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Present : Wijeyewardene and Canekeratne JJ.

THE CHETTINAD CORPORATION, LTD., Appellant, and
FERNANDO *et al.*, Respondents.

112 Inty.—D. C. Kegalla, 3,473.

Civil procedure—Plumbago mine of plaintiff—Encroachment from adjoining mine of defendant—Ascertainment of true extent of encroachment—Order for inspection of defendant's property—Validity of such order—Civil Procedure Code, s. 669.

The plaintiffs who were the owners of a plumbago mine alleged, and made a *prima facie* case, that the defendant company which was the owner of an adjoining plumbago mine had encroached on the plaintiffs' property by tunnelling into it and had wrongfully removed plumbago from their mine. They applied for the issue of a commission to two Licensed Surveyors to survey and inspect the land and underground tunnels of the defendant company for the purpose of ascertaining the true extent of the encroachment made by the defendant company upon the plaintiffs' property.

Held, that the Court had power, under section 669 of the Civil Procedure Code, to issue a commission for the survey and inspection of the defendant's property.

A PPEAL from an order of the District Judge of Kegalla..

The plaintiffs alleged that the defendant company was working from its own plumbago mine into the adjoining mine which belonged to the plaintiffs, and estimated tentatively the damages caused to them by the encroachment at Rs. 102,500.

The main question for consideration in appeal was whether the provisions of section 669 of the Civil Procedure Code were wide enough to enable an order for inspection and survey of the defendant's land and underground tunnels for the purpose of ascertaining the extent of encroachments made by the defendant upon the plaintiffs' property. It was contended on behalf of the defendant that section 669 of the Civil Procedure Code referred to the inspection and survey of only "any property being the subject of such action" and that no inspection could be ordered thereunder in respect of defendant's land or his tunnels. It was argued that the jurisdiction under that section was not so wide as under Order 50 Rule 3 of the English "Rules of the Supreme Court, 1883" which provide for "the inspection of any property or thing being the subject of such cause or matter or as to which any question may arise therein".

F. A. Hayley, K.C. (with him **N. E. Weerasooria, K.C.**, **E. F. N. Gratiaen, K.C.**, **G. C. Crosette Thambyah** and **S. Nadesan**), for the defendant, appellant.—The appeal is from the order of the District Judge allowing (a) an injunction to restrain the defendants from causing damage to the plaintiffs' mine, and (b) a commission for inspection and survey of the defendant's mine under section 669 of the Civil Procedure Code.

Taking the matter of inspection and survey first, there are two grounds on which the appellant relies to set aside the order of the District Judge, viz., (1) The Court has no power to order inspection and survey of the defendant's property under section 669, (2) even if the Court had such power sufficient material has not been placed before the Court to justify the exercise of that power.

(1) Under section 669 the Court has no power to grant a commission for inspection and survey of any property other than the property which is the subject of the action. This action is for declaration of title to plaintiffs' land and therefore clearly the subject of this action is the land of the plaintiffs and not the defendant's land or mine. Section 669 seems to have been taken over from Order 50 Rule 3 of English Rules of the Supreme Court, 1883. But certain words have been omitted. The omission seems to be deliberate and therefore must be given effect to. The position then is that English Courts under Order 50 Rule 3 have wider powers than our Courts have under section 669.

[CANEKERATNE J.—Section 669 may have been taken over from an earlier statute.]

If that is so it is clear that wider powers were given by a later statute because powers under an earlier statute were found to be insufficient. If the plaintiffs wanted only to enter through the defendant's mine in order to inspect and survey plaintiffs' land or mine the position would have been different. In this case plaintiffs want the liberty to survey and inspect the whole of the defendant's land.

(2) The material placed before the Court is utterly insufficient to justify the commission ordered in this case. The plaintiffs should have produced a proper plan of both their land and mine. A sketch like the one filed with the plaint is not sufficient. It is not even identified by anyone. The evidence of Seneviratne is valueless. He has no mining experience and is not even a surveyor. The District Judge has misdirected himself in stating and acting upon the assumption that the defendant admitted that there was an encroachment. There was no such admission. At any rate no *prima facie* case for a survey and inspection of the defendant's land or mine has been made out.

