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plaintiff in execution of the decree of the Privy Council, we think that plaintiff is entitled to a decree for the same sum, *viz.*, Rs. 19,500 in the present case, to which must be added Rs. 3,500 for the seven months between the date of the institution of the suit and the making of the decree, for the Judge has decreed payment of the higher rate of Rs. 750 per mensem only from the latter date, and in that respect we do not alter the decree.

Subject to the alterations required by this judgment, the decrees are confirmed, and plaintiffs must pay proportionate costs of these appeals.

Their memoranda of objections are dismissed with costs. We see no reason to interfere with the decrees of the Judge on the point raised.

If the parties do not agree within one week from date of receipt of this order, the Judge must proceed to inquire as to the property which should be charged with the maintenance.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1893. December 20. 1894. March 29.

MADHAVA RAU (PLAINTIFF), APPELLANT,

v.

P. M. FERNANDES (DEFENDANT), RESPONDENT.*

Tort—Injury to property—Contributary act—Test thereof.

As in the case of contributary negligence, so an act of one party can only be contributary to the injury he complains of, if by the exercise of ordinary care the other party could not have avoided causing the injury.

SECOND APPEAL against the decree of S. Subbarayar, Subordinate Judge of South Canara, in appeal suit No. 321 of 1891, confirming the decree of A. Babu Rau, District Munsif of Udipi, in original suit No. 25 of 1890.

The plaintiff was the owner of a garden. The defendant was his neighbouring proprietor on the north and east. The plaintiff's case was that his garden was surrounded on three sides—north,

* Second Appeal No. 651 of 1893.

east and west—by three channels; that, at a certain point, the defendant blocked up the communication of the third channel with the first by recently putting up a wall; that, by pushing forward a bank to the south of his fields and adding to them, and by additions to the west of his gardens, defendant had encroached upon the beds of the first and second channels and narrowed their water-way considerably; that, by deepening the channel below the foundation of a stone embankment of the plaintiff's he had endangered it, and that these wrongful acts of the defendant had caused the water on three sides of his garden to increase so in depth and force as to overflow his garden, wash off the surface soil and otherwise damage his trees. Plaintiff accordingly prayed that the channels might be restored to their former condition, or Rs. 50 paid to him in the alternative, and that Rs. 21 for damages already sustained might be awarded.

The defendant denied the alleged encroachment and acts complained of, and charged plaintiff with having trespassed upon and included the village road and channel to the area of his garden and otherwise encroached from his side of the garden.

The District Munsif found that the narrowing of the first and second channels and their water-way was caused by the wrongful encroachments into and usurpation of unassessed Government waste land set apart for 'Karugulanadedari' (cattle path) by plaintiff and defendant.

That defendant had blocked up the channel and cut off the communication of the first channel with the third; that defendant had deepened the first channel; that these wrongful acts, though they caused damage to plaintiff's property, were not the sole causes of the damage complained of, the plaintiff having also contributed to bring about the result. In this view he dismissed the plaintiff's suit.

The plaintiff appealed on the ground, *inter alia*, that the encroachment on his part on Government land had taken place more than twelve years before and did not contribute to the injury complained of. The District Judge confirmed the decree of the District Munsif.

The plaintiff preferred this appeal.

Ramachandra Rau Saheb for appellant.

Sundara Ayyar for respondent.

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ORDER.—On the facts found the decrees of the Courts below cannot be supported. It is conceded that the encroachment in the channel by plaintiff was long before the defendant's enroachments. The Courts below are in error in supposing that plaintiff's suit must fail on the ground that he also contributed to the injury. As in the case of contributary negligence, so also in the present case, plaintiff's encroachment could only be held to be contributary if by the exercise of the ordinary care defendant could not have avoided causing the injury. Government, on whose property both parties are found to have encroached, may be entitled to require both parties to restore the channel to its original width; but as between plaintiff and defendant it was the latter's recent encroachment that was the cause of plaintiff's land being submerged. This is a wrong against which plaintiff is entitled to relief against the defendant.

We, therefore, set aside the decrees of the Courts below and call upon the Subordinate Judge to submit findings on the eighth issue, *viz.*, to what relief (if any) is the plaintiff entitled under the circumstance of the case, within one month from date of receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court.

(In compliance with the above order, the Subordinate Judge submitted a finding which was accepted by the High Court in the following judgment:—)

JUDGMENT.—Accepting the finding, we reverse the decrees of the Courts below and direct that the channel and cattle lane be repaired by the defendant, or else that he do pay plaintiff a sum of Rs. 30 (thirty) as costs of doing the work, and that defendant do pay plaintiff a further sum of Rs. 15 as damages, and that he do also pay plaintiff proportionate costs on the above in all three Courts.