

(2007) 12 BOM CK 0059
In the Bombay High Court
Case No : F.A. No. 20 of 1996

Shaikh Gafoor

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 20-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31
Evidence Act, 1872 — Section 12
Limitation Act, 1908 — Article 36

Citation : (2008) 3 MLJ 643

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : A.N. Ansari, for the Appellant; M.L. Dharashive, A.G.P. for respondent Nos. 1 to 3, for the Respondent

Judgement

S.B. Deshmukh, J.—This appeal is filed by the plaintiff seeking enhancement in the amount of damages awarded by the learned II Joint C.J.S.D. Beed. The appellant had filed the Special Civil Suit No. 42 of 1994 seeking recovery of the compensation to the tune of Rs. 3,00,000/-. The suit was partly decreed and respondent Nos. 1 to 3 were directed to make payment of Rs. 10,000/- along with interest at the rate of 6% p.a. from the date of suit till realization.

2. The appellant being aggrieved and dissatisfied with the amount of damages, awarded by the trial Court, has filed this appeal on the point of quantum only. The parties herein are referred to their status in the Special Civil Suit No. 42 of 1994.

3. The agricultural land Gat No. 436, the subject-matter of the suit, is situated at village Upli, Tq. Majalgaon, District Beed admeasures about two hectares and 51 Are. The defendants have constructed the reservoir, for the purpose of irrigation, on Kundlika river flowing from the vicinity of village Upli. Initially, it was medium irrigation project. However, as of today, it is large minor irrigation project. The left bank canal has been constructed by the defendants, which is adjoining to the

suit property owned by the plaintiff. The relevant portion of the canal is undisputedly chain Nos. 2260 to 2930, in the vicinity of the suit property. The plaintiff has alleged that excavation and construction of left bank canal was defective. The water accumulated, had been percolated into the suit property and thereby destructed the fertility and cultivability of the suit property with crops. The plaintiff had pointed out this fact by various written communications to the Officers of defendant No. 1 and defendant Nos. 2 and 3. The District Collector addressed one communication to Officer of Soil Conservation department of the State. Defendant No. 3 ultimately was informed by defendant No. 2 by communication dated 18-6-1992 for taking necessary steps for stopping the percolation of canal water to the plaintiffs land. The plaintiff, could not raise crop in the suit property for 5/6 years and thereby claimed compensation to the tune of Rs. 3,00,000/-.

4. The defendants after entering appearance filed written statement Exh. 9/B. They have pleaded that drains were constructed by them for taking out percolated water to Nala in the vicinity. They denied the percolation of canal water to the suit property and destruction of suit property on account of such accumulation of water. They also pleaded that "Uncoarsal Rubble Lining" (UCR lining) was provided to the stretch of canal in question. Side drains to the canal were also provided and therefore, they denied the claim of the plaintiff for compensation. The side drains were provided to facilitate to drain water to Nala. It has also pleaded that the quality of the land/suit property was barren and therefore, there is no responsibility and liability of making any payment of damages for such land. They further pleaded that they were not at all fault for such alleged damages. The trial Court framed about 12 issues, accepted the case of the plaintiff in relation to cause for damages, partly decreed the suit, and awarded the amount of Rs. 10,000/- with interest in favour of the plaintiff.

5. The learned Counsel for the plaintiff submitted that there is no appeal filed on behalf of the State neither cross objection in this appeal is filed on behalf of respondents-defendants. The learned A.G.P. on instructions from the Officer of defendant No. 1 State, concedes to this position. This appeal in this premise, is filed by the plaintiff for enhancement of quantum of damages only.

6. The plaintiff in support of his case has examined P.W. 1 Shaikh Ayyub Shaikh Gafoor at Exh. 18. On behalf of the plaintiff, P.W.2 Govinda Ranba Soge is also examined. In support of the case pleaded by the defendants, on their behalf, D.W.1 Mr. Prakash Madhavrao Maslekar, Sectional Engineer was examined.

