

1938

Present : Maartensz and Koch JJ.

POUNDS *et al.* v. GANEGAMA.

33—D. C. (Inty.) Matara, 11,735.

Injunction—Partnership action—Interim injunction to remove defendant and to place plaintiff in possession—Power of Court—Courts Ordinance, No. 1 of 1889, s. 87.

A Court has no power under section 87 of the Courts Ordinance to remove a defendant who is in possession of the subject matter of the action and to place the plaintiff in possession pending the result of the action.

THE plaintiffs-respondents obtained an *intérim* injunction which prevented the defendant-appellant from interfering with the plaintiffs (1) in the management and control of the business known as "The Ideal Stores"; (2) in the taking charge of all the stock-in-trade, money, goods, fixtures, books of accounts, &c.; (3) from entering upon the premises in which the business was run. The defendant filed a petition and affidavit praying for the dissolution of the injunction on the ground that he was in possession in his own right. After inquiry the learned District Judge refused to dissolve the injunction, from which order the defendant appealed.

H. V. Perera, K.C. (with him N. Sivagnanasunderam), for defendant, appellant.—Injunctions are granted under section 87 of the Courts Ordinance, 1889. The fundamental principle underlying this is that the *status quo* must be maintained, for example, if a person is in possession, he can be prevented from taking the produce, but not eject him. The proper remedy in this case is the appointment of a receiver, but the plaintiffs had not asked for it. An injunction normally should not be issued without notice to the other side. Further the injunction was not served on the defendant. The plaintiffs are in possession now, but if the injunction is dissolved the defendant is entitled to be restored to possession as held in *Dorasami Ayyar v. Annasami Ayyar*¹

Counsel cited *Woodroffe on Injunctions* (2nd ed.), p. 97.

F. A. Hayley, K.C. (with him N. K. Choksy and C. X. Martyn), for plaintiffs-respondents.—There is no law laying down the procedure with regard to injunctions.

[Koch J.—What about Chapter XLVIII. of the Civil Procedure Code?]

The injunction need not be served on the other side. As a matter of practice Courts may serve it, but it is not necessary. The defendant was aware of the terms of the injunction as he moved under section 666 of the Civil Procedure Code. The Service of Order for Injunction is dealt with in 7 *Encyclopedia of the Laws of England* (2nd ed.), p. 265. Notice by telegram has been held sufficient in *Ex parte Langley, Ex parte Smith, In re Bishop*².

¹ (1899) I. L. R. 23 Mad. 306.

² (1879) 13 Ch. Div. 110.

An injunction can be used to eject a trespasser—see 17 *Halsbury* (1st ed.) p. 233, s. 508; *Goodson v. Richardson*¹; *Allen v. Martin*²; *Kerr on Injunctions*, p. 115; *Stretton v. Great Western Railway Co.*³; and *Woodroffe on Injunctions*, p. 361.

H. V. Perera, K.C., in reply.—On the material placed by the plaintiffs an injunction ought not to have issued. It has been worded as an injunction, but in fact it gives possession to the plaintiffs. A plaintiff out of possession cannot gain possession by way of an injunction.

Cur. adv. vult.

June 10, 1938. KOCH J.—

The appeal is from an order of the District Court refusing to dissolve an interim injunction which was obtained by the respondents against the appellant on March 12, 1937.

The application for the injunction was contained in the prayer of the plaint of an action instituted by the respondents against the appellant for a declaration, *inter alia*, that the respondents were entitled to the full and exclusive possession and control of a business known as "The Ideal Stores, Matara".

The plaint was supported by an affidavit sworn to by Horace John Hutchings, who described himself as the attorney of the first respondent and the secretary of the second respondent company.

The facts set out in the plaint and in the affidavit and relied on in support of the application were:—

That by and under an indenture executed on May 18, 1933, between the respondents and one George Senaratne, a partnership was entered into in regard to the carrying on of the business known as "The Ideal Stores";

That according to the terms of the said indenture, the general management of the said business was to be under the entire and sole control of the first respondent;

That as the said George Senaratne was indebted to the second respondent, this debt was to be liquidated out of a three-fourth share of the nett profits of the said business and that the remaining one-fourth share was to be paid to the said George Senaratne;

That in the event of the death of the said George Senaratne, the business was to be continued to be carried on as before and his share, namely, 49/100 shares, if not purchased by the first respondent, was to devolve on his heirs who would be entitled to so much of the nett profits as George Senaratne would have been entitled to, but they would be subject to and bound by the terms and covenants of the indenture;

That the said George Senaratne died on April 9, 1934, leaving a last will which was proved and under the terms of which his widow and his brother succeeded to his share of the partnership and to his right to be paid a one-fourth share of the nett profits;

That the deceased's share was not purchased by the first respondent and the business continued to be carried on under the supervision and control of the respondents;

¹ (1874) 9 Ch. App. 221.

² (1875) L. R. 20 Eq. 462.

³ L. R. 5 Ch. 751.