In regard to the injunction which was issued the defendant is not causing any damage; therefore it is unnecessary. As the defendant is unaffected by the injunction the order of the District Judge might stand so long as it does not violate defendant's right of property.

H. V. Perera, K.C. (with him **N. Nadarajah, K.C.**, and **H. W. Jayewardene**), for the plaintiffs, respondents.—It is possible for even one who is not an expert to find out whether there is an encroachment underneath a certain land if the encroachment comes well

within a certain land. The plaintiffs have come to know that there is an encroachment of their property and now seek the assistance of Court to find out the nature and extent of such encroachment, as the plaintiffs could not get any assistance in that respect from the defendant. The objections of the defendant to the survey and inspection seem sentimental and fanciful.

Sub-sections (a), (b) and (c) of section 669 confer cumulative powers. Section 499 of the Indian Civil Procedure Code of 1882 was the same as section 669 of our Civil Procedure Code. In *Dhorney Dhur Ghose v. Radha Gobind Kur*¹ Ameer Ali J. held that subject-matter of suit referred to in section 499 of the Indian Code was comprehensive enough to include all matters in issue in suit. Order 52 Rule 3 of 38 and 39 Victoria Chapter 77 was identical with our section 669. Under that Order 52 Rule 3, on facts similar to the present case, the plaintiffs would have the right to inspect defendant's mine. See *Cooper and others v. Ince Hall Company*²; *The Earl of Lonsdale v. Curven*³; *Bennit v. Whitehouse*⁴; *Strelly v. Pearson*⁵; *Bennet v. Griffiths and another*⁶. These cases show that on making a *prima facie* case that an encroachment exists the plaintiff is entitled to an inspection. The position is the same according to well known text books. See McSwinney on Mines, 3rd Edition, 596, Bainbridge on Mines and Minerals, 5th Edition, 445.

Hayley, K.C., in reply.—The observations in 24 *Calcutta* case are purely *obiter* because in that case it was the defendant who asked for inspection of the plaintiff's house in respect of damages to which the action was brought by the plaintiff. Order 52 Rule 3 referred to is different from section 669. It omits reference to a survey. All the cases cited were for inspection and not for survey. The case reported in 3 *Law Times* was decided under a different statute giving much wider powers. The position has been summarised in Halsbury (2nd ed.), Vol. 22, p. 577. See *Lewis v. Marsh*⁷ about the limits to be imposed if an inspection is allowed.

Cur. adv. vult.

December 18, 1946. WIJEYWARDENE J.—

The plaintiffs and the defendant company claim to be the owners of two adjoining plumbago mines called Maha Bogala Mine and Karanda-watta Mine respectively.

The plaintiffs filed their plaint on August 5, 1944, alleging that the defendant had encroached on the plaintiffs' property by tunnelling into it and had wrongfully removed plumbago from their mine. They alleged that it was necessary to have access to the tunnels in question through the defendant's mine for a proper inspection of the encroachment so as to enable them to submit to Court an accurate description of the course and extent of the wrongful tunnelling operations of the defendant and ascertain the quantity of plumbago wrongfully taken by the defendant. They said that before filing action they asked permission of the defendant

¹ (1896) *I. L. R.* 24 *Cal.* 117 at 122.

² (1876) *Weekly Notes* 24.

³ (1799) 4 *E. R.* 566.

⁴ (1860) 54 *E. R.* 311, also 28 *Beav.* 119.

⁵ (1880) *L. R.* 15 *Ch.* 113.

⁶ (1861) 3 *Law Times* 735.

⁷ (1849) 8 *Hare* 97.

for such an inspection and the defendant refused to grant such permission. They stated further that "the defendant was proceeding to fill up, flood and in other ways damage the said tunnels" and alter their existing condition, and that they applied for and obtained from this Court, under section 20 of the Courts Ordinance, an injunction restraining the defendant from doing such acts for twenty-one days from July 21, 1944. They annexed to the plaint the sketch B drawn to scale showing the encroachment so far as they could ascertain from an inspection through their mine and estimated tentatively the damage sustained by them at Rs. 102,500. They prayed *inter alia* for an interim injunction and an injunction during the pendency of the action restraining the defendants from causing damage as stated in the plaint.

