

1890
October 31.

REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Young.

JAWITRI (DEFENDANT) *v.* H. A. EMILE (PLAINTIFF).*

Trespass—Building on plaintiff's land—Damages—Mandatory injunction—Suit for further damages—Alleged disobedience of mandatory injunction—Cause of action—Suit not maintainable.

The defendant having built a wall on the plaintiff's land, the plaintiff brought a suit in which he asked for damages for the trespass, and an injunction, and a decree was passed for damages and for a mandatory injunction directing the defendant within two months to remove the wall, and to restore the plaintiff's premises to their former condition. Two years subsequently the plaintiff brought another suit for damages, alleging his cause of action to be the defendant's disobedience of the mandatory injunction, and proving as damages that people were deterred from becoming his tenants by fearing that, owing to the defendant's previous action, the hillside on which the plaintiff's premises were situate, was likely to fall. There was no structural or other damage done to the plaintiff's property other than that which was done prior to the commencement of the previous suit.

Held that the suit would not lie for damages for non-compliance with the mandatory injunction, to compel the performance of which the plaintiff had his remedy in execution. *Mitchell v. Darley Main Colliery Company* (1) distinguished.

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Dwarka Nath Banerji*, for the petitioner.

Mr. *J. E. Howard* and Babu *Bishan Sahai*, for the opposite party.

EDGE, C. J., and YOUNG, J.—The plaintiff in this case was the owner of Thespia Lodge, Mussoorée. 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

* Miscellaneous Application under s. 622 of the Civil Procedure Code.

(1) L. R., 11 App. Cas, 127.

1890

 JAWAHRI
 v.
 H. A. EMILE.

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 by 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* (1) that this suit lies. On the other hand, Mr. Banerji relies on the case of *Serrao v. Noel* (2) 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* (3) 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

(1) L. R., 11 App. Cas. 127. (2) L. R., 15 Q. B. D., 549.

(3) 34 L. J. Q. B. 181.

1890

JAWATRI
v.
H. A. EMILE.

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 plaintiff's 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 non-compliance 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.

Appeal allowed.

APPELLATE CIVIL.

1890
December 5.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAMZAN (PETITIONER) v. GERHARD (OBJECTOR).*

Surety, liability of—Judgment-debtor applying to be declared an insolvent—Civil Procedure Code, ss. 336, 344.

A person who executes a bond undertaking to produce a judgment-debtor at any time when the Court should direct him to do so, and standing security under s. 336 of the Civil Procedure Code for the judgment-debtor's applying to be declared insolvent, is released from his obligation under the bond when the judgment-debtor

* Reference under s. 617 of the Civil Procedure Code, by C. Steel, Esq., Subordinate Judge, Dehra Dún, dated the 1st November 1889.