That at or about the end of 1936, there was a sum of over Rs. 8,000 still due to the second respondent from the estate of the said George Senaratne and also a sum of Rs. 7,859.23 from the business ;

That the defendant who was appointed manager of the business of "The Ideal Stores" by the respondents at a date prior to the dates material to the action and who acted under the control and supervision of the respondents was given notice on January 30, 1937, terminating his services as from and after February 28, 1937 ;

That the appellant instead of relinquishing his management at the end of February repudiated his contract of employment and wrongfully and in defiance of the respondent's rights continued to remain on the premises and to be in unlawful possession and control of the said business.

The acts complained of against the appellant are that he has refused to hand over to the respondents the stock-in-trade, money and other assets of the business, that he wrongfully claims to be in possession of the business and its assets by a right adverse to that of the respondents, that he refuses to allow the respondents to take stock of their goods or to check the accounts thereof or to hand over the cash realised by sales or by payments by those owing money to the business, and that he is making it impossible for the respondents to carry on the said business.

The affidavit further states that it is anticipated that the appellant will dispose of the stock-in-trade and appropriate the proceeds thereof and do such other acts in disregard and violation of the respondents' rights as would render the provisions of the indenture nugatory to the loss and damage of the respondents unless restrained by an injunction.

On this material, the Court, on March 12, 1937, ordered an injunction to issue in terms of the prayer and the Fiscal on the same day served the injunction on the appellant's agents and employees who vacated the premises when, it is admitted, the respondents took possession and control. Three days later the appellant filed a petition and affidavit praying for a dissolution of the injunction on the ground, *inter alia*, that several of the averments in Hutching's affidavit were untrue, that the appellant was in possession in his own right and independent of the respondents, that the respondents never managed or controlled the business, and that no injunction addressed to him issued from the Court nor was an injunction served on him personally. After inquiry the learned District Judge refused, on November 10, 1937, to dissolve the injunction. The defendant has appealed from this order.

The appellant restricted his argument to matters of law which he maintained applied whether he was rightly or wrongly in possession. Appellant's Counsel, when informed that the order granting the injunction was signed by the Judge or at any rate bore his initials, was not disposed to press his arguments on the points that the injunction had not been addressed to the appellant nor personally served on him. He confined himself to contending that although there might have been material before the Court for granting an injunction, yet the injunction should not

have been issued in the terms prayed for as the effect of some of the terms was to oust his client and place the respondents in possession and control. He referred to terms 1, 5, and 6.

The appellant was restrained by term 1, "from interfering with the respondents in their management and control of the business"; by term 5, "from preventing the respondents taking charge of all the stock-in-trade, money, goods, fixtures, books of accounts, &c."; by term 6, "from preventing the respondents from entering upon the premises in which the business was run".

That these terms had the effect which appellant's Counsel ascribed to them there can be little doubt and it has transpired, to judge from results that it did in fact have that effect.

The power of a Court to grant an injunction is given by section 87 of the Courts Ordinance, No. 1 of 1889. Under that section this power can be exercised under any one of the three sets of circumstances set out in the section. It may be, and very likely too, that the respondents have depended on facts which would bring their case under every one of these sets, but what is the relief which can be granted? The section only permits the Court to restrain the defendants from doing or committing any of the acts set out in it. I can see nothing in the section that empowers a Court to remove a defendant from the possession of the subject matter of an action and to place the plaintiff in possession instead pending the result of the action. Sub-section 2 of section 87 refers to the case of a defendant, who during the pendency of an action, does or commits an act in violation of the plaintiff's right respecting the subject matter of the action and which tends to render the judgment ineffectual—a situation similar to the one before us as portrayed by the respondents—and yet the remedy as laid down does not proceed beyond restraining the defendant from committing such and act.

Mr. Perera has also referred us to a passage in *Woodroffe on "Injunctions"* (2nd ed.) at p. 97 which is to the effect that "the object of an injunction is to prevent future injury and leave matters as far as possible *in statu quo* until the suit in all its business can be heard and determined".

Mr. Hayley on the other hand contends that on the averments of the affidavit relied on by him, it is clear that the appellant was a trespasser and that he was therefore entitled by injunction, though of an interim nature to have the appellant removed and his clients placed in possession pending the trial of the action.

He cited in support the case of *Gordon v. Richardson*¹. The facts here are that the plaintiff was the owner in fee of a moiety of a highway adjoining his lands. The defendant, having obtained permission from the Highway Board to lay down pipes along the highway for the purpose of supplying water to his houses, laid pipes in the soil of the side of the road adjoining the plaintiff's land and without his consent. The upper surface of the moiety of the highway was dedicated to the public, but the soil in which the pipes were laid belonged to the plaintiff. The work of laying down the pipes had been completed and the defendant insisted on keeping the

¹ 9 *Law Reps. Ch. App.* 221.

pipes and allowing the water to go through them. On the facts, the Court was of opinion that the defendant was a trespasser and a continuing trespasser and held that the judgment of the Master of the Rolls allowing a permanent injunction should not be disturbed. Now the pipes, as one of the Judges, Sir G. Mellish L.J. said, were still chattels and had not become part of the realty for there was no intention to annex them to the soil and it was clear that the defendant had not got into possession of any portion of real property "so as to make it necessary for the plaintiff to bring an action in ejectment". The pipes therefore were still the property of the defendant, the plaintiff being in possession of the soil, and the effect of the permanent injunction was to cause the defendant to remove his own property and thus put an end to the trespass which he had committed by placing his property in land belonging to the plaintiff. Save for the removal of the property—property which admittedly belonged to the defendant—the position of the plaintiff was the same after the injunction was granted as it was before. I cannot therefore see that this decision has any application.

