IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present :
THE HON'BLE JUSTICE I.P. MUKERJI

G.A. No. 2428 of 2013
C.S.No. 285 of 2013

ITC Limited
Vs.
Chowringhee Residency Private Limited

For the plaintiff/petitioner:- Mr. Ahin Choudhury; senior adv.
Mr. Samit Talukdar; senior adv.
Mr.Sakya Sen; adv.
Ms. Sudeshna Bagchi; adv.
Ms. Hasnuhana Chakroborty; adv.
Ms. Debasri Dutta; adv.

For the defendants/respondents:- Mr. Ram Jethmalani; senior adv.
Mr. S.N. Mookherjee; senior adv.
Mr. S.N. Mitra; senior adv
Mr. Ratnanko Banerjee; senior adv.
Mr. Sanjiv Kumar Trivedi; adv.
Mr. Debanjan Mandal; adv.
Mr. Arindam Banerjee; senior adv.
Mr. Biswajit Kumar; adv.
Ms. Shruti Swaika; adv.

Judgment on:- 16TH JANUARY, 2015

I.P. MUKERJI, J.

This suit is concerned with easementary rights. It relates to the exercise of an alleged right to obtain uninterrupted ancient light to a building, by ITC Ltd., the plaintiff, and its owner, against Chowringhee Residency Private Limited, the defendant. The plaintiff, is exercising this alleged right as dominant owner of Fountain Court comprised in premises no. 7/1 Little Russell Street Kolkata 700071, also known as Nandalal Bose Sarani over the defendant, the servient owner of a property on its western side.

What is under consideration, by me, is an interim application in aid of the above suit, taken out by the plaintiff for an order of injunction restraining the defendant from interfering with the plaintiff's access to and use of light.

This premises comprises of about 2 bighas 1 cottah 3 chittacks and 13 square feet of land. It has this five storied building, Fountain Court, used for residential purposes. Some of the directors and other most senior officers of the plaintiff reside here.

It was purchased by the company on 13th November, 1956. The western part of the building is allegedly affected. It has 43 windows. Up till 1973, it had 30 windows. 13 were added that year. The height of this building is about 67 feet 6 inches.

At the time of purchase of this property, there also existed another five storied building on its western side. The plaintiff says that the alignment and height of this building was such that its existence did not cause any interference with the plaintiff's access to ancient light. This building was also 67 feet 6 inches tall. It was

subsequently demolished. The land on the western side of Fountain Court was mostly open space. There was only a damaged building on Chowringhee Road which did not cause any interference with the plaintiff's access to light.

All this changed in 2013. The western side of Fountain Court comprising 42B Chowringhee Road, Kolkata was acquired by the defendant. They started laying the infrastructure and bringing in equipments and machinery, what seemed like, for the purpose of making a massive construction.

The plaintiff enquired of them about their plans by their letter dated 5th March, 2013. They were completely taken back by the reply of 12th March 2013, A residential building was to come up at the site. It was to be a tower about 240 metres tall. 60 stories were to be built. Building sanction had been accorded by the Kolkata Municipal Corporation. It is admitted by the plaintiff that as early as 18th February 2013, they had a sketch of the proposed building.

The lateral distance between the boundary of Fountain Court and the proposed building was stated to be 16.35m – 16.75m whereas the total separation between the two buildings would be 20.72m, according to the report of M/s. Ingram Gordon & associates referred to later.

According to the plaintiff, if this building block was allowed to come up, it would substantially obstruct the passage of this ancient light to Fountain Court. This would cause substantial deprivation of light to its western side and also to the building as a

whole. They claim to be using this ancient light, as an easementary right uninterruptedly, from 1956, their purchase of the premises. Since this enjoyment, according to them, was well over 20 years, their easement right had become absolute and indefeasible. Hence, this suit.

The explanation in the plaint is that upon learning about the proposed construction by the defendant, the plaintiff started studying its impact on Fountain Court. Their date of engagement is not disclosed in the petition but it is said that a firm of English experts on light M/s Gordon Ingram and Associates was engaged by the plaintiff to make a study of this situation and to report.

