

(1890) 10 AHC CK 0002
In the Allahabad High Court

H.A. Emile

APPELLANT

Vs

Jawitri

RESPONDENT

Date of Decision : 31-10-1890

Acts Referred:

Citation : (1890) 10 AHC CK 0002

Final Decision : Dismissed

Judgement

John Edge, Kt., C.J. and Young, J.—The plaintiff in this case was the owner of Thespis Lodge, Mussoorie. His property was on a lower level than that of the defendant. The defendant, in order to secure his property, which had been damaged by a slip, proceeded to build a "pushta" or retaining wall, and, unfortunately for him, commenced to build that wall on the plaintiff's premises, and thereby undoubtedly committed a trespass. It would appear that at the time of the slip some soil and other matters had come down the hillside on to the plaintiff's premises. The plaintiff brought a suit in which he asked for damages for the wrongful trespass of the defendant, and also sought an injunction. The plaintiff got a decree for damages and obtained a mandatory injunction by which the defendant was ordered within two months to remove the wall from the plaintiff's premises and to restore the plaintiff's premises to the condition in which they were before. The plaintiff proceeded to; execute that decree, but execution appears to have been resisted by the defendant; whether it was properly pressed on or not for the plaintiff we need not inquire. In 1889, two years subsequently, the plaintiff brought the present suit in which he sought damages, alleging his cause of action to be that the defendant had not obeyed the mandatory injunction. The damages which he proved were that people were deterred from becoming tenants of some rooms in his house, fearing that, owing to what the defendant had done, the hillside might come down and overwhelm them. The plaintiff obtained a decree for Rs. 300. There was in fact no structural or other damage done to the plaintiff's property other than that which was done before the commencement of the previous suit. The question for us is, whether this suit will lie. It has been contended by Mr. Howard on the authority of Mitchell

v. Darley Main Colliery Company L.R., 11 App. Cas. 127 that this suit lies. On the other hand, Mr. Banerji relies on the case of Serrao v. Noel L.R., 15 Q.B.D., 549 in the Court of Appeal. The Darley Main Colliery Company case was a case in which the defendants had lawfully excavated their own coal, but, unfortunately for them, had not taken the precaution to leave support for the surface. In that case a subsidence occurred and damaged the property of the plaintiff. Compensation was made for that damage, and many years subsequently a fresh subsidence occurred, and the majority of the House of Lords ultimately decided that the fresh subsidence gave a fresh cause of action. In Backhouse v. Bonomi 34 L.J.(sic) B. 181 the House of Lords had decided that a cause of action did not arise until subsidence occurred. The House of Lords, following the principle of that case, held that each fresh subsidence gave a fresh cause of action. To take that case, if Mr. Mitchell, after compensation had been made for the original damage, had brought a suit in which he claimed damages on the ground that people were deterred from taking his surface lands for building purposes owing to a fear that there might be fresh subsidence, we apprehend that such a suit would not have lain. In this case the cause of action was the wrongful act of the defendant in building the "pushta" on the land of the plaintiff. For that wrongful act compensation was awarded in the first suit, and a further remedy was decreed in the form of a mandatory injunction. All that has happened since has been that people have been afraid to take the rooms in the plaintiffs house fearing that some injury-might happen to them. We need not decide whether the plaintiff would have any remedy or not, if, by reason of the original acts of the defendant, structural or other damages should happen to his property. In our opinion this suit does not lie for damages for noncompliance with the mandatory injunction to compel the performance of which the plaintiff had his remedy in execution. It is always dangerous to give illustrations, but it appears to us that it might equally well be contended that plaintiff who had obtained a money decree might bring a subsequent action for the non-payment of the decretal amount. We set aside the decree below and make an order dismissing the suit with costs here and below.