APPELLATE CIVIL.

Before Mr. Justice Baguley.

BURMA RAILWAYS COMPANY, LIMITED
v.
MAUNG HLA TIN.*

1927
Aug. 30.

Damages for trespass or trover vary according to party's interests in land—Lessee from Government not entitled to remove minerals or earth—Damages awardable when earth is removed.

Held, that a lessee from Government who has only grazing and cultivation rights over a piece of land and is not entitled to extract any minerals or earth therefrom, cannot claim the value of any earth removed, and can only claim damages for deprivation of the use of part of the surface of the earth, *i.e.*, the diminution in the value of his land. Damages vary considerably according to a party's interest in the land.

BAGULEY, J.—Respondent, Maung Hla Tin, is lessee of some land adjoining the Burma Railways Company's line. The land is apparently a good deal higher than the line itself. In the course of work in connection with the Pegu-Kayan line construction the Railways Company's servants, while excavating for earth, went over the boundary line between the plaintiff's land and the railway line and dug a considerable amount of earth from the plaintiff's land. This was about the beginning of 1926. The plaintiff discovered this fact and sent a letter, Ex. B, dated the 2nd February, claming Rs. 3,930 as damages. The Railways Company replied asking for time to go into the matter, and, finally they sent him a letter, Ex. K, dated the 20th April, admitting that they had encroached upon an area of ·16 acre and offering, without prejudice, the sum of Rs. 100 as compensation. The plaintiff was not prepared to accept this, and, on the 16th June 1926, filed the present suit. An amended plaint was filed on the 9th October. It is headed "suit for the recovery of Rs. 1,000 as

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damages for earth removed from the plaintiff's land." It sets out that in January the defendant Company trespassed on the land and removed 810 sadrams of earth. It goes on to value the earth removed at Rs. 2,430; but the prayer is for Rs. 1,000 only as damages for earth removed.

The defendant-Company in their written statement admit encroachment of ·08 acre only and say that they only removed 43 sadrams of earth. The written statement further submits that compensation cannot be assessed on the quantity of earth removed.

Evidence was gone into, and the trial Court dismissed the claim on the ground that, as the plaintiff was only a lessee of Government, holding the land under a lease for cultivation or grazing purposes only, he could not claim any compensation. The Township Judge seems also to have been influenced by the fact that before he wrote his judgment the land had been acquired by Government. The real reason for his finding is not particularly clear.

The plaintiff went in appeal before the Additional District Judge and, though he comes to a very definite conclusion, I am afraid that his judgment is also not quite as clear as it might have been. He states definitely that in argument before him the plaintiff was suing for trover and not trespass. I agree that the claim made is one for damages for removal and conversion of earth. Nevertheless, having taken up this standpoint the learned Judge assessed damages as the value of ·49 acre of land at Rs. 1,171 per acre. It seems to me that, if the claim is one for trover, damages must be assessed by the ton or cubic feet. An assessment per acre as this is shows that the case was regarded as being one of trespass.

However, before me the case was treated as one for damages in general.

The plaintiff was a lease-holder of the land and the damages to be awarded to him must be for the damage done to his interests. This is pointed out in Mayne on Damages at page 424 and the following pages. "Damages will vary considerably according to the plaintiff's interests in the land."

On the other side it was contended before me that the Courts could not look into the plaintiff's title, and I was referred to Salmond's Law of Torts, pages 228 and 229. "In other words, no defendant in an action of trespass can plead *jus tertii*—the right of possession outstanding in some third person—as against the fact of possession in the plaintiff."

This argument, I think, shows a misapprehension of the facts of the case. The plaintiff is suing for the injury done to him. What he had was the right to go on occupying the surface of this land for about fifteen years after the date of the trespass. If the argument is that, I am unable to look at the plaintiff's interests at all but to hold that because he was in possession of the land he must be regarded as the full and outright owner. I cannot see my way to accept it. The plaintiff filed his lease as an exhibit, and it is impossible for the Court to refuse to read the plaintiff's documents which he has filed. He being only a lessee his interest is that of a lease-holder. He has no right to minerals or to take out and cart away the earth. He has been deprived of the use of part of the surface of the earth because the defendant-Company had removed it and that, so far as I can see, is the full extent of his damage.

I have been referred to *Whitwham* v. *The Westminster Brymbo Coal & Coke Company* (1), in which it is laid down in one particular case that the damages to which the plaintiff was entitled must be assessed

(1) [1896] 2 Ch.Div. 538.

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partly with a view to the benefit derived from the trespass of the trespasser. The facts of that case are totally different to the facts in the present one. In that case the trespass had gone on for years and the defendants had been tipping spoil from a mine on to the land of the plaintiff. Lopes, L.J., in his judgment at page 543 says: "It is a peculiar case" and it is dangerous indeed to apply principles given in peculiar cases to cases in which the facts are totally different. In the case of a wilful wrongdoer, no doubt, the gain obtained by him from his trespass would be taken into consideration in assessing the damages to be awarded to the plaintiff, but there is no suggestion here, I think, that the defendant Company was a wilful wrongdoer. It was a case of unintentionally overstepping the boundary, and, as soon as the fact had been brought to their notice, they took steps to remedy the matter by acquiring the land under the Land Acquisition Act.

Holding as I do that the plaintiff had no right to the earth, any damage payable for removing the earth, would have to be paid to his landlord. The damage awardable to the plaintiff must be assessed on the diminution in the value of his land. For this we have to determine the area of land of which he has been deprived, for, once the Railways Company had used the land as an earth quarry, there can be no doubt that its value for cultivation and grazing purposes would be nil.

[The plaintiff's interest in the land ceased on the 20th August 1926, on account of the acquisition. On the evidence His Lordship found that the plaintiff was deprived of the use of ·26 of an acre only, and as the sum of Rs. 100 offered by the Railways Company was sufficient compensation, His Lordship allowed that sum, but made the appellant pay the costs throughout.]