It appears from the report of Mr. Gordon Ingram, the senior partner that on 6th June 2013 they received instructions to do their work. They made site inspection on 12th and 13th June. The report came only on 19th July 2013.

Thereafter, it took the plaintiff about 25 days to institute this suit.

According to the report of Gordon Ingram and Associates of 19thJuly 2013 the light which would be received by Fountain Court, after the proposed construction would be substantially diminished so as to make it insufficient for ordinary habitancy.

What exactly is the implication of this report has to be analysed.

First of all, the report is based on the principles expounded in the case of **Colls Vs. Home and Colonial Stores (1904).** It says that in cases decided in India, judges have referred to this case. One of the standards for assessment is whether there is substantial

diminution of light, so as to amount to nuisance? Whether the "retained light" is "comfortable" and sufficient for the ordinary purposes of inhabitancy"?

Now, to come to such a finding the 50/50 rule is applied. What is this 50/50 rule?

In making this assessment a 0.2 per cent sky factor or less is plotted in respect of a room both before and after the proposed construction is erected. What I understood, from examining the report is that less than 0.2 per cent sky factor represents insufficient light. The area of a room is sufficiently lit, if it has 0.2 per cent or more than 0.2 per cent sky factor. It more than half of a room has a sky factor of less than 0.2 per cent sky factor then the room as a whole is inadequately lit. This is known as the 50/50 rule. However, the author of the report opined that even if more than half the room had 0.2 per cent sky factor or more light, it could sometimes still be termed as inadequately lit.

According to the report, only the western side of Fountain Court would be affected. Not even the whole of it.

The report contains plans, sketches and drawings as annexures to it, where the lighting of each room on the western side is sought to be shown before erection of the proposed building and after it.

At the end Mr. Gordon Ingram, comes to the conclusion that the proposed tower on the western side of the Fountain Court would "create a substantial loss of light to the residential amenity within Fountain Court".

Mr. Ahin Chaudhuri, learned senior advocate appearing for the plaintiff made certain straightforward submissions. He said that ever since the plaintiff acquired Fountain Court in 1956, it had uninterrupted access to and enjoyment of ancient light, from its western side. He said that the old building which was situated on the western side of Fountain Court was so situated and aligned that there was no obstruction to the passage of ancient light to the plaintiff's building. As on the date of filing of the suit, construction of the proposed tower by the defendant on the western side of the plaintiff's building had not begun. On the basis of the pleadings made in the plaint and on the evidence of the report of Mr. Gordon Ingram, it could be necessarily anticipated that the proposed tower would cause substantial deprivation of light to the western side of the plaintiff's building. On the strength of the existing authorities, the plaintiff was entitled to an order of injunction restraining further construction of the building. I will discuss the authorities and other law cited by learned counsel, at a later stage.

First of all, Mr. Ram Jethmalani, learned senior advocate appearing for the defendant, argued that easement rights had to be exercised openly and in a hostile manner. On the western side of Fountain Court there was a wide open space, with a damaged building with nobody exercising or opposing exercise of any easement right. Hence, the plaintiff could not argue that they "openly" enjoyed uninterrupted access to light on the western side for over twenty years. They asserted their right to light, only in

2013, with the advent of the defendant. So there was not twenty years uninterrupted use of ancient light.

Learned Counsel also argued that no case of any worth had been made out in the plaint and in the documents appended thereto. He said that there were absolutely no details as to the manner in which the easementary right to light of the plaintiff was infringed by the defendant's construction. At any rate, according to him, in order to get an order of injunction, the plaintiff had to establish that actionable nuisance had been committed. To establish actionable nuisance, one had to prove an unlawful act in relation to a property resulting in damage, following the definition of actionable nuisance by the Supreme Court in **Rafat Ali Vs**. **Sugni Bai & Ors. reported in1999 (1) SCC 133** Nothing had been shown to demonstrate that occupation of Fountain Court for residential purposes would become so uncomfortable as to result in actionable nuisance, it was said. The degree to which there would be diminution of light, if at all was not established.