The plaintiffs filed with the plaint two affidavits—one from D. T. Senewiratne, the Managing Supervisor of the plaintiffs' mine, and the other from J. L. Fernando, the Secretary of a Company working the Maha Bogala Mine under the plaintiffs. These affidavits substantiated the various material allegations in the plaint. Both these affidavits showed that D. T. Senewiratne "made a survey" of the encroachment by inspection through the plaintiffs' mine shortly after it was brought to his notice on June 30, 1944.

The defendant filed in September, 1944, a statement opposing the grant of the injunction and submitted two affidavits dated September 13, 1944, denying that the defendant encroached on the plaintiffs' mine or removed plumbago from it, or that the defendant's agents "have been filling up, flooding and in other ways damaging any tunnels alleged to have been made on the plaintiffs' land".

On January 25, 1945, the plaintiffs applied to the Court, under section 669 of the Civil Procedure Code, for the issue of a commission to two Licensed Surveyors, named therein, to survey and inspect "the land of the defendant company and the tunnels made therein which the said surveyors and experts may consider necessary for the purpose of ascertaining the trace and extent of the encroachments made by the defendant company upon the petitioners' land". The allegations in the petition were supported by an affidavit of the first plaintiff who stated that it was necessary to have access to the underground tunnels through the defendant's mine for a proper survey and inspection of the encroachment, and that it was also necessary for the purpose "to make a survey both of the surface of the defendant company's land and of the tunnels dug into our land and the defendant company's land by the defendant company".

The defendant filed on March 2, 1945, a statement objecting to the issue of the commission asked for by the plaintiffs, but did not file a counter affidavit traversing the averments in the first plaintiff's affidavit.

The District Judge held an inquiry with regard to the granting of an injunction and the issue of a commission. No further affidavits were tendered at that inquiry and no oral evidence was led. The plaintiffs tendered certain letters marked P1 to P7 which had passed between the parties and their Proctors shortly after the discovery of the alleged encroachment and before the filing of this action. The District Judge admitted those documents though objected to by the defendant. I

may add that at the hearing of the appeal before us no argument was addressed to us against the admissibility of the documents, and the Counsel for the defendant appellant himself referred to these documents and read passages in support of his case.

The present appeal is from the order of the District Judge granting both the applications of the plaintiffs.

It was not seriously contended before us that the injunction should not have been granted. I fail to see what reasonable objection the defendant could have with regard to that injunction. If he is doing the acts complained of, it is right that he should be restrained from doing them. If he is not doing these acts, the injunction cannot do him harm as it will not hamper him in the working of his mine.

It was argued before us that the Commission for survey and inspection should not have been issued as :—

- (a) the Court had no power under section 669 to issue a commission for the survey and inspection of the defendant's property ;
- (b) in any event, the material placed before the Court by the plaintiff was not sufficient to justify the issue of such a commission.

The argument of Counsel on the first point was that, as section 669 of the Civil Procedure Code referred to the inspection and survey of only "any property being the subject of such action", the District Judge had no jurisdiction to authorise the commissioners to inspect and survey the defendant's land or his tunnels. It was argued that the jurisdiction under that section was not so wide as under Order 50 Rule 3 of the English "Rules of the Supreme Court, 1883" which provide for "the inspection of any property or thing being the subject of such cause or matter or as to which any question may arise therein".

I do not think the jurisdiction of the Court is as limited as it is said to be by the appellant's Counsel. While sub-section (a) of the section speaks of "the inspection and survey of any property being the subject of such actions", sub-sections (b) and (c) say that for the purpose of such inspection and survey the persons authorised by the Court could "enter upon or into any land or building in the possession of any party to such action" and could make any "observation" "which may seem necessary or expedient for the purpose of obtaining full information or evidence".

The section of the Indian Code of 1882 corresponding to section 669 of our Code is section 499, and that section provided for the survey and inspection only of "any property which is the subject matter of such suit". In *Dhoroney Dhur Ghose v. Radha Gobind Kur*¹, where the High Court of Calcutta had to consider the scope of section 499 of the Indian Code, a similar argument was addressed to Mr. Justice Ameer Ali who said :—

Mr. Plough contended that the last words (i.e., the words "or as to which any question may arise therein") not being contained in section 499 the powers contained in Rule 3 (i.e., of Order 50 mentioned above) were not intended to be given by the Code. I entirely differ from that view. It seems to me that the words,

¹ (1896) 24 Calcutta 117.

