

(1984) 03 CAL CK 0027

Calcutta High Court

Case No: Second Appeal No's. 861 and 862 of 1976

Kali Charan
Chakraborty having
died, his heirs Sm.
Kashiswari Chakraborty
and Others

APPELLANT

Vs

Durgacharan Banerjee
having died his heirs
Smt. Anandamoyee
Banerjee and Others

RESPONDENT

Date of Decision: March 22, 1984

Acts Referred:

Transfer of Property Act, 1882 " Section 11, 40

Citation: (1984) 03 CAL CK 0027

Hon'ble Judges: Amitabha Dutta, J

Bench: Single Bench

Advocate: Saktinath Mukhrjee, Shyama Prasanna Roy Chowdhury, for the Appellant;

Final Decision: Dismissed

Judgement

Amitabha Dutta, J.

These two appeals by the defendants are from the appellate judgment and decree of the learned Additional District

Judge, 2nd Court; Alipore (24 Parganas) who has allowed the appeal preferred by the plaintiffs and dismissed the appeal preferred by the

defendants, after hearing them analogously and modified the decree passed by the learned Munsif, 4th Court, Alipore in Title Suit No. 217 of

1972 for declarations and permanent and mandatory injunctions.

2. The subject matter of the dispute between the parties is a strip of land 59ft in length from east to west and 4ft in width from north to south

appertaining to premises No. 35, Fakir Haldar lane, P. S. Bhawanipore in the district of 24 parganas. The said premises originally belonged to

Haridas Chatterjee. To the adjacent north of the said premises lie premises No. 33, Fakir Haldar Lane of which Mrinalini Dassi was the original

owner. By a registered sale deed dated 19-3-1915 Mrinalini Dassi purchased land measuring 59ft. Being the northern half of the suit land from

Haridas Chatterjee who reserved certain rights over the land sold to her for the benefit of the remaining portion of premises No. 35, Fakir Haldar

Lane, as at the time of the sale there was a covenant between the Vendor and the Vendee that the Vendee would not disturb the passage of light,

air and water over the strip of land sold to her, that the Vendee would not build on it or make any construction except a drain over it and that the

drain and privy of premises No 35, could be connected with the drain of premises No 33. Thereafter the interest of Mrinalini Dassi in premises

No. 3, Fakir Haldar Lane and the northern half of the suit land devolved on her heirs Netaidas Mallick and others. The right, title and interest of

Haridas Chatterjee in the land and building within premises No 35, Fakir Halldar Lane devolved on his heirs Tara Prasad Chatterjee and others

and were sold by them in 1942 to Tinkari Banerjee, whose sole successor-in-interest was the original plaintiff in the present suit. Tinkari Banerjee

obtained a decree for permanent injunction against. Netaidas Mallick and others restraining them from obstructing his easement rights over the

northern half of the suit land and his ownership rights over the southern half of the suit land in Title Suit No 112 of 1948, which was renumbered as

Title Suit No 71 of 1949. Thereafter in the course of sale in Money Execution Case No. 9 of 1959 against Netaidas mallick and others, the heirs

of Mrinalini Dassi the premises No. 33, Fakir haldar Lane along with northern half of he suit land was auction purchased by Kali Charan

Chakraborty the original defendant in the present suit.

3. The plaintiff's case was that he carried on his business at Gauhati in Assam and lived there with his family. Taking advantage of his absence the

defendant without knowledge of the plaintiff encroached upon the northern part of the suit land and illegally and wrongfully constructed two

kitchens shown by the letters "K" and "k (i)"; two urinals shown by the letters "U" and "U(i)" and a privy shown by the letter "P" in the sketch map

of the schedule to the plaint, in breach of the restrictive covenant expressed in the sale deed dated 19-3-1915 and has obstructed the plaintiffs"

user of and interfered with the easement rights of passage of air, light and water over the northern half of the suit land shown by the letters, ""A",

B"", ""E" and ""F" in the sketch map. The plaintiff has claimed absolute title to the southern half of the suit land shown by the letters ""E, ""C", ""D"" and

F"" in the sketch map, permanent injunction restraining the defendants from interfering with the plaintiff's easement rights over the northern half of the

suit land and mandatory injunction for removal of the aforesaid structures constructed by the defendants.

4. The defendant resisted the suit by filing a written statement in which various pleas were taken but such pleas were not followed up in evidence.

The defendant did not deny in the written statement the plaintiff's allegations of encroachment on the suit land by construction of two kitchens, two

urinals and a privy.

5. The court of first instance decreed the suit in part disallowing the prayer for mandatory injunctions. Both parties preferred appeal against the said

decision. The first appellate court after hearing both the appeals analogously has allowed the plaintiff's appeal and dismissed the defendants'

appeal. In the result it has decreed the suit granting the relief of mandatory injunction along with the other reliefs claimed by the plaintiffs.

6. Several points have been raised on behalf of the appellants before this Court. It is contended that the second paragraph of S. 11 of the Transfer

of property Act relates to the right of the transferor or as against the transferee to enforce performance of an affirmative covenant or to restrain the

breach of a negative covenant and the first paragraph of S. 40 of the said Act relates to the right of the transferor as against a purchaser from the

transferee to restrain the breach of a negative covenant. It is argued that the expression ""third person"" in the first paragraph of S. 40 means the

original covenanted and not his successors-in-interest. So, in the present case the plaintiffs are not entitled to enforce the negative covenant in the

sale deed of 1915 against the defendants. But it is difficult to accept this contention. In my view, under the Indian law when a covenant was

imposed by the vendor as owner of other land of which the land sold formed a part for the benefit of the unsold land, it is annexed to the unsold

land so as to run with it or in other words its benefit runs with the whole of the land for the benefit of which it was expressed to be made and not

only the original covenanted but his transferee or successor-in-interest of the entire land can enforce the covenant. In the present case both the a

forenamed conditions are fulfilled and the covenant in the sale deed of 1915 can be enforced by the plaintiff as successor-in-interest of Haridas

Chatterjee against the defendant as transferee from the heirs of Mrinalini Dassi in court sale. The learned author Mulla in his commentary on the

transfer of property Act has also held that the third person spoken of in the first paragraph of S. 40 is either the original covenanted or his

transferee and has elucidated his views by an illustration, which fits in with the present case.