7. I have heard the learned Counsel Mrs. Ansari for the appellant-plaintiff and Mr. M. L. Dharashive, learned A.G.P. for respondents/defendants. I have considered the pleadings of the parties. In my view, the following points arise for my determination in this appeal under Order 41, Rule 31 of Code of Civil Procedure;

i) Whether the plaintiff proved damage to the crops in the suit property on account of percolation and accumulation of canal water from chain No. 2260 to

2920?

ii) Whether defendants proved that they have taken precaution to prevent the percolation of water from the canal?

iii) Whether the plaintiff is entitled for damages to the tune of Rs. 3,00,000/- as claimed in the suit?

Reasons on point Nos. 1 and 2:

8. These two points are interlinked and therefore can be considered simultaneously. It is not in dispute that the agricultural land bearing Gat No. 436 admeasuring two hectare 51 Are (about Six Acres 11 Gunthas) is owned and possessed by the plaintiff. It is also not in dispute that the construction of minor irrigation project, on Kundlika river has been carried out by the defendants. The suit property owned by the plaintiff is situated in the vicinity of the left bank canal is also admitted by the defendants. The material facts asserted by the plaintiff in paras 1, 2 and 3 are specifically admitted by the defendant No. 1 in para 1 of the written statement, Exh.9. The defendants however, denied the percolation of canal water and the loss allegedly sustained by the plaintiff to his crops in the suit property. Though there is no appeal or cross objection filed on behalf of the defendants, since it is first appeal, I have heard the learned Counsel for the parties, extensively.

9. The plaintiff has alleged negligence on the part of the defendants while excavating and constructing the left bank canal of the said project. Further contention raised by the plaintiff is in relation to loss suffered by him for the period of about 5/6 years. It is also not in dispute that the defendants have subsequently taken necessary measure and percolation of canal water was successfully stopped.

10. Defendant No. 1 State undisputedly has acquired the land for left bank canal. Excavation and construction of the left bank canal is also not in dispute. The liability, loss caused to such owner is a question to be considered. It is lawful for the defendants to construct the irrigation dam and take the water by canal to agricultural lands for irrigation through canal. However, if such water escapes from canal in question and causes destruction of property of the adjoining owner or neighbour, the defendants can be held liable for damages. It is apposite in this context to refer judgment in the case of *Rylands and Anr. v. Fletcher* All E.L.R. (Reprint) 1. It is laid down that true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril and if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape.

11. Mrs. Ansari, learned Counsel for the plaintiff justifiably relies on the judgment of the Apex Court in the matter of *Jay Laxmi Salt Works (P) Ltd. Vs. State of Gujarat*, . The facts in the case of *Jayalaxmi* are similar to the facts of

the case at hand. The Apex Court examined the findings of the High Court on two questions:

i) Applicability of Article 36 of Limitation Act, 1908 and plea of bar of limitation; and ii) Whether the rule of strict liability as enunciated in *Rylands v. Fletcher* and as modified by the Supreme Court in *State of Punjab v. Modern Cultivators* is applicable to the facts of the present case?

I am concerned with question (ii) in the case at hand. The Apex Court in para 15 of the judgment held that rule in *Rylands and Anr. v. Fletcher* has not been modified by the Apex Court in *State of Punjab Vs. Modern Cultivators, Ladwa*, . Thus the judgment in the case of *Rylands v. Fletcher* is still holding the field. The ratio laid down, in my view, squarely applies to the facts obtaining in the case at hand.

12. While considering the evidence of the parties, I am not relying on the evidence of P.W.1, Shaikh Ayyub, since he is power of attorney holder and not the plaintiff himself. However, in the written statement, as noted above, the facts asserted by the plaintiff mostly have been admitted. We have evidence of D.W.1 Mr. Maslekar, Sectional Engineer, who was working as Junior Engineer from 2-2-1984 on the left bank canal work on Kundlika project. Mr. Maslekar, claimed construction of permanent drain of both sides of the canal in para 3 of his evidence. However, in the cross-examination, Mr. Maslekar had admitted that he was transferred in the year 1987 and by that time excavation and construction work of the canal was not completed. He had handed over the charge to Mr. G. D. Kshirsagar, another Engineer.

