APPELLATE CIVIL.

Before Mitter J.

TAMLUK TRADING AND MANUFACTURING COMPANY, LIMITED

v.

NABADWIPCHANDRA NANDI.*

1931

May, 22.

Injunction—Occurrence of actual damages, if necessary for grant of—Right of natural support to land by adjacent land—Threatened disturbance of, if ground for injunction——Suit for establishment of right of lateral support to land by adjacent land without proof of actual damage, if maintainable.

Every owner of land in its natural state has a right to lateral support of his land by the adjacent land of another landowner. Such a right is not an easement, but is a right of property.

The court will interfere by injunction to prevent irreparable damages to land when anything is done by the owner of the adjacent land in his own land so as to let the former land slip or go down or subside even if no actual damages are sustained by the former land.

Corporation of Birmingham v. *Allen* (1) and *Trinidad Ashphalt Company* v. *Ambard* (2) referred to.

A suit for the establishment of natural right to lateral support to the plaintiff's land by the adjacent land of the defendant and for injunction is maintainable without the occurrence of any actual damage to the plaintiff's land on account of the defendant excavating his land.

SECOND APPEAL by the defendants.

The material facts will appear from the judgment.

Saratchandra Basak, *Bipinchandra Mallik*, *Gobindachandra Datta* and *Kushiprasanna Chatterji* for the appellants.

Saratchandra Basu and *Ramaprasad Mukhopadhaya* for the respondents.

MITTER J. This is an appeal by the defendant and arises out of a suit commenced by the plaintiffs for establishment of their natural right to lateral

*Appeal from Appellate Decree, No. 1874 of 1929, against the decree of Prafullakrishna Ghosh, Second Subordinate Judge of Midnapore, dated Jan. 25, 1929, reversing the decree of Naranath Mukherjee, Second Munsif of Midnapore, dated Mar. 9, 1926.

(1) (1877) 6 Ch. D. 284. (2) [1899] A. C. 594.

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support in respect of three plots which are described as cadastral survey plots Nos. 39, 40 and 41 from defendant's *dâg* No. 19, which is adjacent to the said plots. The case of the plaintiffs is that the cadastral survey *dâg* No. 19 was *jal* land before, and the defendant by excavating a tank in it has caused the lateral support of the plaintiffs' contiguous plots to give way and there is a danger of subsidence of those plots in the tank of the defendant as excavated. The defendant's substantial defence is that the plaintiffs have got no right to the lateral support and the defendant which is the Tamluk Trading Company further contends that there is no danger of any subsidence and consequently the suit for injunction must fail. It is not necessary to state the earlier history of this litigation, which commenced on the 29th March, 1924. It is sufficient to state that, by the judgment now under appeal, a decree has been granted to the plaintiffs, and the defendant company has been directed to protect the lateral support of cadastral survey plots Nos. 40 and 41, the existing *bund* or *âil* between them, and the defendant's newly excavated tank by erecting a certain embankment the details of which are given in the judgment of the Subordinate Judge. The Subordinate Judge has accepted the report of the Public Works Department officer, who was directed by the court, in pursuance of the order of this Court, to investigate into the matter. His conclusions are embodied in the judgment and it is not necessary to refer to them except the portion with regard to the lateral support of cadastral survey plot No. 39. In order to protect this plot, an embankment, of which the average base is 9 ft. 9 in. in width and 135 ft. in length, has been considered to be necessary; and the defendants have been directed to build such an embankment by the Subordinate Judge.

Against this decree, the present appeal has been brought and it has been argued, in the first place,

very broadly that a suit of this character does not lie until it is shown that the plaintiff has sustained actual damage. In other words, the broad contention is put forward that no cause for injunction lies unless the damage is actually sustained. Reference has been made in support of this contention to the case of *Dalton* v. *Henry Angus & Co.* (1) which is the leading case relative to the right of lateral support. That case, however, is no authority for the proposition contended for, namely, that the suit for injunction will not lie until the damage is actually sustained. This question has been dealt with in an illuminating judgment of Sir George Jessel, Master of Rolls, in the case of *Corporation of Birmingham* v. *Allen* (2), where the Master of Rolls says: "Now, having so far dealt "with the facts, let me consider the law. As I "understand, the law was settled by the House of "Lords, confirming the decision of the Court of "Exchequer Chamber in the case of *Backhouse* v. "*Bonomi* (3), that every landowner in the kingdom "has a right to the support of his land in its natural "state. It is not an easement: it is a right of "property. That being so, if the plaintiffs' land "had been in its natural state, no doubt the "defendants must not do anything to let that land "slip, or go down, or subside. If they were doing "an act which it could be proved to me by "satisfactory expert evidence would necessarily have "that effect, I have no doubt this Court would "interfere by injunction on the ground upon which "it always interfere, namely, to prevent irreparable "damage when the damage is only threatened. Of "course they must have a much clearer and much "stronger case to call for the interference of this "Court by injunction where the damage is merely "threatened and no damage has actually occurred, "than when some damage has actually occurred, "because in the one case you have no facts to go by,

(1) (1881) 6 App. Cas. 740. (2) (1877) 6 Ch. D. 284, 287.
(3) (1861) 9 H. L. C. 503; 11 E. R. 825.