7. The next contention raised on behalf of the appellant is that the defendant kalicharan being an auction purchaser forms the heirs of the

covenanter Mrinalini Dassi was not a transferee within the meaning of S. 40 of the Transfer of Property Act and, so the negative covenant in

question cannot be enforced against him or his heirs. In this connection reliance has been placed on R.. Venkatta Reddi v. M. Yellappa Chetty

AIR 1917 Mad 4 and Nand Gopal v. Batuk Prasad AIR 1922 PC 393. But both these decisions relate to obligation arising out of contract for

sale of land and the point at issue in the present case was not decided in them. In the present case the defendant has not adduced any evidence to

prove Prima facie that he was a purchaser without notice of the negative covenant and he has thus not discharged the initial onus which vests on him.

Moreover it has been held by a Division Bench of this Court in J.C. Galstaun Vs. Sonatan Pal and Others, that a purchaser at a court sale

purchases the property subject to all equities of the judgment debtor and he cannot take the position of a bona fide purchaser for value without

notice. All the rights and obligations of the judgment debtor in relation to the property sold in the court's sale are transmitted to the auction

purchaser.

8. It is argued on behalf of the appellants that there is nothing in the Kobala dated 25.9.1942 (Ext. 3(a) by which Tinkari Banerjee, predecessor-

in-interest of the plaintiff purchased the land and building within the premises No. 35, Fakir Haldar Lane to show that the obligation created in

favour of the vendor was expressly transferred, such obligation being different from a right of easement. But in my view, the expression ""Aolat Adi

Dar Bastu Hak Hakuk"" in the Schedule to the Kobala covers such obligation. Moreover, as it has already been held the benefit of the obligation is

annexed to the land runs with it.

9. It is submitted on behalf of the appellants that in the absence of any report of local investigation by a survey passed Commissioner to show the

extent of encroachment on the suit land or northern half thereof, the decree for mandatory injunction should not have been passed by the court of

appeal below. In this connection it is argued that although there is no denial of the alleged encroachment by the defendant in his written statement

according to Order 8 Rule 5 of the CPC the court of first instance rightly exercised its discretion by requiring the fact of encroachment so admitted

to be proved otherwise than by such admission under the proviso to the said Rule and the court of appeal below should not have taken a different

view. But the discretion under the proviso to rule 5 of Order 8 is exercisable where the court of first instance suspected on Prima facie grounds

that the admission was made collusively or through mistake or to avoid a rule of public policy or where question of statute is involved. Otherwise

each party must be held to the state of facts alleged in the plaint or written statement as the case may be or consistent therewith and the doctrine of

non-traverse normally applies. It cannot, therefore, be said that the first appellate court has erred in applying it in the present case. The difficulty

that may arise in locating that extent of encroachment on the northern half of the suit land for the purpose of executing the decree for mandatory

injunction can be resolved by local investigation through a survey passed commissioner at the stage of execution of the decree.

10. It is next submitted on behalf of the appellants that in this case the plaintiff who is the only witness on his side has failed to mention in his

evidence the date when the defendant made the construction of the structures in question. It is pointed out that the defendant in his evidence has

decided that he made any construction on the disputed land and has stated that the construction in question had been made before his auction

purchase. The appellant's contention is that the court below considered the question of granting monetary compensation as equitable relief in view

of the circumstances appearing from such evidence. In this connection reference has been made to the following passage from Kerr on Injunctions

6th Edn. 1981.

The Court will not as a rule interfere by way of mandatory injunction without taking into consideration the comparative convenience and

inconvenience which the granting or withholding the injunction would cause to the parties. Where the injury done is capable of being fully and

patently compensated by a pecuniary sum, while the inconvenience to the other party from granting an injunction would be serious, the court will

not interpose by way of injunction but will award damages by way of compensation for the injury.

11. But in the present case the defendant's version in his evidence is inconsistent with his pleading in which he has not denied the plaintiff's averment

that he made the construction in question. The learned Author Kerr in continuation of the above extract of the same passage has further stated:

But where the injury is of so serious or material a character that the restoring things to their former condition is the only remedy which will meet the

requirements of the case, the injunction will issue notwithstanding the amount of inconvenience to the other party, and although the expense

thereby caused to him will be out of proportion to any advantage the plaintiff may derive from it. So, also as a general rule when the act

complained of is the breach of a negative covenant.

12. In the present case the construction in question of two kitchens, two urinals and a privy were made by the defendant in breach of the negative

covenant contained in the sale deed of 1915 which was binding on him. It cannot, therefore, be said that the first appellate court has acted unjustly

in awarding the relief of mandatory injunction along with other reliefs to the plaintiff.

13. In the result, the appeal fails and is dismissed. The judgment and decree of the court of appeal below are affirmed subject to the

modification that the structures of the defendants to the extent to which they stand on the northern half of the suit land shall be removed in execution

with the help of a survey passed commissioner who will ascertain the extent of encroachment and thereafter the defendants will be given three

months' time to remove the encroachment failing which it will be given three months' time to remove the encroachment failing which it will be

removed by the plaintiffs at the cost of the defendants. The cost of local investigation shall be borne equally by the parties. There will be no order

as to costs in these appeals.