13. The excavation and construction of the canal, can be completed in various stages. After excavation and construction of the canal, all relevant stretches, UCR lining as well, cement cover work can be carried out. Since Mr. Maslekar had admitted that he was transferred when the construction of left bank canal was not complete, it is very difficult to accept his contention that permanent drain was constructed during his tenure to the left bank canal. D.W.1 Mr. Maslekar, in his cross-examination, was constrained to admit that repair work was carried out by the defendants after filing of the suit. Such repair work undisputedly was done in view of the various representations/written complaints made by the plaintiff to various authorities and in view of the written communications by the District Collector to defendant No. 2 and in turn to defendant No. 3.

14. Excavation of canal is a matter of engineering expertise. Authority concern. shall take into account various aspects like, the level or height of the reservoir, length of the canal, depth of the canal, slope, level of various agricultural lands, covered under the benefited zone and so on. The objective is to take the dam water, by natural flow to its destination i.e. the last part of the agricultural lands, proposed to be irrigated. In this process accumulation of water, at any part of the canal is not expected. In the case at hand, such accumulation of water at chain Nos. 2260 to 2920 for about 5/6 years, is established. Thus, from the evidence

on record it appears that excavation and construction of canal work in the vicinity of suit property was not up to the mark. Accumulation of water at chain No. 2260 to 2920 was the result of defective excavation and construction of the canal. Such accumulated water naturally percolated to the suit property and the plaintiff could not use the suit property for cultivation of crops as alleged by him.

15. At this stage, communication addressed by S.D.O., Minor Irrigation Sub Division Telam, can be considered. This communication is dated 9-2-1994 addressed to the Executive Engineer, Beed. This communication is at Exh.47. It is admitted in this communication that the land in the near vicinity to chain No. 2260 to 2920, was rendered uncultivable on account of percolation of water prior to 1993. It was further opined that the actual area of such non-cultivable land would be measured by the authorities and accordingly it would be informed. This communication also refers to a fact that the completion of UCR lining and stoppage of percolation.

16. The defendant No. 1, was in fact responsible for such accumulation of water at chain Nos. 2260 to 2920. It was the duty of the defendants, therefore, to have taken due and proper care while excavating and carrying out construction of left bank canal. The trial Court on these two points has justifiably recorded the findings against the defendants and in favour of the plaintiff. There is no material for deviation from the findings recorded by the trial Court. The findings on these two points therefore, are recorded in affirmative i.e. in favour of the plaintiff.

Reasons on point No. 3:

17. The plaintiff has claimed an amount of Rs. 3,00,000/- towards damages. According to the plaintiff, damage to the tune of Rs. 1,00,000/- per year has been sustained by the plaintiff for three consecutive years prior to the date of filing of suit. The plaintiff, in fact has led the evidence for such damage for a period of five years. This appeal by the plaintiff, as noted in foregoing paragraphs, is only on the point of quantum of damages. By this time, power of the appellate Court to interfere with the award of compensation is not in dispute. There are two grounds for interference, permissible for the first appellate Court. The first ground is that if the trial Judge has acted on wrong principle of law and has made entirely erroneous estimate of the damages. It is so held in the matter of State of Kerala and Others Vs. P. Vijayakumaran Nair, . It is also apposite to refer the judgment of the Privy Council in the matter of AIR 1945 168 (Privy Council) . It has been held that in British India, the full rigour of the rule stated in (1935) 1 KB. 354, that the appellate Court should not reverse the finding of the trial Judge as to amount of damages, does not apply.

