* (2) are clear authorities to show that "if a stranger builds on the land of another, believing it to be his own, the owner is entitled to

(1) (1892) 17 Bom. 771. (2) (1895) 20 Bom. 298.

recover the land," and "the party building on the land of another is allowed to remove the building," unless "there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land." No such special circumstances are found by the District Judge to exist in the present case.

But the ground on which the District Judge finds that the plaintiff is entitled to no more than compensation is that there has been on the part of the defendant "a technical encroachment," because "a foot or so of ground has been taken to support the wall which divides the properties" of the parties. But if the foot or so of ground so taken by the defendant belongs to the plaintiff, the act of the defendant is one of continuous trespass on the plaintiff's property and the wrongdoer cannot be heard to say that he has deprived the owner of only a little and that of not much use to the latter. To allow such a defence and on the strength of it to award compensation is to let a trespasser put a value or money's worth on another man's property and deprive him of it against his will. No doubt section 54 of the Specific Relief Act lays down in effect that a perpetual injunction shall not be granted where the Court finds that the invasion by one man of another man's right to property is such that pecuniary compensation can afford adequate relief. But where a man builds on another man's property against the will of the latter or without his consent, the invasion is practically one where pecuniary compensation cannot be regarded as adequate relief. The owner is, in such a case, not only deprived of the property but he is also deprived permanently of such user of it as he is entitled to make. How are the damages to be estimated in such a case and how can it be said that an award of compensation can do justice to the owner who loses the property, and all opportunity besides of using it for purposes which he may consider profitable, or beneficial to himself? The principle upon which such cases are to be decided was enunciated by Lord Selborne, L. C., in *Goodson* v. *Richardson*,[1] where he

(1) (1874) L. R. 9 Ch. 221 at p. 224.

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said: "I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me as such to be a proper subject for an injunction." And there he distinguished between such cases and cases of ancient lights and covenants. In the former one man appropriates to himself and uses another man's property; in the latter one man does something upon his own property which exposes him to an action by another man. The Courts lean towards compensation in the latter class of cases because the wrong is done by the wrongdoer upon his own property. It would not have been a wrong but for the fact that his right of free user as owner happens to be subject to the right acquired by another man for the enjoyment of his property and restricting the absolute right of property of the former. In such a case when anything is done in violation of a right limiting another man's right of ownership, the Court naturally has to consider whether the violation can be compensated by damages. But it is a different thing when a man illegally builds upon another man's land or builds in such a way as to overhang a portion of it. There, to use the words of James, L.J., in *Goodson* v. *Richardson*[1], he is "taking that which was not his for the purpose of a profit to himself against the will of the real owner. That is taking another man's property improperly, both morally as well as legally." Relief by way of compensation in such a case is tantamount to allowing a trespasser to purchase another man's property against that man's will. On no principle of law or equity is that allowable and the current of decisions whether here or in England is opposed to it.

Another ground on which the District Judge holds that the plaintiff is entitled not to a mandatory injunction but only to nominal damages is that he (the plaintiff) has failed to prove that the superstructure of the defendant so far as it overhangs the *dhora* interferes with his light and air. But the plaintiff's

[1] (1874) L. R. 9 Ch. 221 at p. 228.

failure to prove that the building causes any inconvenience to him is no valid ground for depriving him of his property. His right to recover it arises out of his ownership and stands apart from any practical injury done to other property of the plaintiff by the defendant's act of continuous trespass.

We must, therefore, amend the decree of the District Judge by awarding to the plaintiff the relief claimed in prayer No. 3 of his plaint. Each party to bear his own costs throughout.

BATTY, J.:—I concur.

Decree amended.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Chandavarkar.

THE HONOURABLE LAKHAMGAVDA BASAPRABHU (ORIGINAL PLAINTIFF), APPELLANT, *v.* KESHAV ANNAJI KULKARNI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1901. *December* 9.

Service Inám—Lands—Resumption.

The combination of an interest in land and an obligation as to service may fall under three heads, *viz.*: (1) there may be a grant of land burdened with service, (2) there may be a grant in consideration of past and future service, and (3) there may be the grant of an office the services attached to which are remunerated by an interest in land. In either of the first two classes of grants it may be made a condition that the interest in the land should cease when the services are no longer required, but in the absence of a provision to that effect lands held under those grants are not resumable at will.

Where a plaintiff Inámdár asserts that he has a right to resume, he has to establish that the combination is such as permits of resumption and where there has been long and undisturbed possession enjoyed by the defendant and his predecessors, it will require strong evidence on plaintiff's part to make out his case.

APPEAL against the decision of Gangadhar V. Limaye, First Class Subordinate Judge of Belgaum, in Suit No. 393 of 1893.

Suit by an Inámdár to resume lands alleged to be held by defendants on service tenure.

* Appeal No. 16 of 1898.