Mr.Jethmalani wanted to rely upon a report of an expert of light obtained by the defendant. But Mr. Chaudhuri rightly objected to its production at the stage of hearing of the interim application.

Learned counsel for the defendant invoked the principles of the Constitution of India, to be more specific, Article 300 A. It relates to the right to property. If I understood Mr. Jethmalani, correctly, according to him, the right to make construction of a building was part of the right to property. This right to property had to be taken away expressly by law. The Indian Easements Act, 1882 does not

have application in the State of West Bengal. Therefore, infringement of the right to light could not be asserted by the plaintiff to deprive the defendant of the right to erect the building or tower on the western side of Fountain Court.

Moreover, his client had obtained express sanction of the building plan from Kolkata Municipal Corporation under the Kolkata Municipal Corporation Act, 1980 and the Building rules framed thereunder. The plan was according to the said building rules. The said building rules had inturn been framed on the basis of a building Code approved by the Government of India to have an India application. I will discuss the cases cited by Mr. Jethmalani at a later point of time.

At this point of time it is necessary to know what is meant by easement. It is a right enjoyed by the owner or occupier of land. It is for the beneficial enjoyment of it. Such beneficial enjoyment is signified by continuing to do something on the land or preventing and continuing to prevent something being done on another land. The benefit is attached to the land known as the dominant heritage. The land on which the right is exercised or through which this right is exercised is called the servient heritage. Right to light or air is recognised as an easement.

Now, how is this easement acquired? When access to or use of light is peaceably enjoyed as an easement, without interruption for 20 years the right to such access and use of light becomes absolute.

This is part of the old English common law with regard to right of easement. There is no dispute whatsoever that this common law has been applied by our courts in this country for a very long time.

See Bhupati Bhushan Mandal Vs. Jadunath Ghosal reported in AIR 1955 Cal 70 (para 9), Nunia Mal & Anr. Vs. Maha Dev reported in AIR 1962 P & H 299 (para 17) and Prabir Guha Vs. Uttam Chand Surana reported in 2011 (2) CHN 665 (para 41).

Mr. Jethamalani, is absolutely right in his submission that the Indian Easements Act 1882 is not applicable to West Bengal. Even if the Indian Easements Act 1882 has no application in the State of West Bengal, the english common law with regard to easements, which has been applied in our country, by the age old decisions, does apply to this State. This Act, in my opinion, is nothing but a mere codification of the english common law relating to easements.

That is the justification for holding, in my view, that the principles of Indian Easements Act apply to our State.

Let us see how this common law developed in England and how it has been applied in our country.

Access to and use of ancient light as an easement and its infringement was discussed in a very early case of **1752 Fishmongers' Co. Vs. East-India Company reported in (1752) 1 dick 163**, by the House of Lords. To constitute infringement the obstruction should amount to a nuisance. In **Back Vs. Stacey reported in (31) RR 679 and Parker Vs. Smith supra (1862) 38 RR 828**, nuisance was defined as an illegality to a dwelling and

damage caused by it. Chief Justice Tindal pronounced the dicta that to constitute infringement of the right to light and air, it should be so diminished so as to "sensibly" affect the occupation of the plaintiff's premises and "make them less fit for occupation". This was also affirmed in another House of Lords decision in **Clarke Vs. Clark reported in 1865 (L.R.) 1 Ch.16.**

What is nuisance? According to the House of Lords in **Hunter Vs. Canary Wharf Limited (1997) AC 655** it is actionable user of land, so as to interfere with the plaintiff's rights in it. According to the Supreme Court in **Rafat Ali Vs Sugni Bai & Ors. 1999 (5) SCC 133** nuisance is an unlawful act in relation to property which results in damage.