The next case cited was that of *Allan v. Martin*¹. This case is still less helpful. The applicant for the injunction was the owner of a garden over which his tenants of the adjoining houses had rights of enjoyment and management. Graham had on behalf of the occupiers the management of the garden. He proposed to make certain alterations and improvements within reason, and entered into a contract with one Martin to do this work. Martin without the authority of Graham commenced digging out and selling the sand subsoil and committed a number of acts which were outside and beyond the right of enjoyment and management which the occupiers had. The plaintiff therefore filed a bill to restrain the defendant Martin from entering or remaining upon the garden and from continuing to commit such other acts as were complained of. Sir Charles Hall V.C. was not disposed to grant the injunction in the terms asked and to turn the defendant out of the garden, but confined the injunction to restraining the defendant and his agents from further committing the acts complained of. The decision in this case therefore does not help the present respondents.

Counsel also referred to the case of the *Attorney-General v. Tomline*². This case can be distinguished on more grounds than one. It was not an application for an interim injunction pending the trial but a regular suit for a permanent injunction and damages. Besides, the plaintiff was in actual possession of the land when the defendant entered upon it and excavated for minerals. The plaintiff continued to remain in possession, but his grievance was that the defendant had no right to dig and excavate. The relief he wanted was that the defendant should be prevented from further trespassing by excavating and that he should be paid the damages sustained. In these circumstances it would appear that he rightly claimed in his suit to be entitled to a permanent injunction restraining the defendant and to damages. This was allowed. There was no term in the

¹ 20 Law Reps. Equity Cases 462.

² Law Reps. 5 Ch. Div. 750.

injunction that he should be restored to possession nor was this asked for as he continued to remain in possession and was only disturbed by the excavation works which the defendant carried out.

A passage at p. 102 in *Kerr on Injunctions* (5th ed.) was also read to us as being the law after the Judicature Act, 1873. What is stated is that "an injunction may be asked before the hearing to prevent any threatened waste or trespass and may be granted whether the defendant is or is not in possession". That a defendant in possession can be restrained from committing acts which amount in law to a trespass on plaintiff's rights can well be understood, and this would be an authority for the respondents in this case justifiably to ask that the appellant who is in possession be restrained from doing such of the acts as are set out in terms 2, 3, and 4 of the injunction; but what has been quoted cannot be availed of to enable the respondents to enter into possession pending the trial.

Mr. Hayley also cited section 532 in *Halsbury's Laws of England*, vol. 17 at p. 249 which is to the effect that the Court will restrain by injunction a partner from violating the terms of his partnership and acting inconsistently with his duties as a partner. But the present respondents made their application on the footing that the appellant was a trespasser and it was on that footing that the injunction was ordered to issue. In any event, I am not prepared to go to the length that Counsel would wish us to go in construing that the effect of the restraint would involve the restoration of one partner, who has been kept out of partnership property by another partner, to possession of that property.

Finally, it is argued that unless the respondents are permitted to enter and take charge of and to carry on the business, the business would come to a standstill and grave loss will result. The position of the respondents is, no doubt, unfortunate, but there is still a way out of this difficulty, and that is by the appointment of a receiver under section 671 of the Civil Procedure Code till the action is determined. *Halsbury's Laws of England*, vol. 17, s. 535, at p. 250 contemplates a receiver being appointed in the case of a deadlock between partners.

It is a common occurrence in Ceylon for a person unlawfully to enter upon land and turn out the party in possession. Such acts have led to innumerable actions for declaration of title and ejectment by parties so dispossessed and though in such actions it is sometimes asked, and rightly too, that the defendant be restrained from committing wasteful acts on the land pending final determination of title, no decision has been cited to us—and as far as I am aware there is no such decision—in which under such circumstances the plaintiff was able to be placed in possession pending trial by means of an interim injunction. The reason, no doubt, is that the law will not permit such a proceeding and, if this is so in such a flagrant type of case, could it be expected that the law will enable a party who was not in actual occupation to enter by injunction and take possession as against a person who, having been in occupation as a licensee, has repudiated that position and claims to be in possession in his own rights.

I am of opinion that, by reason of the insertion of terms 1, 5, and 6 in the injunction, the injunction is bad and that its issue and execution was wrongful. The order of the District Judge of November 10, 1937, is set aside, the injunction dissolved, and the appeal allowed with costs. The appellant will also be entitled to the costs of the inquiry in the Court below. .

MAARTENSZ J.—I agree.

Appeal allowed.
