

(1914) 06 CAL CK 0053

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 328 of 1912

Akhoy Kumar Chatterjee

APPELLANT

Vs

Akman Molla and Others

RESPONDENT

Date of Decision : 09-06-1914

Acts Referred:

Citation : (1914) 06 CAL CK 0053

Final Decision : Allowed

Judgement

1. This is an appeal by the Plaintiff in a suit for declaration that the Defendants have no right to excavate a tank on the disputed holding. The Plaintiff also asks for a mandatory injunction on the Defendant to compel him to fill up the tank or in the alternative for a decree for compensation to the extent of Rs. 400. The Courts below have dismissed the suit against all the four Defendants. The first Defendant is a raiyat in occupation of the land, while the other three are tenure-holders intermediate between the Plaintiff and the raiyat. The title of the tenure-holders was created on the 28th May 1854, by a lease under which they undertook not to cut down fruit-bearing trees and to excavate tanks on the property. The first Defendant executed a kabuliyat in favour of the tenure-holders on the 6th May 1888, but he was in occupation of a portion of the land from before that date. The Subordinate Judge has held that this kabuliyat was the inception of the present tenancy, because at that time the tenant obtained a lease of additional lands of which he had not previously been in occupation. The case for the Plaintiff is that the Defendants have committed a breach of covenant not to excavate a tank on the property comprised in the tenure and that they are consequently liable to indemnify him. The prayer for a mandatory injunction has not been seriously pressed; in fact the alternative claim shows that the Plaintiff would be amply satisfied with a decree for compensation and does "not intend that the tank should be filled up. The first question for consideration is, whether there has been a breach of covenant, and if so, by whom? There is no room for controversy that there was an express undertaking by the tenure-holders not to excavate any tank on the property. That covenant has been broken. No doubt, it

has not been broken by the excavation of a tank by the tenure-holders themselves, but prima facie, they must be held responsible for the act of their under-tenant. In the first place, in the lease which was granted to the raiyat on the 6th May 1888, they did not take the precaution to insert a covenant that the raiyat would not excavate any tank on the holding. Indeed, there is nothing to show that the raiyat was ever apprised of this restrictive covenant in the lease of the tenure-holders. In the second place, it is plain that they have placed the raiyat in a position to excavate the tank. Our attention, however, has been drawn to sec. 194 of the Bengal Tenancy Act which is in these terms :-- where a proprietor or permanent tenure-holder holds his estate or tenure subject to the observance of any specified rule or condition, nothing in the Act shall entitle any person occupying land within the estate or tenure to do any act which involves a violation of that rule or condition." It has been argued for the Appellant that this is a saving clause for condition binding on landlords, and that consequently the first Defendant was not entitled to excavate a tank in violation of a condition to that effect in the lease of the tenure-holders. On behalf of the Respondents it has been argued that the tenure-holders should not be held responsible because if they had inserted a restrictive covenant in the lease granted to the raiyat, it would have been unenforceable under sec. 178, sub-sec. (1), cl. (d), which provides that nothing in any contract between a landlord and a tenant made before or after the passing of the Act shall take away or limit the right of a tenant as provided by the Act to make improvements and claim compensation for them. Stress has also been laid on the fact that the Courts below have concurrently found that the excavation of this tank was an improvement of the holding, that the tank covers only a small portion of the land comprised in the holding and that water is needed for the use of men and cattle and will be beneficial for the purposes of cultivation. Under these circumstances, the tenure-holders Respondents contend that they should not be held responsible as they could not have, in any event, restrained the first Defendant from improving his holding by the excavation of the tank. This contention is clearly unsound, for, in our opinion, sec. 178, sub-sec. (7), cl. (d), is controlled by sec. 194, which would have been superfluous if the object of the Legislature had been merely to lay down that the grantee is in no better position than the grantor. The Legislature obviously contemplated cases of the character now before us, where it might be argued with plausibility that the grantee was entitled, by virtue of the provisions of the Bengal/Tenancy Act, to do what could not be done by his grantor. To avoid the conflict which may in this way arise, the Legislature has expressly provided that persons occupying land within a tenure cannot do such acts as involve a violation of the conditions under which the tenure is held. It is thus plain that the tenure-holders might have effectively inserted a restrictive covenant against excavation of tanks in the sub-lease granted by them to the first Defendant. The tenure-holders are liable for breach of covenant, even if it be assumed that they have no remedy against their sub-lessee. [Penley v. Watts 7 M. and W. 601 (1841), Smith v. Howell 6 Ex. 730 (1851), Walker v. Hatton 10 M. and W. 249 (1842).] This does not, however, show that the Plaintiff is entitled to ask for

damages as against the first Defendant. It is well-settled that there is neither privity of contract nor privity of estate between the head lessor and the under-lessee, and hence the under-lessee is not personally liable for the rent reserved by, nor on the covenants contained in the head lease. [Berney v. Moore 2 Ridgeway Parl. Rep. 310 at p. 331 (1791) and Holford v. Hatch 1 Doug. 183 (1779); Laws of England, Ed. Halsbury, Vol. XVIII, Art. 865.] Consequently, the Plaintiff has no cause of action against the first Defendant.

2. The second question for consideration is the measure of damages for the breach of the covenant. It has been argued on behalf of the tenure-holders that no decree for damages should be made, because the Plaintiff has suffered no appreciable damage. It has not been shown that the value of the land as security for the rent has diminished, nor has it been proved that if the land reverts to the Plaintiff upon surrender, abandonment or sale of the tenure in execution of a decree for arrears of rent, the Plaintiff will not be able to make a resettlement on the same rent as at present. On the other hand, the excavation of the tank has been a real improvement of the holding. On these facts, we have been pressed to hold that the Plaintiff is not entitled to a decree for damages. We are of opinion that this contention is not well founded. There has been a breach of the covenant not to excavate any tank, that is, an infringement of the legal right of the Plaintiff, who is consequently entitled to nominal damages, even though he may not have, suffered actual damage. [Williams v. Williams L.R. 9 C.P. 659 (1874) and Wigsell v. The Corporation of the School for the Indigent and Blind 8 Q.B.D. 357 (1882).] As Serjeant Williams says, wherever any act injures another's right and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific damage. [Mellor v. Spateman 1 Saunders 346 b (1651) and Patrick v. Greenaway 1 Saunders 346 b Note (1796).] In this way, not only is the principle, that wherever there is a wrong there should be a remedy, enforced but the award of nominal damages for the infliction of a legal wrong may settle the question of title and determine rights of the greatest importance to the Plaintiff. From this point of view, it has sometimes been said that even though the result of a trespass may benefit the Plaintiff and not damnify him, he is entitled to nominal damages. Hence if a breach of covenant is deliberate, the Court may award vindictive damages as Bowen, L.J., put it in Whitham v. Kershaw 16 Q.B.D. 613,618 (1885). Here, however, there is no reason to apprehend that the tenure-holders have wilfully committed the breach of covenant. The Plaintiff is consequently entitled to nominal damages, which is not necessarily small damages. As Halsbury, L.C., said in Mediana v. Comet (1900) A.C. 113 (116)," nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment, because your legal right has been infringed, but the term " nominal damages " does not mean small damages." We assess the damages at Rs. 100 which

according to the Plaintiff is the sum required to fill up the tank The result is that this appeal is allowed and the decree of the District Judge set aside. The suit will stand dismissed with costs in all the Courts as against the first Defendant, but it will stand decreed for Rs. 100 as against the other Defendants. The Appellant is entitled to his costs in this Court on the amount decreed, but as between him and the Defendants other than the first Defendant the costs in both the Courts below must be borne by themselves.