“or as to which any question may arise therein” were omitted because it was thought that the words, “the subject matter of such suit” were sufficiently comprehensive to cover all matters in issue in the suit.

No doubt, these remarks were made *obiter*, but they are entitled to the greatest respect as expressing the views of a great Indian Judge.

Before 1883 the law in England on this matter was contained in Order 52 Rule 3 in the First Schedule to the Supreme Court of Judicature Act, 1875. That Rule provided for the inspection only “of any property being the subject of such action”. In *Cooper and others v. Ince Hall Company*¹ decided under that Rule, the plaintiffs who were proprietors of a colliery of seven acres brought an action for trespass against the defendants, the proprietors of an adjoining colliery of eight hundred acres. The plaintiffs applied for an order of inspection of the defendants’ colliery and for that purpose for the removal of the barriers erected by the defendants between the mines, for liberty to go down into the defendants’ mine and for liberty to take measurements, &c. The defendants objected on the ground that the Rule was never intended to enable a colliery proprietor to get an inspection of his neighbour’s mine by mere allegation of trespass. They further filed an affidavit to the effect that it was “important for reasons apart from the action that the working of the defendants’ mines should not be seen by the plaintiffs”. Granting the plaintiffs’ application Lindley J. said :—

“An order for inspection of this kind is so common in Chancery that I should have thought this was a matter of course. My impression is that the plaintiffs are entitled, almost as matter of course, to inspect the defendants’ mines about the alleged boundaries”.

In *Bennitt v. Whitehouse*² the plaintiff who was the lessee of a coal mine stated that he had reason to suspect that the defendant, the lessee of the adjoining coal mine, was working from his own mine into the plaintiff’s mine. He sued the defendant praying for an account of the coal wrongfully removed by the defendant and payment of its value. The defendant denied any encroachment and opposed an application of the plaintiff for an inspection of the defendant’s mine. Sir John Romilly, M.R., allowed the application and said :—

“Wherever it appears that a person has power to make use of his land to the injury of another, and there is *prima facie* evidence of his doing so, though it is contradicted, still, as the only way of ascertaining the fact is by an inspection, the Court always allows it, if it can be done without injury to the defendant”.

As regards the second point I need only say that in my opinion the plaintiffs have made a *prima facie* case affording a reasonable ground for belief that the defendants are trespassing on their mine. No doubt, the plaintiffs’ statements are contradicted by the statements in the defendant’s affidavit, but the issue of a commission of this nature does

¹ (1876) *Weekly Notes* 24.

² (1860) 54 *E. R.* 311.

not depend on the balance of testimony (*vide Bennitt v. Whitehouse (supra)*). The best evidence of the truth or the falsity of the plaintiffs' assertions will be supplied by an inspection and survey, and it is necessary that the trial Court should have such evidence before it.

The Order allowing the issue of the commission should, however, be made subject to certain conditions. In the first instance the inspection and survey should be at the expense of the plaintiffs. The plaintiffs should also deposit a sum of Rs. 5,000 in Court as security against any damages that may be caused to the defendants by such inspection and survey. The District Judge should, after notice to the parties, fix (a) the period of time during which the inspection and survey will be made reserving to himself the right to extend such period from time to time, as it seems to him to be necessary, (b) the period of notice that should be given in writing by the Commissioners to the defendants before such inspection and survey and (c) the maximum number of persons that should accompany the Commissioners on such inspection and survey. The written notice should give the names and descriptions of persons who would accompany the Commissioners. Such persons should be selected from a panel of persons submitted by the plaintiffs to the District Judge and approved by him after notice to the defendant. The Court will have the right to give such other and further directions as it may find necessary with regard to the execution of the commission even after the issue of the commission.

Subject to the modification indicated above, the order of the District Judge will stand. The respondents are entitled to costs of this appeal.

CANEKERATNE J.—I agree.

Appeal dismissed.
