

(1910) 07 CAL CK 0065
In the Calcutta High Court

Syed Quamzal Huda

APPELLANT

Vs

Kumud Nath Sen Gupta and Others

RESPONDENT

Date of Decision : 29-07-1910

Acts Referred:

Citation : 7 Ind. Cas. 248

Hon'ble Judges : Vincent, J; Brett, J

Bench : Division Bench

Judgement

1. The plaintiff-appellant brought the suit against the defendants (63 in number) to recover damages caused by the wrongful omission on their part to cut a bund in the river Mohana on the 7th Kartik 1309 and the 7th Kartik 1310 in accordance with the terms of a compromise decree passed between the parties in a suit on the 6th August 1884. The plaintiff is the proprietor of mouzah Raghunathpur and the defendants are the proprietors of mouzah Sartha. There appears to have been a dispute between the proprietors of these two villages with regard to the use of the water flowing down this Mohana River and the right to discharge the surplus water from their villages down this river. The result was a suit in 1884, which was disposed of by the compromise decree of the 6th August 1884 above alluded to. That decree was in favour of the plaintiff who was the pre-decessor-in-interest of the present plaintiff and it provided that the defendants, who were the predecessors-in-interest of the present defendants, should cut the bund in dispute every year on the 7th day of Kartik of the Fasli year and that, if they failed to do so, the plaintiff should cause the bund in dispute to be cut in execution of the decree. It appears that, in order to irrigate their lands, the defendants every year constructed a bund in the river Mohana and the removal of that bund in Kartik was necessary in order that the surplus water from the land of the plaintiff's village might be discharged down the river. It seems that, from 1884 down to 1900, the terms of this compromise decree were complied with but on the 15th October 1900, corresponding to 7th Kartik 1308, the defendants failed to cut the bund in the Mohana River. The plaintiff's men went to try to cut it themselves but were resisted and, on the 10th October

1901, they brought a suit to recover damages from the defendants and to have the bund in the river cut. The suit was not disposed of till the 7th March 1903 when a decree was passed in favour of the plaintiff. In that decree damages were given for the year 1308 only and, as the defendants had failed, in compliance with the compromise decree, to cut the bund on the 7th Kartik 1309 or on the 7th Kartik 1310, the present suit was brought in order to recover damages for the loss of the crops of those years.

2. In the Court of first instance a decree was granted in favour of the plaintiff for the full damages claimed. There was an appeal to the lower appellate Court by one only of the 63 defendants and the result of that appeal was that the whole suit of the plaintiff was dismissed and costs were given against him in favour of all the defendants. The plaintiff has brought the present appeal.

3. The ground, on which the learned District Judge held that the suit of the plaintiff must fail, was that no cause of action for the years 1309 or 1310 arose, in favour of the plaintiff until he had essayed to cut the bund and was prevented. Evidence was adduced on behalf of the plaintiff to prove that he had through his servants attempted to cut the bund in those years but that evidence was disbelieved and the learned Judge was of opinion that, in those circumstances, the plaintiff had no cause of action against the defendants. He further held that, so far as the special appellant before him was concerned, the plaintiff had no cause of action against him as, from the evidence of the plaintiff's own witnesses, it would appear that neither that defendant nor any of his servants was present to prevent the servant of the plaintiff in 1309 and 1310 from cutting the bund.

4. In support of the appeal, it has been contended that the learned Judge erred in law in holding that the plaintiff had no cause of action against the defendants. Under the terms of the compromise decree, it was provided that the defendants should cut the bund in dispute every year on the 7th day of Kartik and it was only on their failure to carry out their duty under the decree that the plaintiff was to be entitled to have the bund cut in execution of the decree. It is argued--and we think rightly--that, under the decree, which is, in fact, a decree declaring the respective rights of the two parties and the agreement arrived at between them for the enforcement of their rights, the defendants are bound to cut the bund every year on the 7th day of Kartik. It is not denied that in the years 1309 and 1310, the defendants failed to cut the bund and it is argued that, under the terms of the decree, the plaintiff is entitled to recover damages for the loss of the crops in his village by the wrongful omission of the defendants to carry out the terms of the compromise decree. It is argued that this wrongful omission afforded a sufficient cause of action to the plaintiff and, in our opinion, that contention is correct. We are unable to agree with the learned Judge of the lower appellate Court that, in order to entitle the plaintiff to recover damages, it was essential that, in each year the plaintiff should have essayed to cut the bund and should have been prevented from doing so. Under the term of the decree, the

obligation was on the defendants to cut the bund, and it was apparently in the contemplation of the parties and of the Court when the decree was passed that on failure of the defendants to cut the bund, the plaintiff should apply to the Court in order that the agreement might be enforced. Power was not given to the plaintiff to have the bund cut by his servants. We are unable, therefore, to support the judgment of the lower appellate Court dismissing the plaintiff's suit on the ground that the plaintiff had no cause of action. In the present case we think that the view taken by the Court of first instance was correct that, after the plaintiff had instituted his suit against the defendants for damages in consequence of their failure to cut the bund in 1305, it would not have been open to the plaintiff to proceed to assert his right by cutting the bund before that suit had been determined and his right declared.

5. So far as the defendant-appellant in the lower appellate Court is concerned, we are also of opinion that the view taken by the learned District Judge cannot be accepted. The basis of the plaintiff's claim for damages was not that he or his servants were prevented from cutting the bund but that he had suffered damages by reason of the wrongful omission of the defendants, one and all of them, to carry out the terms of the compromise decree. In these circumstances, it was, in our opinion, perfectly immaterial whether or not the defendant No. 57 or his servants were present in the village on the 7th Kartik in 1309 or 1310. It was his duty, under the terms of the compromise decree, either to have arranged with his co-defendants to have the bund cut or to have himself made provision to have the bund put in accordance with the terms of the agreement. The decision of the lower appellate Court must, therefore, in our opinion, be reversed.

6. The learned District Judge in disposing of the appeal has expressed some doubt as to the propriety of the damages claimed by the plaintiff but he has not settled that question nor has he come to any decision about it. In these circumstances, we think that the case must go back to the lower appellate Court in order that that Court may now proceed to determine what should be the damages to which the plaintiff is entitled for the two years in suit.

7. We, therefore, decree the present appeal set aside the judgment and decree of the lower appellate Court and direct that the case be sent back to that Court in order that that Court may now proceed to ascertain and determine the amount of damages which the plaintiff is entitled to recover from the defendants in the present case. It has been suggested that, in remanding the case, we should direct the learned Judge to decide the other points which seem to have been taken in the original grounds of appeal. We do not think that we should do so as, in deciding this appeal, we are of opinion that the plaintiff has made out his case that he is entitled to recover damages from the defendants for the two years in suit and the only question which remains for determination by the lower appellate Court is the amount of those damages. Of course, it will be open to the parties to urge before the lower appellate Court any facts bearing on the amount of the damages, and whether they were entirely the result of the wrongful

omission on the part of the defendants.

8. The plaintiff is entitled to recover his costs from the defendants in this appeal but the costs in the lower Courts will depend on the respective success and failure of the parties.