Then came the celebrated case of **Colls Vs. Home and Colonial Stores, Ltd reported in (1904) AC 179,** before the same House. Different law lords pronounced different opinions. But, from a reading of the whole judgment, the ratio appears to be that it affirmed the principle that nuisance had to be caused by the obstruction of ancient light which was enjoyed uninterruptedly for 20 years by the owner on occupier of the dominant tenement . By such use the right had become absolute and indefeasible. **(See Lord Lindlay's speech).**

The amount of light received had to be judged according to the "surrounding and circumstances of light coming from the other sources and the proximity of the premises complained of". It was always "a question of degree" (see Lord Robertson's speech).

The dictum which is oft quoted is one of Lord Davey to the following effect :

"According to both principle and authority, I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and that the question for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of his tenement, does not affect the question. The actual user will neither increase nor diminish the right".

Now, Colls Vs. Home and Colonial Stores became a part of our law after a suit was instituted in this High Court by the owner of a building complaining of erection of a higher building on the eastern side. All along the plaintiff had been enjoying uninterrupted access to and use of light from the eastern side because the other buildings on that side were much lower in height. The suit of the plaintiff was dismissed by the learned trial Judge. An appeal was preferred before a Division Bench of this Court which dismissed the appeal. Thereafter, a further appeal was preferred before the **Privy Privy Council. (P.C.E Paul and Another Vs. W. Robson and Others reported in AIR 1914 Council).** The tests for ascertaining whether interruption of light amounted to nuisance against the property of the plaintiff, as laid down in the Colls case, were approved and applied by the Privy Council in this

appeal. It held that the courts below had correctly appreciated the principles and applied them in the facts and circumstances of the case.

Applying the same principles the Supreme Court remarked in **Chapsibhai Dhanjibhai Danad Vs. Purushottam reported in 1971 (2) SCC 205.**

"There must be a substantial privation of light, enough to render the occupation of the house uncomfortable, according to the ordinary notions of mankind". (**paragraph 22)**

Very importantly, the Supreme Court also held in paragraph 23, that it also had to be shown in detail, how raising of a construction would cause this substantial privation of light so as to make occupation of the house uncomfortable. This was emphasized by Mr. Jethmalani, to say that the plaint and the petition of the plaintiff were lacking in material particulars with regard to the details of infringement of the easement of light.

A Division Bench of this High Court pronounced the same principle **In Re: Reba Samanta (1993) ILR 1 Cal 317.** Mr. Justice S.K. Mukherjee opined as follows :

"In the first place, the disputed property on which the construction in progress is sought to be thwarted admittedly belongs to the opposite parties. The proposed construction again admittedly is being done on the basis of a sanctional plan and ordinarily every person has a right of constructing without interruption in such a situation, it is well settled by several judicial decisions that in order

to succeed in preventing such legal right to construct on one's own land, it is to be established that the construction would result in actionable nuisance against the complainant. In the case of a complaint of actionable nuisance regarding air and light one must show that the interference with the enjoyment of the same is such that it results in substantial deprivation of a comfortable user of the document tenement impossible. In the instant case, the lower appellate Court has overlooked, to arrive at a prima facie satisfaction, on the points as indicated above. The entire approach of the lower appellate Court is endeavoured to be justified on the basis that no prejudice would be caused to the opposite parties. If during the pendency of the suit injunction regarding the disputed construction is issued. This approach can be unhesitatingly said to be wrong with the immediate result of issuance of an interim order disregarding the basic criteria for exercise of jurisdiction in such a case. Even the only reasoning of the lower appellate Court can have no bearing in the event of success of the Plaintiff in the suit as there is already a prayer for relief by way of mandatory injunction".

Grant of Injunction

Before discussing whether this court should grant or refrain from granting an order of injunction in this case, a little background regarding exercise of this jurisdiction is necessary.

In England, the courts of equity granted injunction. It did not grant damages. It appears that this kind of cases was heard by the courts of equity. By an Act of Parliament popularly known as Lord Cairn's Act 1858, the courts of equity were empowered to grant damages in lieu of or in addition to injunction. It was always a matter of exercise of judicial discretion.

