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actions to enforce them." But the Transfer of Property Act provides otherwise and says that no title of ownership can be created to tangible immoveable property of Rs. 100 and upwards in any other manner than by a registered conveyance. That excludes all considerations of equity based on part or whole performance and makes the law laid down in the Act applicable whether a vendee is suing or is sued.

We must, therefore, confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

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MOHOLAL MAGANLAL SHA (ORIGINAL DEFENDANT), APPELLANT *v* BAI JIVKORE (ORIGINAL PLAINTIFF), RESPONDENT.*

Damage—Trenches for foundations—Percolation of rain-water through the trenches—Injury to the neighbouring house.

The defendant dug a trench on his land for the foundation of a superstructure on his land. This trench was close to, and in a line with, the back wall of the plaintiff's house. The rain-water collected in the trench and percolating into the foundations of the plaintiff's house, caused the back wall of the plaintiff's house to subside and caused other damage. The plaintiff brought a suit to recover damages.

Held (1), that the defendant had a right to build on his land and for the purpose of building to make ditches for foundations.

(2) that the effective cause of the damage being the percolation of the rain-water which collected in the trenches and caused the shrinkage of the house, the defendant was not liable.

Before a person can be held liable in damages for injury caused to his neighbour's land by water either flowing from the former's land to the latter's or percolating from the one into the other, it must be shown that the water was brought or collected on his land by him voluntarily for his own purposes in a non-natural user of it. Otherwise, he is not liable.

SECOND APPEAL from the decision of P. E. Pereival, Joint Judge of Ahmedabad, confirming the decree passed by Vadilal T. Parekh, Joint Subordinate Judge at Ahmedabad.

Suit to recover damages.

* Second Appeal No. 562 of 1903.

The plaintiff owned a house in Laxminarayan's Pole in Ahmedabad. To the east of this house was a house belonging to a temple of which the defendant was the manager. The defendant pulled down this house in June, 1900, and made trenches in September, 1900, for the foundations of the building to be erected on the land. The plaintiff's complaint was that by reason of water and concrete in these foundations, the eastern and southern walls of her house were weakened. One of the trenches for foundation was in a straight line with the back wall of the plaintiff's house; on the 22nd September, 1900, while this second trench was so open, it rained, the rain-water of the street collected in the trench, and percolating thence to the plaintiff's land caused shrinkage of the plaintiff's house. A portion of the back wall of the plaintiff's house fell down, the eastern wall cracked, and a portion of the ground floor gave way. This suit was, therefore, brought to recover Rs. 1,000 as damages.

The defendant contended (*inter alia*) that no part of the plaintiff's house suffered damage on account of his (defendant's) act or negligence; that necessary precautions were taken in digging the foundations, and that the plaintiff's house was old and weak and had cracks.

The Subordinate Judge held that the acts complained of were committed by the defendant, and that damage was caused to the plaintiff's house by defendant's negligence. He, therefore, awarded Rs. 500 as damages to the plaintiff. On appeal this decree was confirmed.

The defendant appealed to the High Court contending (*inter alia*) that the lower Appellate Court was wrong in ignoring the fact that the defendant was acting quite within his rights in having the foundations dug for the new building; that he had in no way transgressed any duty imposed upon him by law in raising a new building; that the lower Appellate Court had omitted to consider the point that the defendant had taken sufficient care to keep the rain-water from the foundations, and that he was guilty of no negligence.

L. A. Shah (with the Advocate General), for the defendant (appellant):—The first point in the case is that the plaintiff has no cause of action against us. The defendant was using his

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property in a natural and legitimate manner, and was entitled to dig foundations on his own land for building purposes. He owned no duty to the plaintiff; and the plaintiff even does not complain of any breach of duty on his part. The defendant is not responsible for damages resulting from the percolation of rain-water accumulating in his foundations which is no act of his: see *Wilson* v. *Waddell* (1) in which reliance is placed on *Rylands* v. *Fletcher*,(2) *Popplewell* v. *Hodkinson*,(3) and *Chadwick* v. *Trower*.(4)

Secondly, the lower Appellate Court has recorded no finding as to our negligence. There is evidence in the case to show that we had taken proper precautions to prevent rain-water from getting into our foundations, which the Appellate Court has not considered at all, and even assuming that the defendant owned any duty to the plaintiff, then unless it were found that the defendant had been negligent, he could not be held liable for the results of natural percolation of rain-water on the plaintiff's land through foundations dug on defendant's land.

