

(1890) 09 CAL CK 0006
In the Calcutta High Court

Dwarka Nath Gupto

APPELLANT

Vs

The Corporation of Calcutta

RESPONDENT

Date of Decision : 15-09-1890

Acts Referred:

Citation : (1891) ILR (Cal) 91

Hon'ble Judges : W. Comer Petheram, J; Prinsep, J; Pigot, J

Bench : Full Bench

Judgement

Pigot, J.—The present suit came on for hearing before Mr. Justice WILSON, who dismissed it, on the ground that the suit was barred by Section 357 of the Municipal Act. He said: "The question is whether on the plaintiff's own evidence it is shown that any right to sue accrued within three months before the 15th March, on which date the present suit was brought. I think it is not so shown."

2. The suit was dismissed on the ground of limitation alone: there was no finding on the other issues in the case.

3. The plaintiff appeals against the decree of the Original Court. Section 357 is as follows: "No suit shall be brought against the Commissioners or any of their officers or any person acting under their direction for anything done under this Act until the expiration of one month next after notice in writing has been delivered or left at the office of the Commissioners, or at the place of abode of such person, stating the cause of suit and the name and place of abode of the intending plaintiff. Unless such notice be proved, the Court shall find for the defendant. Every such suit shall be commenced within three months next after accrual of the right to sue and not afterwards. If any person to whom any such notice of suit is given shall before the suit is brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover in any such action when brought; and if no such tender shall have been made, it shall be lawful for the defendant in such action, by leave of the Court where such action shall be pending at any time before issue joined, to pay into Court such sum of money as he shall think fit, and thereupon such proceedings shall be had as in other cases where defendants

are allowed to pay money into Court."

4. In his judgment the learned Judge says:

5. In order to see whether the plaintiff" can maintain this suit we must see how the plaintiff's case stands on his evidence. The really important evidence is that of Rameshwar Nath, who was the adviser of the plaintiff and who had been an Executive Engineer in the service of Government. He spoke from the notes which he had made at the time he visited the premises, and his evidence is clear that at the time the tank was excavated serious damage was caused to the plaintiff's house which he attributed to the excavation. For the purposes of the former suit this witness prepared an estimate of the damage done to the house up to that time, and he prepared it on the basis of a new building having to be put up because at that time the house was practically a wreck. He said there was nothing to be done but to pull it down. He said that even the materials wore of no value because it would cost as much to pull down and cart away the materials as they were worth. He spoke to the injuries on the 1st December. At that time all the injuries had been incurred and the house was a ruin." I think that this is an accurate statement of the purport of this witness" testimony as to the amount of damage already done to the house more than three months before the institution of the suit.

6. For the appellant it was contended that the case did not come u/s 357 at all; that the excavation by the defendants was in itself an act which the defendants were entitled to do *Darley Main Colliery Co. v. Mitchell* L.R.11 App. Cal. 127 : L.R. 14 Q.B.D. 125; that the subsidence of the plaintiff's land whereby the damage was caused was the cause of action, and not the excavation by the defendants; and that therefore this was not a suit for anything done under the Act within the meaning of the section.

7. Assuming for the purposes of the argument that the *Darley Main Colliery Co. v. Mitchell* LR 11 App Cal 127; LR 14 Q.B.D. 125 and that class of cases are applicable to the present, I think that it cannot be deduced from the principles laid down in those cases that Section 357 does not apply to the present. Taking it that in such a case the cause of action is a subsidence which causes a disturbance of the plaintiff's enjoyment of his land, the defendant surely can only be liable if that subsidence is attributable to his act or default. In the judgment of Fry, L.), (pp. 139-140, L.R. 14 Q.B.D.) adopted by learned Counsel for appellants in the case of *The Darley Main Colliery Co. v. Mitchell* the principle on which that decision rests is expounded.

8. Now with reference to principle, it appears to me to be plain that all damages which result from one and the same cause of action must be recovered at one and the same time, and therefore we are driven to the inquiry what is the cause of action in a case of this description. As has been pointed out by Bowen, L.J.; very clearly, there are two possible ways of stating that cause of action. It may be said that the subsidence attributable to the defendants is itself an interference

with the plaintiff's enjoyment of his property, and as such is the cause of action in itself, or it may be said that the cause of action is the defendants allowing the cavity to continue without giving proper support to the super adjacent land, and the damage which follows from that circumstance to the plaintiff. To my mind it is not very material to inquire which of the two is the more accurate way of stating the cause of action. Like Bowen, L.J. I incline to consider that the more simple and more correct mode of statement is to say that the subsidence of land attributable either to the acts or default of the defendants is itself an interference with the plaintiff's enjoyment of his own property, and as such constitutes the cause of action.

9. The mere withdrawal of the stratum of coal in itself is a perfectly legitimate and lawful act, and it is only because it is done without doing something else which would prevent the injury to the plaintiff that the cause of action arises.

