Present: Fisher C.J. and Drieberg J.

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ZAHIRA UMMA *v.* ABDUL RAHIMAN.

203—D. C. Colombo, 22,163.

Servitude of light and air—Construction of building to obstruct the access of light—Injunction.

Where the plaintiff sued the defendant to restrain him from erecting a building so as to obstruct the access of light and air to plaintiff's premises,—

Held, that the onus lay on the plaintiff to prove that, if the proposed building was erected, the plaintiff's building could not be put to the purpose for which it is put as beneficially as it has been heretofore.

Where a person with knowledge or warning of another's right or claim of right does something which infringes or will infringe the rights of another, the Court will interfere to protect the person whose rights are infringed or threatened by a mandatory or prohibitory injunction according to circumstances.

APPEAL from a judgment of the District Judge of Colombo. The facts appear from the judgment of the Chief Justice.

Hayley, K. C. (with *Canakaratne*), for defendant, appellant.

H. V. Perera (with *Navaratnam*), for plaintiffs, respondents.

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April 4, 1928. FISHER C.J.—

Zahira Umma v. Abdul Rahiman

In this case the 1st plaintiff is the owner of premises known as 44, Third Cross street, Pettah, in Colombo, and the 2nd plaintiff is her husband. The defendant is the owner of adjoining premises upon which there stood a building which has been pulled down and upon the site of which he has begun to erect another building. The plaintiffs sue the defendant to restrain him from erecting this new building so as to obstruct or diminish the access of light and air to two windows on the south-western wall of 1st plaintiff's premises.

The right of the plaintiff to the access of light and air through the two windows is not now disputed, but the substantial and main contention of the defendant is that if and when the building the defendant wishes to erect is completed the effect on the 1st plaintiff's premises will not be such as to constitute an infringement of her legal rights inasmuch as, so he contends, " the 1st plaintiff's premises will not be less fit for use and occupation after the construction of the said building."

The 1st plaintiff's building is of an oblong shape. It is entered from Third Cross street and the door, or something that serves for a door, is co-extensive in size with the end of the building which abuts on Third Cross street. At the end of the building away from the street there is a staircase leading up to a first floor room 18 feet by 10 feet in size which is lighted by five windows. Of these, the two on the south-west are the windows which the plaintiffs complain will be obstructed by the defendant's building. On the opposite inside wall to these windows is a large glass window opening on to the ground floor of the building, and through this window the light from the windows in the south-west wall of the building reaches the ground floor. Substantially, therefore, the only light of the ground floor is the light from the entrance and the light borrowed from the two windows on the south-west wall.

The evidence shows that the premises of the 1st plaintiff are in a commercial locality and are used as a store for cement and hardware and that sales take place there. The witness called for the defendant states that the first floor is used as an office.

The proposed building—and by the proposed building I mean the building as originally intended to be constructed at the date of the action—would leave no intervening space between the 1st plaintiff's and the defendant's premises, but would be right up against the 1st plaintiff's building, with the result that the two windows affected would, according to the evdence of the one witness called for the defendant, be left with an opening of 5½ inches in height only, and this narrow slit would open on to a roof sloping upwards

at such an angle as would make the ridge of the roof higher than the windows. The two windows would in fact be partially sealed up. It is obvious then that the actual diminution of access of light and air would be very considerable. In passing, I may say that in my view the learned Judge was right in confining the case to the state of things upon which the proceedings were instituted. There was no express abandonment by the defendant of his original intention, and though the suggested modification of his plans might well have afforded a basis for negotiation, he cannot resist and defend himself against the plaintiffs' claim by proposals which include the alteration and adaptation of the 1st plaintiff's premises so as to modify or minimize the loss of light and air which the erection of the building complained of involves.

The first question, therefore, is whether the proposed building would infringe the plantiffs' legal rights.

The law in England as to the legal rights of a plaintiff in cases such as this was exhaustively considered by the House of Lords in *Colls v. Home & Colonial Stores*,[1] and the law as laid down in that case was adopted by this Court as applicable to the rights of parties in Ceylon in similar circumstances in *Goonewardene v. Mohideen Koya & Co.*[2] On the basis of these decisions, in order to show that their legal rights would be infringed, the onus lay on the plaintiffs to show that if the proposed building were erected the 1st plaintiff's building could not be used for the purpose to which it is put as beneficially as it has been heretofore. This is not a case of premises used for residence. The ground floor of the premises in question, and the extent to which the ground floor would be affected seems to have been the question upon which this case was tried and decided, is used as a store for cement and hardware where sales take place. It is not therefore a place which requires light in any special degree. On the other hand, the degree of light and air enjoyed by such a store must have some relation to its value as such, and it could not be contended that the 1st plaintiff must submit to her store being turned into a cellar. The evidence shows that the ground floor, apart from the light coming through the entrance, depends for light entirely, or almost entirely, on the borrowed light to which I have referred. The only witness called for the defendant said in cross-examination :—

> "The new building which the defendant is constructing is for a shop and store. I call the defendant's and plaintiff's premises stores because goods are kept there and sold. If this light is taken from plaintiff's premises it cannot be used for anything else except for a godown. Now it can be used for storing goods and selling them

[1] *(1904) A. C. 179.* [2] *13 N. L. R. 264*

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there. If these two windows are blocked there would be sufficient light, because there would be three windows left intact. The light from those three windows would have to travel obliquely to go to the godown. Now it travels direct and finds its way through another window in a direct line. So that the amount of light coming from the side windows would be a great deal less if these two windows are blocked. "

The learned Judge who tried the case inspected the premises and accepted the evidence of the expert witness called for the plaintiffs as regards the diminution of light to the ground floor, which he said was in accordance with the opinion formed by him at his inspection.

On a consideration of the whole of the evidence I do not think that any other deduction can be drawn than that the proposed building would render the 1st plaintiff's building less fit than it was for the purpose for which it is used and that therefore her legal rights would be infringed.

The question then arises whether it is a case in which an injunction should be granted.

The law seems to be this: If a man with full knowledge or due warning of another's rights or claim of rights does something which infringes or begins to do something which if completed will infringe the rights of another he acts at his own risk, and the Court will interfere to protect the person whose rights are infringed or threatened by a mandatory or prohibitory injunction according to the circumstances. Otherwise the Court would in effect be vesting in the person acting arbitrarily and in defiance of another's legal rights something in the nature of a right of compulsory purchase. This point of view is dealt with by Lord Finlay in a passage in his judgment in *Leeds Industrial Co-operative Society, Ltd. v. Slack*[1] to which my brother Drieberg has drawn my attention.

It is quite clear from the letter written by the plaintiffs' proctors on October 18, 1926 (document P 2), that the defendant had full notice of the position taken up by the plaintiffs. The defendant himself did not go into the witness box, and there is nothing to show that he was encouraged to proceed with the building by any action or conduct on the part of the plaintiffs. Even if there were such evidence, unless it amounted to giving leave and licence or proved facts which created an estoppel, it could hardly be used as a basis for refusing a prohibitory injunction. At the most it could only affect our decision as to costs.

It is to be noted too that the defendant put forward a claim in reconvention for damages based on the plaintiffs having " acted

1 (*1924*) *A. C. 850, at pp. 860, 861.*

maliciously and dishonestly, " but no issue on this claim was framed, nor did the defendant proceed any further with it.

Under all the circumstances, it is in my opinion impossible in this case to refuse the plaintiffs the relief which is their *prima facie* right, namely, an injunction.

The judgment of the District Court must be affirmed, and the appeal dismissed with costs.

DRIEBERG J.—I agree.