G. S. Rao, for the respondent (plaintiff) :—In this case, the Municipality of Ahmedabad had given a warning to the defendant to finish his buildings before the monsoon. Instead of doing so, he dug these trenches in September, 1900; and he left them open. The trench running north to south was filled up in such a way as to have weakened our building. When on the night of the 22nd September, 1900, it rained, the other trench was open and no precautions were taken to prevent the rain-water which had accumulated in the street from getting into the trench. As a matter of fact the whole trench got filled with rain-water which percolated and caused the damage complained of. Both the lower Courts have held that the damage has resulted from the percolation of rain-water. Under these circumstances the defendant was obviously responsible, as it was his act that brought about the accumulation of rain-water which resulted in the percolation of the water on to our land. The defendant was bound to use his property in such a careful way as not to cause any damage to his

(1) (1876) 2 App. Cas. 95.
(2) (1868) L. R. 3 H. L. 330.
(3) (1869) L. R. 4 Exch. 248.
(4) (1839) 8 L. J. Exch. 286.

neighbour: see *Vithaldas* v. *The Municipal Commissioner of Bombay*.[1] Though the lower Appellate Court has not recorded any express finding as to the defendant's negligence, the first Court has expressly found it and the lower Appellate Court has practically adopted that finding. The finding of the first Court about defendant's negligence does not appear to have been specifically questioned by the defendant in the lower Appellate Court. The defendant has all along acted with his eyes open without any regard to his neighbour's rights and ought to be held liable for the consequences.

The Advocate General, in reply:—The case of *Vithaldas* v. *The Municipal Commissioner of Bombay* [1] has no application. The remarks of Lord Bramwell in *Bamford* v. *Turnley*[2] show what is a natural user of one's property. The principle of the case of *Wilson* v. *Waddell* [3] ought to govern the present case.

CHANDAVARKAR, J.:—The facts necessary for the disposal of this second appeal are practically admitted and moreover both the Courts below agree in their findings as to those facts. The plaintiff (who is the respondent before us) complains that the defendant has caused damage to her house by allowing the rain-water collected into a trench dug by the defendant on his land to percolate into the foundations of her house. The defendant admits that he did dig, but his defence is that as it was done in the natural user of his property, he is not liable for damage done to the property of the plaintiff by percolation. This defence, we think, must succeed under the circumstances of this case. The defendant had a right to build on his land and for the purpose of building to make ditches for foundations. It is not the case of the plaintiff that the defendant dug the foundations of his new building in such a way as to occasion damage to, or accelerate the fall of, her house. The effective cause of the damage is the percolation of the rain water, which collected in the trenches and caused the shrinkage of her house. It is no doubt the law that "if a man brings or uses a thing of a

(1) (1902) 4 Bom. L. R. 912.
(2) (1862) 3 B. & S. 62 at p. 82.
(3) (1876) 2 App. Cas. 95.

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dangerous nature on his own land, he must keep it in at his own peril and is liable for the consequences if it escapes and does injury to his neighbour." This is the principle of *Rylands* v. *Fletcher* (1) which, in the opinion of the Judicial Committee of the Privy Council in *Madras Railway Co.* v. *The Zemindár of Carvatenagarum* (2) affords a rule applicable to circumstances of the same character in India. In that case Lord Cairns made these observations:—"The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place" (page 338). Lord Cranworth, referring to the maxim *sic utere tuo ut alienum non lædas*, says in his judgment that it is well illustrated by two cases—*Smith* v. *Kenrick* (3) and *Baird* v. *Williamson*. (4) "In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint." In *Baird* v. *Williamson* (4) "the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned." (5)

(1) (1868) L. R. 3 H. L. 330.
(2) (1874) 1 I. A. 364.
(3) (1849) 7 C. B. 564.
(4) (1863) 15 C. B. (N. S.) 376.
(5) (1868) L. R. 3 H. L. 330 at p. 341.