The leading case on the subject is **Shelfer Vs. City of London Electric Lighting Company (1895) (1) Ch 287** decided by the Court of Appeal. The complaint was about nuisance caused by vibration of engines. The type of nuisance was mainly sound and circulation of dust. The Court opined that nuisance had first to be established. Then it prescribed certain tests to be applied by the courts to decide the type of relief to be granted by it. Was the relief to be in the form of damages or injunction or both? Once the prima facie case was established the court had to see whether the alleged act of nuisance was trivial and occasional? Whether damages were an adequate remedy and could be fairly estimated in terms of money? Whether the plaintiff had instituted the action to extract money? Whether the action was vexatious and oppressive for the defendant? If the nuisance was significant the damages to be awarded would be significant. In that situation, the court would lean in favour of granting an injunction. Awarding damages would amount to "buying" the property rights of the plaintiff, against his wish.

The case of Colls reiterated the principles of Shelfer and added that if the defendant was acting in a high-handed manner or was

trying to evade the jurisdiction of the court, then an injunction ought to be granted. The judges in Colls did not grant the injunction but in Shelfer, injunction was granted.

In a case of partial diminution of light a Division Bench of the Bombay High Court as early as in 1889 opined that the plaintiff should be sufficiently compensated by damages and awarded damages accordingly. **(Dhunjibhoy Cowasji Umrigae Vs. Lisboa ILR 1889 (13) Bom 252).** In Lakshmi **Narain Banerjee Vs. Tara Prosanna Banerjee (1904) ILR 31 Cal 944,** a Division Bench of this Court granted an injunction in a case complaining of breach of easement right by overhanging branches of a tree and penetration of the soil by a growing network of roots. Our Courts in **P.C.E** Pa**ul & Anr. Vs. W. Robson & Ors reported in (AIR 1914 PC 45), Chapsibhai Dhanji Danad Vs. Purushottam reported in (1971 (2) SCC 205) and In Re: Reba Samanta reported in (1993 (ILR) 1 Cal 317)** considered all relevant factors and did not grant an injunction.

In **Regan Vs. Paul Properties Ltd. & Ors. reported in 2007 (4) All.E.R. 48** which was a Court of Appeal judgment, the principles of Shelfer were applied. It was proved by the owner of a Maisonette that two properties which were being built opposite his at a distance of 12.8 metres and comprising of five stories resulted in substantial deprivation of light to the plaintiff's premises. An order of injunction was issued. Even after hundred years of Shelfer, the Court of Appeal maintained that it was always a matter of

discretion to be used by a court whether to grant an injunction or not.

A new test appears to have been added in the case of **HKRUK II (CHC) Limited Vs. Heaney (2010) EWHC 2245 (Ch),** a Chancery bench judgment. The court is to assess whether the defendant was deriving profit out of the transaction and which in my opinion means profit even after paying damages. The dicta of Shelfer was followed by a Single Judge of this Court in **Parma Singh Vs. Tulsi Charan Goswami 41 CWN 794.**

Coventry & Ors. Vs. Lawrence & Anr. (2014) UKSC 13 is the latest decision of the English court on the subject. It was decided by the United Kingdom Supreme Court.

It is very difficult to understand the ratio of this case. In one part of the judgement it is suggested that despite planning permission a neighbour whose private rights might be infringed by the construction of a property could enforce them in a nuisance action. Whilst granting planning permission the authority is not assumed to have decided the neighbour's common law rights (See para-95).

In paragraph-101 of the judgment the Court opined that when the plaintiff had established nuisance, he was entitled to injunction. In the very next line the Court seeks to analyse the effect of Lord Cairns' Act and says that damages may be granted in lieu of injunction.

In paragraph 103-104 some passages from the case of Shelfer are discussed. Then again the case of **Kine Vs Jolly (1905)1 Ch 480** was discussed in paragraph-106 of the report where the Court of Appeal was less inclined than in Colls and Shelfer to grant an injunction. In paragraph-119 the UK Supreme Court remarked that the tests in the Shelfer case were rigid and should be made more flexible. Damages should not be restricted to exceptional cases (see para 119). The Court quoted the passage from the speech of Lord Macnaghten in the Colls case. The Court should be inclined to grant damages if the conduct of the defendant had not been unfair or unneighbourly.

