

**Becharam Chatterjee and anr. Vs. Benode Behari Chatterjee and ors.**

**Becharam Chatterjee and anr. Vs. Benode Behari Chatterjee and ors.**

**SooperKanoon Citation :** [sooperkanoon.com/858534](http://sooperkanoon.com/858534)

**Court :** Kolkata

**Decided On :** May-16-1928

**Reported in :** AIR1928Cal510

**Appellant :** Becharam Chatterjee and anr.

**Respondent :** Benode Behari Chatterjee and ors.

**Judgement :**

1. This appeal is directed against the decree of the lower appellate Court dismissing the plaintiffs' suit which was one for declaration of title and for a mandatory injunction against the defendants directing them to remove a portion of their privy which they have built upon the ejmali drain. The first Court decreed the plaintiffs suit on the finding that there was an encroachment by the defendants on the ejmali drain. The lower appellate Court is of opinion that the plaintiffs have failed to prove that there was any encroachment by the defendants upon the ejmali drain, and this view it has been induced to hold by the fact that the present position of the drain was not demarcated in any of the maps prepared in the case. It appears that in 1904 a partition of the joint properties was made through Court between the ancestors of the parties. The disputed drain was left ejmali and it has been remarked by the lower appellate Court that it is difficult to determine for what purpose. This ejmali drain runs along the eastern side of the defendants' premises. The maps prepared in the case do not show that it in any way touches the plaintiffs' premises. In 1909 the mother of the present plaintiffs instituted a suit against defendants 1 and 2 and another for a declaration that the disputed drain

was the joint property of the parties and for a permanent injunction restraining the defendants from including the drain in their homestead. That suit was decreed on 11th November 1909, but the mandatory injunction prayed therein was disallowed. It is not necessary to go further into the details of the litigation between the parties. It appears that in 1920 the defendants began to erect a privy encroaching upon the drain as alleged by the plaintiffs. In 1921 the decree in the plaintiffs' mother's suit was executed. No attempt was made to remove the encroachment by the defendants which, according to the evidence in the case as found by the learned Subordinate Judge began sometime in 1920. The present suit was instituted in 1922. On these facts the learned Subordinate Judge has held that the present suit was barred under Order 21, Rule 32, Civil P.C. In my judgment the view taken by the learned Judge of the application of Order 21, Rule 32, is not correct and that the suit does not necessarily fail because in the previous execution proceedings the decree-holder did not complain against the encroachment made by the defendants.

2. The next question in the case is whether under the circumstances of the case the plaintiffs are entitled to the relief claimed by them in the suit. The learned Subordinate Judge has held that the local investigation by the commissioners has not been satisfactory as they have not depicted on their maps the location of the drain as it stands at present. He, therefore, finds himself unable to say that there has been any actual encroachment by the defendants on the ejmali drain. If the matter had rested here we would have felt inclined to ask the Judge to reconsider his decision and, if necessary, after a fresh investigation. But the real relief which the plaintiffs claim in this case is mandatory injunction, namely, an order upon the defendants to demolish the portion of the privy which they have erected upon the ejmali drain. This relief, in the circumstances of the present case, they are not entitled to get. The encroachment according to the evidence of the plaintiffs themselves began in 1920. There was a verbal protest, but no further action was taken in the matter. Long after the completion of the structure the plaintiffs have brought this suit and claim that it should be removed. This is a relief which they are not entitled to as a matter of right. It is an equitable relief and one of the principles on which such relief is granted is that the plaintiffs must show diligence and should not be guilty of laches. Under Section 56(j), Specific Relief Act an injunction

cannot be granted when the conduct of the plaintiff or his agent is such as to disentitle him to any assistance from Court. It is a settled principle of law upon which mandatory injunctions are granted that the party who claims relief must be active and prompt. He must when the injury begins protest against it, and if his protests are not listened to he should follow it up by a suit in Court praying for an injunction against the defendant so that further injury may not be done. *Benode Kumari Dassi v. Soudaminy Dassi* [1889] 16 Cal. 252; *Woodroffe on Injunction*, 4th edn. 113.

3. In our opinion the conduct of the plaintiffs has been such as to disentitle them to any relief. They have further failed to prove that they have in any way been injured by the act of the defendants except that it is an encroachment upon the ejmali drain. They may have other remedies open to them which we need not suggest; but they are not, in the circumstances of this case entitled to claim that the privy put up by the defendants should be demolished. That is the principal relief which they claim and since in our opinion they are not entitled to any such relief it is not necessary that any investigation should be made as to the nature of the encroachment alleged to have been made by the defendants on the ejmali drain.

4. The learned Subordinate Judge had dismissed the plaintiffs' suit. But it appears that one of the claims in the suit was for declaration of the plaintiffs' ejmali title to the drain. This was not denied by the defendants and the plaintiffs at any rate are entitled to get a declaration to that effect.

5. The result is that this appeal is allowed and the decree of the lower appellate Court confirmed with the modification as stated above. But in the circumstances of the case we do not allow any costs.