It is clear from these judgments in *Rylands* v. *Fletcher* (1) that before a person can be held liable in damages for injury caused to his neighbour's land by water either flowing from the former's land to the latter's or percolating from the one into the other, it must be shown that the water was brought or collected on his land by him voluntarily for his own purposes in a non-natural user of it. Otherwise, he is not liable. This is illustrated by the case of *Wilson* v. *Waddell* (2) cited for the appellant and also by *Snow* v. *Whitehead*.(3) In the former case, the plaintiff brought his action to prevent the flow of surface water from the defendant's upper coal field coming on to the plaintiff's lower coal field and doing serious damage in respect of which the plaintiff claimed reparation. The defence was that the defendant had conducted his operations in the ordinary mode with due and reasonable care and that the influx of water complained of was by natural gravitation. The House of Lords held, following *Rylands* v. *Fletcher*,(4) that the defendant when working the upper part of the mine was not under any obligation to the plaintiff, as owner of the mine on the dip, to preserve or to restore the impervious roof which, whilst it existed, prevented a great part of the rainfall from descending. One contention for the plaintiff in that case was that the water which had percolated into his mine from the defendant's mine was "foreign water, introduced into his," (defendant's), "mine from the surface," through the defendants's operations, carried on in an unusual, unreasonable and improper manner. But that contention was overruled by the Lords on the ground that, according to the evidence in the case, the defendant could not have worked his coal in the usual and proper course without breaking the surface. Similarly in the present case, though it may be said that the rain water accumulated on defendant's land as the result of his act, because it was due to the digging of the trenches by him, yet the digging was done and the surface of his land broken by him in the usual and proper course of the enjoyment of his land by the defendant. He had a right to

(1) (1868) L. R. 3 H. L. 330.
(2) (1876) 2 App. Cas. 95.
(3) (1884) 27 Ch. D. 588.
(4) (1868) L. R. 3 H. L. 330.

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build and for that purpose to dig the foundations. There was no obligation cast upon him of taking steps to prevent rain water falling either on the surface or in the trenches dug for the purposes of building—nor was he bound to prevent that water percolating into defendant's property by the operation of the laws of nature, if the trenches were dug by him, not for the purpose of introducing water into them, but for the purpose of building and the natural user of his land.

In *Snow* v. *Whitehead* (1) "in erecting a house upon their land, the defendants excavated the ground to form a cellar, and they built the house and put pipes down to convey the water from the roof, but they were not connected with any drain. The rain water came through the pipes into the cellar and collected there in a pool, evidently a considerable one, *because the water was used for the purpose of making mortar during the erection of the buildings.*" The water found its way by percolation through the land into the plaintiff's adjoining house and caused damage. Kay, J., held, following *Rylands* v. *Fletcher* (2), that the defendant was liable because the defendant had brought the water from his roof to his cellar and collected it there for purposes beneficial to himself. Now in the case before us, there is nothing of the kind. It cannot be said that the rain water which percolated into the plaintiff's land was introduced by the defendant into his trenches for purposes of his own. Rain would have fallen all the same on the surface of the land if the trenches had not been made and as the defendant had the right to make them in the natural and usual course of enjoyment of his property, the fact that when the surface was broken, the rain which would otherwise have fallen on the surface fell into the trenches, can make no difference.

Under these circumstances the question of the defendant's negligence does not arise and the decree of the Court below must be reversed and the plaintiff's claim dismissed with costs throughout on the respondent.

Appeal allowed.

(1) (1884) 27 Ch. D. 588. (2) (1868) L. R. 3 H. L. 330.