BOMBAY HIGH COURT

Rasul Karim

Vs.

Pirubhai Amirbhai

Civil Extraordinary Applicatication No. 230 of 1913

(Beaman and Shah, JJ.)

16.01.1914

JUDGMENT

Beaman, J.

1. I think of this Court's revisional power of some general interest manner in which the question brought a suit the object directing the defendant to corrugated iron sheets with and invaded his easement being the nature of the made and acceded to by ordered the defendant to up, and this order was Breach of contract or injury of a lame contract or relating to the a mandatory injunction is not e rule. of the Specific Relief Act bions are treated as distinct from party provided for. The English the Judicature Act, 1873, and of this, even in England, the injunction on interlocutory application cases that occurred: *Gale v. Courts of Justice Chambers* to prejudice the defence. One act is decreed without there being line and before the merits are Order fully the erections the defendant which the injunction has been will, in no way, be prejudiced erections at our expense in case the discretion of the Court. the discretion in the plain-of interfere under Section 115 with discretion. The erections a proper case for the exercise. The question raised is one pending upon a principle. The is raised is this The plaintiff 1 which was to obtain an order down an erection consisting of the plaintiff alleged obstructed pf ancient light and air. That interlocutory application was learned Subordinate Judge who down the erection he had put confirmed on appeal by the learned " District Judge. It has always been in my opinion, a very open question whether in strictness a mandatory injunction can properly be made on interlocutory applications. In England whatever doubts may have existed on this point may be said to have been removed by Section 25 of the Judicature Act, v-and it has long been a common place in the text-books that the Courts indubitably have the power to make mandatory injunctions on interlocutory motions.

2. An examination of the case-law upon which this dictum rests is very interesting, and it confirms my impression speaking generally, that there can hardly be a case of a true mandatory

injunction which could be given upon an interlocutory application without virtually prejudging and deciding in anticipation a part or whole of the suit according to the extent and scope of the mandatory injunction. For example, in one of the earliest cases, that of *Robinson v. Lord Byron*[1] upon which, I think, most of the succeeding cases, as well as the passages in accredited text books rely, the Lord Chanceller, Lord Thurlow,

[1](1785) 1 Bro. C. C. 588

after considerable doubt and hesitation as to the appropriate language, thought that before the hearing he might issue a mandatory injunction to the defendant Lord Byron. But the facts of that case were rather peculiar, and in truth, looking to the form the Lord Chancellor's injunction took, it would be hard to say that it really went much beyond an ordinary prohibitory injunction which of course can always be granted in such suits. The facts, as far as I remember them, were that Lord Byron had the control of large quantities of water and by means of sluices and dams he continually over flowed or starved the plaintiff's mill. The plaintiff brought a suit for an injunction restraining Lord Byron from thus playing fast and loose with the water supply and it was admitted on affidavits at the hearing of the interlocutory motion that the defendant was acting in this manner with the deliberate intention of extorting money from the plaintiff. Thereupon the Lord Chancellor framed an injunction the effect of which was that Lord Byron was restrained from using his power over the water in any other manner than he had been doing prior to the suit. Now it is clear that this is a very unusual injunction and when properly analyzed its effect might be restricted to future acts, which is the effect of all true interlocutory prohibitory injunctions. But I admit that the line is drawn very fine, for practically in obeying the injunction it might be 10th open some sluices he had already opened.

3. Now the difficulty which appear to have felt about which was intended fied in the case of *Allport v. Securities Company Limited*[2]. There the plaintiff according the defendant had removed The plaintiff accordingly bi shut off from all access to inconvenient back staircase defendant to reconstruct from any such interference was tried before North, J., interlocutory application grievous injury had all needed immediate remedy which was asked for in with merely as a grammar manner, " an injunction refrain from permitting the Now in so far as any future negative form of that kinition was meaningless, but the same as though the defendant to rebuild thinking and deciding the would by the learned Judge who only before him on affidavit the defendant could make In these circumstances it was little use in having at all

4. Then again in another before the one I have *Hervey v. Smith*[3] that mandatory injunction resembling the injunction case. There stood between alleged to be a party wall from the rooms in the adjoining tenements, and the defendant apparently suddenly placed tiles on the tops of the chimneys with the result that very great inconvenience was caused to the plaintiff. On an interlocutory application the Vice Chancellor, Page Wood, held that having regard to the great inconvenience occasioned to the plaintiff, and the numerous and delicate equities involved in the case, there could be no harm in directing the defendant upon this interlocutory application immediately to remove the tiles. I think that this is really referable to a doctrine, which, I believe,

was long prevalent in England that the issue of mandatory injunctions on interlocutory applications could most properly be made in matters of nuisance, where the continuing nuisance even up to the hearing might affect the health or life of the plaintiff. Analysis shows that this doctrine is infected with the same illogicality for the issue of the mandatory injunction presupposes the success of the plaintiff in the suit and is precipitated for the reason that deferring the remedy may be dangerous; but suppose the defendant succeeds, it. is clear that the ground would be cut away from under this principle and the plaintiff would have to put up with the nuisance however dangerous.

