

Madras High Court

(Gogineni) Gopayya And Ors. vs (Gogineni) Ankayya on 19 August, 1926

Equivalent citations: AIR 1927 Mad 210

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JUDGMENT Jackson, J.

1. The petitioners seek to revise the order of the Subordinate Judge, Bezwada, in M. A. No. 13 of 1926, dismissing their appeal against the order of the District Munsif, Nuzvid, in C. M. P. No. 596 of 1926 by which they have been ordered to remove earth from a channel and form bunds in order to allow water to flow freely. The counter-petitioner owns Survey No. 208 and claims that through the opening D 1 in the suit plan, water is both supplied and taken off. The petitioners by filling in portions of the channel further to the east have interfered with these rights. Accordingly the District Munsif after inspecting the ground and finding that if the channel is not cleared as prayed the crop in the northern and eastern portion of the land may suffer for want of water and of drainage, has issued a mandatory injunction. This has been confirmed by the Sub-Judge, but with no special reference to the facts of this case.

2. It may be observed at once that the closure of the channel at D 2 and D 3 on the suit plan cannot in any way interfere with the supply to the counter-petitioners' field No. 208 along the channel D above the obstruction. Moreover the counter-petitioners' partition deed shows that D was not the supply channel necessary to No. 208 but that need not be discussed. An injunction can only be justified on the ground that petitioners are obstructing the drainage; but even then there will be no justification for a mandatory injunction. Petitioners ought simply to have been restrained by injunction from preventing the exercise of counter-petitioners' easement to drain water from his dominant heritage, Survey No. 208 on to the servient heritage Survey No. 211 through the vent D 1. If passed in those terms it is very doubtful whether the injunction will entail any alteration of petitioners' ground but at any rate such alteration as may be necessary must be left to petitioners' discretion. It is found that the land slopes from north to south and from west to east. Obviously there cannot then be any great accumulation of drainage water at the north-east corner D1 and the counter-petitioner-himself claims that through D 1 water froth D flows not out of but into his land. The channel is not completely blocked until D 4 is reached though it is narrowed south of 210 and 214. Water flowing through D 1 might be expected to overflow into No. 211. There is nothing either in the plan or the report to suggest that water is entirely prevented from escaping from D 1.

3. Therefore an injunction seems to be hardly necessary but if at all, it should be that petitioners allow the customary flow of drainage water through D 1 and whether they take the water down D 2 or into No. 211 is a matter entirely within their own discretion. As the facts are thus seen to preclude a mandatory injunction it is hardly necessary to discuss whether a mandatory injunction is also precluded by law but the petitioner has raised the point and it may be briefly discussed.

4. Order 39, Rule 2 authorizes a Court in any suit for restraining the defendant from committing an injury of any kind to grant a temporary injunction to restrain the defendant from committing the injury complained of. This is a temporary injunction as contemplated in Section 53 of the Specific Relief Act. Order 39, Rule 2 does not authorize a Court to grant a mandatory injunction such as is

described in Section 55 of the Specific Relief Act under the chapter, of Perpetual Injunctions. In *Rasul Karim v. Pirubhai Amirbhai* [1915] 38 Bom. 381 Beaman, J., has discussed the principle at length with reference to English caselaw but Indian Courts are simply governed by the plain provision of Order 39, Rule 2. As Shah, J., observes in the same judgment Courts must act in strict conformity with the provisions of the Civil Procedure Code though whether a mandatory injunction would conform with Order 39, Rule 2, he prefers not to discuss. In *Kandaswami v. Subramania* [1917] 41 Mad. 208 a Bench of this Court declined to adopt the opinion of Beaman, J., and found that temporary injunction as defined by Section 53 of the Specific Relief Act, do not exclude injunctions of a mandatory nature. This seems evident. An injunction restraining a person from causing an injury may, from the very circumstances of the case be of a mandatory nature and an excellent example is afforded in *Champsey Bhimji & Co. v. Jamna Flour Mills Co.* [1915] 16 Bom. L. R. 566.

5. It is not, however, correct to say that in *Israil v. Shamser Rahman* [1914] 41 Cal. 436, the Court ordered the defendant to pull down an erection. On page 445, their Lordships remark that if a restraining injunction were disobeyed they would if necessary direct that the building so erected in contravention of the order be taken down but they passed no such order. In *Champsey Bhimji Co. v. Jamna Flour Mills Co.* [1915] 16 Bom. L. R. 566, the injunction in question was a restraining injunction and the judgment of Heaton, J., seems to conform with the opinion of the Madras Bench. If a restraining injunction involves the effect of a mandatory injunction it is not illegal on that account. In the same Bombay case Macleod, J., suggests at page 569, that a Court granting a mandatory injunction might act under Section 151, Civil Procedure Code. Therefore it is plain from the statute itself that a Court acting under Order 39, Rule 2 can only grant an injunction restraining the defendant from committing injury. It is no answer to such injunction that in effect the defendant is compelled to perform certain acts which ordinarily would be subject of a mandatory injunction. And if for some reason the Court finds it necessary to issue a temporary mandatory injunction it cannot be said that such an injunction is beyond its inherent power, but it should not act under Order 39, Rule 2. The present case affords a good example of why Order 39, Rule 2 has been restricted to restraining orders, The counter-petitioners only want to enforce their alleged right of drainage and it is immaterial to them how the petitioners carry off the water. Suppose that the petitioners had planted cocoanuts along this reclaimed channel it would be a most unwarrantable interference with their rights to insist that the water should be carried off in no way except by destroying their plantation. But if it so happened as with the road in *Champsey Bhimji & Co. v. Jamna Flour Mills Co.* [1915] 16 Bom. L. R. 566 that the proper restraint could only be caused by the destruction of the defendants' work and he had no alternative method of obeying the injunction it would none the less be enforceable.

6. In this case, a mandatory injunction should not have been issued and the lower Court's order must be altered to an order restraining plaintiff from preventing the customary flow of drainage water through the outlet D1, pending disposal of the suit.

7. The petitioner succeeds in the main and may have his costs throughout.