18. The trial Court seems to have awarded compensation of Rs. 10,000/- nominally. There is no reasoning for assessment of compensation of Rs. 10,000/-. The burden of proving the damages and the circumstances which led to the occurring of the damage is upon the plaintiff and he has to adduce the best possible evidence available to him. The provision laid down u/s 12 of the

Indian Evidence Act states that in suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant. The plaintiff moreover is bound to prove all items of the damages. The onus on the plaintiff to prove the damage is not less heavy because the claim is undefended or ex-parte. The duty to assess the damages however, is entirely upon the Judge, and more or less resorting to rules, which regulate practice of Courts.

19. A Judge has to decide and determine every question which will ultimately enable the parties to obtain the final judgment in case-question, such as, the proper measure of damages to be applied, remoteness of damage, and the amount which the plaintiff is actually entitled to such damage. The amount of damages, which the Court can award is, however, limited by its pecuniary jurisdiction. The Court can never grant a decree for a sum which exceeds the limits of jurisdiction. The general date of assessment of the damages is the date of accrual of the cause of action for the suit. Such damages, however, are permissible for a period of three years prior to the date of filing of suit, in view of provision of Indian Limitation Act. In the given case, to do justice on the question of damages, event which have happened subsequent to the date, on which the cause of action has occurred, throwing light upon the reality of the case, can be considered. It is of course clear that no Court can assess the damage with anything like mathematical precision and accuracy in all cases. However, in cases admitting of proof, the amount must be worked out with reasonable certainty. The difficulty in assessing damages is no ground for refusing to fix or for giving nominal damages only. The Court is not altogether relieved of the duty of assessing the damages based on the material brought on record by the plaintiff. The Court cannot refuse the assessment of damage simply because the plaintiff failed to adduce the best evidence available. Every year for assessment of damages, it is a question to be determined by the Court.

20. There is 7 x 12 extract produced on record; Exh.51 for the year 1994- 95. This 7 x 12 extract shows the cultivation of crop like Bajra, Sunflower, cotton. The learned A.G.P. pointed out from the 7 x 12 extract that some area was found non-cultivable and accordingly it is mentioned as barren land. The learned A.G.P. is justified upto some extent. However, it is equally proved that the area of such barren land is not mentioned in this 7x12 extract. This 7x12 extract shows that the land Gut No. 436 is admeasuring 4 hectare 51 Are (dry crop land 0.64 Are), totalling to 5 acres and 50 Are. The character of the part of the land as dry crop and irrigated, is not substantiated by any other entry at Exh.51. However, from the crop entry it appears that crops like Bajra, Sunflower and cotton were grown during the year 1994-95. Area of cultivation of these crops also does not reflect from this 7x12 extract. Except this 7x12 extract, no other documentary evidence is produced on behalf of the plaintiff. . The plaintiff however, has examined Mr. Govind Soge P.W.1 for plaintiff. P.W.1 Govind Soge, in his evidence testifies that the plaintiff would have received income of Rs. 20,000/- per acre from the suit property i.e. land to the tune of 5 acres. He also quantifies non-cultivable portion

of the suit property approximately more than 5 acres (i.e. suit property). He gives rate of the sugar-cane at Rs. 700 to 750 per tonne and rate of ground nut crop and average yield of such crops in the area. He claimed to be holder of land in the neighbourhood of the suit property. In the cross-examination he admits that he did not maintain the account of income from his land. He further states that his son is looking after the lands. Prevailing sugarcane price, he states, was Rs. 500 to 600 per tonne. He also fairly admits that he does not have documentary evidence to show agricultural income. He has also not filed 7 x 12 extract of his land.