10. I think it cannot be successfully contended that in such a case the suit is not brought for anything done by the defendants, whether it be said that the subsidence "attributable to the defendants" is the cause of action in itself, or that the cause of action is "the defendants allowing the cavity to continue without giving proper support, etc." In either view the defendant is liable by reason of, or "for," an act done by him; whether that be an act of commission or of omission, is quite immaterial. If it be necessary to seek authority as to acts of omission from this point of view, it has been decided that omission to repair the handrail of a bridge is a "something done" under the Highway Act *Holland v. Northwich Highway Board* 34 L.T. 137 and in an action for damages resulting from such omission, plaintiff was non-suited, because the action was not brought within three months. A suit could not lie against a defendant at all unless for something done by him, leading (ab any rate) to the cause of action. It is plain that here the defendants are sued for something done by them under the Act, and that Section 357 applies.

11. The case being, as I think, within Section 357, the question is whether the plaintiff has shown that a right to sue on which this suit can be sustained accrued within the period prescribed by the section, and within the terms of the notice of December 15th. It is clear, I think, that the right to sue accrues--assuming as most favourable to him the applicability of the *Darley Company* case--to the appellant upon the happening of damage by reason of a subsidence arising from the defendants' act. Without damage no suit would lie; *Smith v. Thackeray* L.R. 1 C.P. 564 a case the great authority of which cannot be affected by the observations, intentionally thrown out as speculative (as I understand them), of Bowen, L.J., at page 137 of his judgment in the *Darley Company* case.

12. Now *Rameshwar Nabh*'s evidence is clear, in my opinion, as to this--that more than three months before suit the house had been reduced to such a condition, from whatever cause, that it was incapable of sustaining further damage. A further subsidence (of which indeed there is no evidence whatever) might perhaps have caused further changes in the ruined structure: the walls, or

parts of them, might have fallen in, or fresh cracks have begun, or old ones widened; but these changes would be merely the displacement of materials already valueless as they stood, and could not amount, in any true sense, to fresh damage to the plaintiff's house.

13. In truth, the exigencies of the appellant's case before us compelled him to deal with Rameshwar's evidence very differently from that in which, as suppose, he would have dealt with it if the question of limitation had not arisen. It was suggested that that evidence did not really amount to what the learned Judge understood to be the effect of it, or that, if it did, it was exaggerated; and that Rameshwar's picture of total ruin was probably coloured by a professional impulse, which would lead him to take a fastidious view of dilapidated buildings, and to encourage rather than to avert a complete condemnation of them, and an entire reconstruction of them with skilled professional assistance. This argument was put with great skill, and with much lightness of touch. But in plain words it amounts to an attempt to discredit the evidence of the plaintiff's own witness, his chief witness, upon whose estimate the claim in the former and in the present suit was based; and to do this, not because he has turned out hostile to the appellant, but because he has been too favourable to him; and has so completely supported his case as to prove it out of Court on the point of limitation.

14. I think it would be of the worst example to allow a party in appeal so to deal with the most material part of his evidence, and that the appellant must be made to abide by the fair meaning of what Rameshwar said, which I see no reason whatever to doubt. That evidence proves that no damage and therefore no right to sue could have accrued after the beginning of December. The leave to bring a fresh suit granted on December 11th could not, of course, operate to prevent the operation on the present suit of the provisions of Section 357.

15. Then it was said that this was a case of continuing damage. If this be granted, plaintiff could only sue for damage accruing within the three months. *Wilkes v. Hungerford Market Co.* 2 Bing. N.C. 294. [3rd point not overruled, as the case was on another point, in *Rickett's case* in Dom. Proc. (L.R., 2 H.L., 175)]. No subsidence is proved to have taken place after December 1st 1838, and whether any such subsidence did take place or not, it is certain, as has been already said, that no damage to the plaintiff in respect of the house did or could have occurred after that time.

16. I think the appeal must be dismissed with costs.

Pigot, J.

17. I may add an observation not necessary for the judgment in this case, but which may arise, having regard to the recent English cases cited before us in cases to which Section 357 of the Municipal Act may be applicable, with respect to the scope of the notice required under that Act.

18. Whether or not damage arising out of a subsidence referred to in the notice,

but arising after the date of the notice, could be recovered, without fresh notice and fresh suit, may be a question. If the subsidence alone constituted the cause of action, of course subsequent damage arising from it might be recovered in a suit brought within three months from the subsidence. If the damage arising from the subsidence be the cause of action, as seems to be the result of the cases, then only what is stated in the notice can be recovered, and nothing arising after it.

19. It may be that the Courts in the face of the recent decisions, if this be the effect of them, might be asked to place a liberal construction on the words of Section 357 as to the requirements of the notice.