It appears from the ratio of this case that after analysis of all the cases on the subject that the Court was of the opinion that all the relevant factors had to be considered before deciding whether to grant an injunction or not. New factors were introduced in this judgement. The injunction may involve the loss or waste of public resources. The financial loss of the defendant may be disproportionate to the damage done to the claimant. The grant of a planning permission was seen as an administrative decision. (in para 222 of the Judgment).

A passage from a judgement of the Court of Appeal in **Barr Vs. Biffa Waste Services Ltd** reported in **(2013) QB 455** was quoted with approval in paragraph-92 of this judgement. Paragraph 92 is inserted below:

92. **In my view, therefore, Carnwath LJ was right when he said in Barr v. Biffa Waste Services Ltd. (2013) QB 455, Para 46(ii), that**

"The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should 'march with' a statutory scheme covering similar subject matter. Short of express or implied statutory authority to commit a nuisance…, there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights".

On my reading and assessment of this judgment I tend to form the view that as Lord Macmillan had observed in the case of **Donoghue Vs. Stevenson reported in 1932 AC 562** that the categories of negligence were never closed, similarly, the factors which should be considered by the judge in coming to a decision whether to grant an injunction or not in easement infringement cases are never closed and vary with the circumstances, from case to case.

It is also useful to remember the dictum in the case of **Sturges Vs. Brizman (1879) 11 Chd 852** that " what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". It is possible to have a mansion in a village with wide open spaces on each and every side of the building. But it is quite a different thing to have a mansion in a crowded city like Kolkata and to think that wide open spaces which were available at the time of its purchase would continue to be available in the same way for

years together. If a person came to build on the neighbourhood of the village mansion, the owner or occupier would certainly have the right to protect his right to ancient light, more vigorously than he would be able to do in a crowded city. When it comes to a crowded city the standards of assessment become different than those applicable to a village. A person has to remain content with much less amount of ancient light then he needs or wants.

Prima facie case

The only evidence which the plaintiff has sought to put forward in support of their claim in the suit is the report of an expert on light, Gordon Ingram and Associates.

It is quite plain that there is no interruption of light to the northern, southern and eastern parts of Fountain Court. Only the western part would be allegedly affected. The report has relied on the 50/50 rule. There is no doubt that this 50/50 rule has wide acceptance. (See the unreported case of **William Cory Vs. City of London Real Property Ltd**. decided on 10th May, 1954; **Ough Vs. King reported in (1967) 3 All.E.R 859; HKRUK II CHC Ltd. Vs. Heaney (2010) EWHC 2245 (Ch).**

The rule is this. 50 per cent of an area should have .2 percent or more than 0.2 per cent sky factor of ancient light. The report, however, goes on to add that even if the sufficiently lighted area is more than 50 per cent, still a case of deprivation of light can be made out. Appended to the report are drawings, plans, maps,

charts and so on. These drawings represent the net result of the findings made by the expert. What were the findings that led to these results are not disclosed in the report. Say for example, if you take one room from the drawings attached. Let us assume that a shaded part or a hatch marked part represents a sufficiently lighted part of it. Therefore, the light in that part of the room is equal to or more than what is represented by 0.2 per cent sky factor. At the time of making of the survey, no construction had been made. The only information given by the defendant was that a 270 metre tall 60 storied tower would come up at the said lateral distance on the western side of Fountain Court. There is no mention of any measurement taken or data collected or experiments performed at the site or in a laboratory. No calculations or workings or formulae are shown to justify the results arrived at. It could at best be the opinion of the expert, based on his experience, given the limited data which was available to him.

On my part, I do not take the report as sacrosanct. It has to stand the test of trial. Mr. Ingram has to be examined and cross-examined. The defendant should be given an opportunity of producing their witness and their counter report to contradict this evidence.