21. From the evidence of P.W.1 Soge it appears that he is resident of same village Upali and owner of agricultural land in the vicinity. He claimed that his land is adjoining to the suit property. It is true that he could not produce on record the receipts in relation to sale of sugar-cane to sugar factory, ground nut or any other agricultural produce. Incidentally, it is not seriously disputed that Majalgaon Sahakari Sakhar Karkhana Limited, Sundarnagar is situated at a distance of about 2/3 kilometres from the suit property. Only because receipts of sale of the agricultural produce could not be produced by P.W. 1 Govind Soge, his entire evidence cannot be jettisoned. His claim regarding the rate of groundnut as well as rate of sugar-cane elicited in the cross-examination, cannot be said to be irrelevant or destroying his evidence in the examination-in-chief. Factually, it is true that he could not testify in relation to the character of the land that the suit property was being irrigated with any source of irrigation.

22. From the material produced on record, in my view, the suit property i.e. land to the tune of five acres can be considered to be dry crop land. However, even judicial notice of the fact can be taken that in this region, ordinarily two crops are being raised by the agriculturists. Autumnal crop and Vernal crop, there is no cross-examination on the point of approximation in relation to income per acre to the tune of Rs. 20,000/- testified by P.W.1 Govind Soge in his examination-in-chief. However, it would be hazardous to accept the statement made by P.W.1 Mr. Govind that net income per acre from the suit property at the relevant time would have been Rs. 20,000/- per acre. Some allowance of alleged exaggeration, some allowance for non-producing the documentary evidence for sale of agricultural produces and some discount for estimation of the yield per acre, can be considered. Even cultivation costs, can be considered. In my view, towards the cultivation costs 30% expenses can be reasonably accepted. For allowances, as noted earlier up to 30% can be reasonably considered. Thus out of Rs. 20,000/- alleged income per acre, according to P.W.1 Mr. Govind Soge, 60% amount can be excluded which renders the yield per acre to the tune of Rs. 8000/-. In other words, the amount of Rs. 8,000/- fairly can be considered to be the income or damage per acre payable to the plaintiff. The total land which remained uncultivable, as per the evidence, is to the tune of 5 acres. The plaintiff therefore, is entitled to seek damages at the rate of Rs. 40,000/- per year for the suit property. The plaintiff has restricted the suit for such damages, for past three years from the date of filing of the suit. Thus, the plaintiff is entitled to

recover an amount of Rs. 1,20,000/- towards the damages from the defendants. At this stage, learned A.G.P. states that the amount of Rs. 10,556/- is deposited in the executing Court on behalf of the defendants on 8-12-1995. This amount shall be adjusted from the decree, which is being passed by this Court.

23. Learned A.G.P. states that the defendants have considered the grievance raised and necessary steps were taken by them. There is no grievance of percolation after corrective steps taken by the defendants. The defendants have also deposited the decretal amount of Rs. 10,556/- in the trial Court on 8-12-1995. In this view of the matter, if some amount is likely to be awarded towards the damages by this Court, the defendants should not be burdened with interest from the date of filing of the suit. According to him, in that eventuality the interest from the date of passing of the order by this Court (Appellate Court) may be awarded.

Mrs. Ansari, learned Counsel for the plaintiff states that from 1983-84 the plaintiff has raised grievance. The plaintiff therefore is entitled for interest from the date of filing of the suit. Having considered the submissions of the learned Counsel for the parties, in my view, interest can be awarded from the date of filing of the appeal. This appeal seems to have been filed in this Court on 17-1-1996. I am inclined to award interest at the rate of 6% p.a. on the enhanced amount of compensation from 17-1-1996 till realization of the amount of compensation. In this view of the matter, this point I accordingly answer partly in favour of the plaintiff. Hence I proceed to pass the following order:

A) Appeal is partly allowed.

B) The plaintiff is entitled for recovery of damages to the tune of Rs. 1,20,000/-; however, the defendants are permitted for adjustment of payment of Rs. 10,000/-.

C) Amount of Rs. 1,10,000/- awarded by this Court towards enhanced compensation shall carry interest at the rate of 6% p.a. from 17-1-1996 till realization.

D) The defendants shall make the payment of enhanced amount of compensation with interest within four months.

E) Considering the fact situation, parties to bear their own costs.