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"but only opinion, and in the other case you have "actual facts to go by." This view has also been taken by their Lordships of the Judicial Committee in the case of *The Trinidad Asphalt Company* v. *Ambard* (1) where Lord Macnaghten said: "Assuming that "the plaintiffs were entitled to have their land in "its natural state supported by the adjacent "land belonging to Ambard, it would seem to follow "as a matter of course that this right which the "defendants have invaded should now be protected "by injunction, and not the less so because in his "Honour's view the damages that could be recovered "at law would be only trifling." The law is accurately stated in respect of the remedy by injunction in the case of the kind, with which I have to deal with, in the present case by Kerr in his well-known treatise of Law of Injunction at page 198 of the 6th Edition. The learned author says this: "An owner's right to "support will be protected by an injunction when "the interference with the right is of a substantial "nature even though the pecuniary loss actually "resulting from the defendant's wrongful acts is "small. The Court will also interfere by injunction "before subsidence has actually taken place if "satisfied that injury is imminent and certain to "result from the defendant's acts, also when the "defendant claims the right to do acts which must "inevitably cause a subsidence." In support of this latter proposition, the learned author refers to a case to which my attention has been drawn by the learned advocate for the respondent, namely, the case of *Attorney General* v. *Conduit Colliery Company* (2). On these authorities, it appears clear that this ground, challenging the maintainability of the suit on the ground that an action does not lie unless an actual damage has occurred, must fail. The finding of the lower appellate court, which was based on the report of the Public Works Department Officer, is that the excavation of the tank has affected

(1) [1899] A. C. 594, 600.

(2) [1895] 1. Q. B. 301, 314.

the plaintiff's lateral support to a considerable extent. It is argued for the appellant that the damage or subsidence in this case was not imminent or certain at the time of the institution of the suit. Reliance has been placed on a passage in the judgment of the Subordinate Judge, now under appeal, to the effect that although there is a bund between plots Nos. 40 and 41 and plot No. 19 yet that is insufficient and cannot prevent subsidence in course of time. But it would not be fair to read the judgment of the Subordinate Judge in this way: The other portion of the judgment shows that the Subordinate Judge has accepted the report of the Public Works Department Officer who was appointed in this case to the effect that the subsidence is certain and, as a matter of fact, in some parts subsidence has already begun and portions of land underneath plaintiffs' land have been scoured away by the action of the tank. The next ground taken is really confined to the lateral support with reference to plot No. 39. It is argued that plot No. 39 is not in its ancient natural state and that, on the plaintiffs' own admission, the *bund* has been raised by reason of the plaintiffs' excavating in his own plot No. 39 a tank many years ago. It is said that this bund was erected not for a sufficiently long period, namely, that it has been raised only within 20 years of the institution of the suit, and that, therefore, the plaintiffs have not acquired a right of lateral support with reference to the erection of the bank. It is contended that the right of support is limited to a right of support from land, in its natural state to land in its natural state. It is said that as this bank has been raised and the support required has been increased by increasing the weight of the surrounding land no right exists in the plaintiffs in the absence of prescription or grant to have this additional support supplied by the neighbouring land. It is argued for the respondent that this point was not specifically taken

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in the written defence in the suit and that, therefore, it should not be allowed to be raised before me. On the other hand, the appellant argues that this point arises on the finding of the Subordinate Judge to the following effect: "It is true that this bank is a new construction and as it has admittedly been raised within 20 years of the institution of this suit, the plaintiffs have not acquired any easement right with respect thereto." It is contended that, on this finding, a direction has been given by the lower appellate court to the effect that, in order to protect this plot, construction of an embankment with an average base of 9 ft. 9 in. in width and 135 ft. in length is necessary. It is contended for the appellant that this order should be modified in view of the increase in the weight of the new construction and change in the natural state of the land. This point seems also to have been discussed by the Munsif, who tried the suit in the first instance. In these circumstances, the appellant contends that the matter should be remanded for a fresh investigation with reference to the effect of this new construction in changing the natural state of the land. It seems to me, however, that remand is unnecessary since the matter after all entails a question of cost, and as the litigation was started in March, 1924, the matter should be decided here and now finally.

I think the proper order to make in this case is to affirm the decree of the Subordinate Judge with reference to plots Nos. 40 and 41 as also with reference to plot No. 39 subject, however, to this that the plaintiff must bear one-third of the costs of the structure, which is to be of an area of which the average base should be 9ft. 9in. in width and 135ft. in length. The defendant must proceed to erect this structure and after he has done so he is to submit an account of the expenses to the court which after a scrutiny is to direct the plaintiffs to put in one-third costs. The scrutiny is to be made in the presence of the pleaders on both sides. Subject to

this modification the judgment of the lower appellate court will stand.

There will be no order as to costs of this appeal.

Decree modified.

A. K. D.

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