But let us assume that Mr. Ingram is a recognised expert and that his opinion should be given some value. Even going by the opinion in the report, I do not think that there would be substantial deprivation of light. On my study of the expert's report with the annexures, I do not find that a single drawing room or living room

is affected. Look at appendix 5 of the report. It is a day light distribution analysis. It measures the diminution of light in square feet. Out of ten bedrooms facing the western side, only two are allegedly affected, one by 34.9 per cent and the other by 40.2 per cent.

In my prima facie opinion there would only be a partial diminution of light on the western side. Assuming the above data to be correct, habitancy cannot become so uncomfortable, as to amount to a nuisance. Following the ratio of the authorities discussed above, where the diminution of light is not substantial, damages are an adequate remedy. Injunction should not be issued.

Furthermore, as I have mentioned before it took the plaintiff about six months to file the suit after receiving the communication from the defendant that they proposed to build the tower. The plaintiff has tried to explain this delay by saying that they called in an expert from London to make the survey and furnish a report to them. The report was made available on 19th July 2013. Even after receiving the report it took the plaintiff about three weeks' time to file the plaint. In order to get an order of injunction the plaintiff has to act with great expedition. The action which the plaintiff proposes to maintain is quia timet**.** It was all the more necessary that the plaintiff moved at a much faster pace, than they did to obtain an order of injunction.

Moreover, when this application was moved before Justice Patherya and her ladyship refused to pass an interim order, no

steps were taken by the plaintiff to prefer an appeal. They were content to allow the defendant to file an affidavit in opposition to the petition and to make the application ready for hearing, so that they might pray for an order of injunction, a second time when the application would be heard after filing of affidavits. It is this application after filing on affidavits, which is before me.

Furthermore, these authorities tell us that if an order of injunction is oppressive to the defendant it should not be passed by the court. In my opinion, in the above situation, an order of injunction would be oppressive for the defendant. Furthermore, damage caused to the defendant by grant of the injunction will be much more than the damage to the plaintiff by non-grant of it (see **Coventry and Ors. Vs. Lawrence and Anr).** And it has been clearly laid down in the above case that the decision whether to grant or not to grant an order of injunction is exercise of discretion by the Court taking into account each and every fact in issue. Considering the above facts I do not think that I should exercise this discretion.

While concluding, I would like to dispose of one more point: whether sanction of a building plan by a municipal authority is in supersession of easementary rights? My answer is no, fortified by **Kamalakanta De Vs. Radhabalav Kundu reported in 84 CWN 624 (Para-15), Dhannalal & Ors. Vs. Thakur Chittarsingh Mchtapsuigh reported in AIR 1959 MP 240 (Paras 6 & 7)** and **Wheeler vs. J.J. Sanders Ltd. & Ors. Reported in 1995 (2) All.ER 697, Coventry Vs. Lawrence & Anr. (2014) UKSC 13 (Para 89, 94, 95).** To my mind the express mandate of the statute can be set up as a defence say,

for example, when by an Act of Parliament the Kolkata metro rail was to be set up. Under its operation buildings were damaged, people had to bear up with unbearable noise, vibrations, polluting substances and so on. There was no remedy except those under the Act, which was compensation. Building according to the building rules does not get such protection according to the above authorities.

Before parting with the case I should deal with one more submission of Mr. Jethmalani. He argued that on the western side of Fountain Court there were only wide open spaces before the defendant acquired premises no. 42B Chowringhee Road and started building on it. He said that the right of easement had to be openly exercised and in a manner hostile to the servient owner. Since there was nobody to challenge the plaintiff they could not claim 20 years' uninterrupted access to and use of light. This is plainly incorrect. There could be no wide open space of land without an owner, even if there was no occupier. There is nothing in the authorities above to suggest that the right to access and use of light has to be open and hostile as against the servient owner. Fountain Court always had a servient tenement on the western side through which it enjoyed uninterrupted light for 20 years. This created a right of easement in their favour.

Under those circumstances, the order of injunction as prayed for by the plaintiff is refused. Their right to claim damages against the defendant at the trial of the suit is preserved. Their right to apply for injunction in case there is deviation from the existing building

plan by the defendant is also preserved. This application is disposed of accordingly.

Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(I.P. MUKERJI, J.)