

(1949) 09 AHC CK 0006
In the Allahabad High Court
Case No : Application No. 35 of 1947

Abdul Qayume and Another	Vs	APPELLANT
Fariudoon Mirza		RESPONDENT

Date of Decision : 01-09-1949

Acts Referred:

Easements Act, 1882 — Section 33
Provincial Small Cause Courts Act, 1887 — Article 35

Citation : AIR 1950 All 519

Hon'ble Judges : Kaul, J

Bench : Single Bench

Advocate : Naimullah, for the Appellant; H.D. Srivastava, for Nos. 1 and 2 and M.P. Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Kaul, J.—This is an application preferred u/s 25, Provincial Small Cause Courts Act, for revision of a decree passed by the Judge, Small Cause Court, Lucknow, in a suit for damages on account of injury caused to the plaintiff's wall by the defendants allowing rain water to accumulate on their land by building a pushta (embankment).

2. The material facts lie within a short compass; The plaintiff's house adjoins some plots of land owned by the defendants. In order to prevent the rain water flowing from the southern plots on to the northern plots owned by the defendant, they constructed an embankment or pushta, which obstructed the channel through which rain water naturally used to flow out. This, it was complained, resulted in the accumulation of rain water on the defendants' land which damaged the wall of the plaintiff's house. He accordingly instituted the suit, which has given rise to the present application, in the Court of the Judge, Small Causes, Lucknow, for recovery of Rs. 500 as damages. The learned Judge held that water had accumulated on the defendants' land because they built a pushta and obstructed the natural flow of rain water which used to escape

through the channel towards north. The accumulation of the water damaged the plaintiff's wall. The claim was decreed for Rs. 200 and proportionate costs. The present application has been made challenging the decree.

3. Two points were raised by the learned counsel for the petitioners: (1) That the suit was not cognizable by a Court of Small Causes as it fell within the purview of Article 35 (i), Schedule II, Provincial Small Cause Courts Act, and (2) that the plaintiff was guilty of contributory negligence and hence the defendants were not liable to any damages.

4. Reliance in support of his contention was placed by the petitioners' learned counsel on *Perialcaruppan v. Palaniyandi*, 18 Mad, 28. In that case, which was one for compensation due for defendant's having wrongfully obstructed the flow of water to the plaintiff's cowle land, it was found that a channel led off from the tank to the plaintiff's land and that the petitioner's obstruction prevented the plaintiff from taking water along it, that loss of crop resulted and a claim was brought for compensation for this loss. It was contended that "diversion" within the meaning of that expression as used in Article 35 (i), Provincial Small Cause Courts Act, does not include "obstruction". This is not the question which arises in the present case. Damages in the present case are claimed for the injury caused to the plaintiff's wall on account of the accumulation of rain water on the defendants' land. It is true that this was the result of the defendants' obstructing the channel through which water used to flow out, This would not, however, as held in *In re Hausambhai Abdulabhai* 20 Bom. 283 and *Jagdat v. Jagmohan* 21 SC 138 : AIR 1918 Oudh 24 bring a case like present within the exception just referred to. I am satisfied that the case was cognizable by the Court of Small Causes.

5. It is further clear that the plea of contributory negligence has no substance. It appears that before bringing the suit, which has given rise to the present application, the plaintiff instituted a suit and obtained a decree for an injunction and damages against the defendants. By this injunction the defendants were directed to remove the pushta which they- had constructed, and damages were awarded for the injury that had been caused to the plaintiff's house by the accumulation of rain water on a previous occasion. It was argued that under the provisions of Order 21, Rule 32, Civil P. C., it was open to the plaintiff to take out execution of his decree and compel the defendants to remove the pushta. Inasmuch as he did not do so, he was guilty of contributory negligence. I am clear that the defence of contributory negligence has no place in a suit brought for damages on account of an intentional wrong. In the present case when the defendants constructed the pushta, they were repeatedly asked, by the plaintiff to remove the same as it was intended to keep the rain water from flowing out towards the north with the result that it accumulated on the southern plot and damaged the plaintiff's house on the east. The defendants paid no heed to these remonstrances. In such a case the plea of contributory negligence cannot be availed of. As observed by Salmond in his *Law of Torts*, 10th Edn., page 522:

"Although a person is not responsible for allowing the escape of things which are naturally on his land, he is responsible for causing their escape. He is not entitled to relieve his own land of a burden by casting it upon the land of his neighbour. Thus he is responsible for the escape of water from his land, if the escape is due to some embankment, channel or other artificial structure made or maintained by him there, or to any other alteration in the natural condition of his land."

In *Wholly v. Lancashire and Yorkshire Rly. Co.* (1884) 13 QBD 131 ; 53 LJ QB 285 the Railway Company cut trenches in an embankment close to the plaintiff's land. This was done in order to avoid damage to the embankment on account of unprecedented rainfall, the water escaped through these trenches on to the plaintiff's land and caused damage. It was held that though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were, therefore, liable.

6. I am satisfied that the claim was rightly decreed. The application is dismissed with costs.