[2](1895) 72 L.T. 533

[3](1855) 1 K. & J. 389

5. However that may be, there can be no question but that in this case, although the form in which the injunction was given was negative, the injunction itself was mandatory, and, as I have said, was in many respects much akin to the injunction with which we are now dealing, for the removal of these tiles although a definite and completed act was one which could have been done in a few minutes and really entailed no great expense upon the defendant.

6. An examination of this and many other cases which I have gone through, however, leaves me unshaken in the opinion that in strictness no mandatory injunction upon an interlocutory proceeding can ever be temporary. If we analyse the contents of any true mandatory injunction, where we get one relieved from all complicating details such as those which exist in Lord Byron's case, it would be found to involve the doing of a definite act, whereas all true interlocutory prohibitory injunctions merely prevent the party enjoined, from doing the act for a certain period. The latter are therefore all truly temporary while the former never can be. It is only by a loose use of language and a confusion of ideas that any true mandatory injunction compelling the performance of an act can be said to be temporary. The reason why this principle is not so easy to ascertain in Lord Byron's case is because the scope of Page no. Tiff 294 note readable Justice says that no doubt can be entertained as to the power of the Court to issue a mandatory injunction in a proper case upon an interlocutory application. That case was decided in 1883, ten years after the passing of the Judicature Act, and, as I have said, in that Act Legislative sanction was conferred upon the old, though not very confident, opinion of the English Judges. But the object of my observations and criticism of these cases has been to emphasize a distinction which may exist in principle, and certainly does exist in language, between the provisions of the statute law in England and in India. If we turn to Order xxxix, Rules 1 and 2, which govern all the Courts of the Moffusil in India, it will be observed that the issue of injunctions upon interlocutory applications is designedly confined to temporary injunctions, and, speaking for myself, I do entertain some doubt whether the Courts in India have any right to assume that in this respect they are on the same footing as the Courts in England, and have the power and a discretion to issue mandatory injunctions upon interlocutory applications. It is obvious that if this were done the discretion would have to be constantly and narrowly scrutinized, for in every case of the kind, as I believe I have shown, the issue of such a mandatory injunction practically prejudges the suit, and there may be other practical inconveniences of a lesser degree, such as for example that by pulling down a structure, of which

the plaintiff complains before suit, the Court might not be in a position to determine at the hearing whether such structure did or did not interfere with the easements which the plaintiff wished to have confirmed, or if it did interfere then to what extent so as to be able to decide whether the remedy should be by injunction or damages.

7. It is true that in the present case Mr. Thakore does not put a very high value upon the screens which have been put up, or contend that pulling them down would involve the defendant in heavy expense, and Mr. Gokuldas has volunteered to undertake that any expense so incurred should be refunded to the defendant by the plaintiff ii the suit is finally decided in his favor. That, of course, might meet the requirements of a particular case, but it does not really touch the principle which I am considering. And it certainly appears to me mots un. desirable that what is ultimately to be decided at the hearing should thus be prejudged and relief given in anticipation, nor does the reasoning of the learned Judges below commend it self to me. They appear ground that the plaint and air for fourteen years and that no doubt has the learned Judges below and afterwards confirming injunction can ever be "temporary." But assuming that there was the jurisdiction, I still think that this was. a case in which no such injunction ought to have been issued, arid that not only upon the particular facts but with regard to general and far reaching principles.- So. that it would not be an abuse. of Ian guage to say that the Court in exercise of its jurisdiction had acted in my opinion illegally and with material irregularity. We are, therefore, agreed that the mandatory portion of the injunction of which alone complaint has been made to us here ought to be set aside, and we think that all costs of this might well be made costs in the cause.

Shah, J.

8. I do not desire to decide the general question argued on this application, viz., whether the Courts have power under Order xxxix, Rule 2, to make an order restraining a defendant from committing the injury complained of, which may render it necessary for him to undo what may have been done by him before the suit. There can be no doubt that the English Courts have the power to grant mandatory injunctions on interlocutory applications' (see Halsbury's Laws of England, Vol. XVII, para 489). I am not sure that the Indian Courts have not similar powers under Rule 2 of Order xxxix.

9. But assuming, without deciding, that the Courts have, the power to grant such temporary relief, it is clear that it must be exercised with great caution, and in strict conformity with the provisions of the Civil Procedure Code. In this case the mandatory injunction directing the defendant to remove the partition does not appear to me to conform to the provisions of the rule in question. Having regard to the pleadings, as also to. the reasons given by the . lower Courts for granting mandatory injunction, I feel satisfied that there has been a "material irregularity in making such an order.

10. I, therefore, agree in the order proposed by my learned brother.

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