Before Mr. Justice Macpherson and Mr Justice Aieslie

TARINI CHARAN BOSE (PLAINTIFF) *v.* DEBNARAYAN MISTRI (ONE OF THE DEFENDANTS)* 1871 *July* 28.

Landlord and Tenant—Digging a Tank by a Ryot—Burden of Proof.

In this case the plaintiff sued, alleging that the defendants had dug a tank on his land, and thereby done him damage.

The plaintiff, who was the zemindar, stated in his plaint that the ground on which the tank had been dug formed part of the jote of his tenant Jitu, but that the tank was dug by Debnarayan, the holder of an adjoining jote.

Debnarayan, who was the principal defendant, alleged that the jote now belonged to him by transfer from Jitu, and had been in existence from the time of the permanent settlement, and that therefore he had a right to dig this tank, without the consent of the landlord.

Jitu appeared in the Moonsiff's Court, and declared the jote to be his. He denied that he had ever transferred the jote, and denied that he had anything to do with the digging of the tank.

The Moonsiff decided the suit without determining what the nature of Jitu's tenure originally was, or whether Jitu had transferred it. The Moonsiff was of opinion that, whether Jitu had transferred it or not, Debnarayan had no right to dig the tank, and that he was bound to keep the land in its original condition.

The Judge, on appeal, considered that the plaintiff had admitted that the tenure had been in existence since the time of the permanent settlement, and he also considered it to be proved that a custom prevailed in the zemindari by which persons having a tenure of such a nature had a right to dig tanks, and that the digging of this particular tank was an improvement to the property; he accordingly set aside the decree, but ordered that the earth excavated should be removed from an adjoining piece of land belonging to the plaintiff upon which it had been thrown.

On appeal to the High Court,

Mr. *Money* (with him Baboo *Hem Chandra Banerjee*) for the appellant contended that the Judge's decision was wrong, and that of the Moonsiff was right. To convert a man's property from one thing to another, from culturable land, for instance, to a tank without the owner'r consent, is a very doubtful improvement. A tenant may have a right to dig a tank in his zemindar's land under certain circumstances, and according to the nature of his tenure;

*Special Appeal, No. 317 of 1871, from a decree of the Judge of 24-Pergunnas, dated the 28th December 1870, reversing a decree of the Additional Moonsiff of Allipore, dated the 14th June 1870.

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the *onus* of proving the nature of the tenure, and of the right to dig a tank is on the tenant. Lands are given by zemindars to ryots to occupy in a particular way, and they are bound to occupy them in that way.

Baboo Bhawani Charan Dutt for the respondent contended that the zemindar came into Court as plaintiff, he is therefore, under the ordinary rule of practice, bound to make out his case as laid in his plaint. His case is that the ryot, as such, has no right to dig a tank, he ought therefore to have given evidence to show what the ryot's tenure was. The ryot has a right to enjoy possession as he likes while his tenure lasts, and the zemindar cannot oust him; but when the tenure is at an end, the zemindar may sue him for any damage done to the property. This suit therefore is premature even if the tenant had no right to dig the tank.

MACPHERSON, J. (after stating the facts).—It appears to me that the Judge is wrong in various respects, and that the case which it was necessary for Debnarayan to prove has not been proved in either of the lower Courts.

It is contended for Debnarayan (the respondent) here, as it was in the Courts below, that the *onus* lay entirely on the plaintiff. But this is a mistake. The plaintiff, being the zemindar, came into Court complaining that of this jote which consisted altogether of only three b gas, more than one biga had been converted into a tank whereby he had been damaged. He put his case considerably higher than, he ought to have put it, contending that under no possible circumstances could the defendants have a right to dig a tank without his consent: and taking this view of his position, he rather lost sight of the question of damage, and at the hearing gave no evidence as to it. Nevertheless, it appears to me that, under the circumstances, the case which the plaintiff made out, was a sufficient *prima facie* case to put the defendant to the proof of his right to dig the tank. The plaintiff stated that more than one-third of the land had been converted from its original purpose; and as the defendant admitted that this was so and alleged that he had a right so to convert it, whether the plaintiff approved or not, I think the question thus raised by the defendant came to be the main issue in the case.

Although both the lower Courts find that the digging of the tank was an improvement, the issue as to whether it was so has not been properly tried; for there is no real evidence that the land has been improved. It may be true that a tank, covering a biga of land, may produce an annual rent of Rs. 8, while the same quantity of paddy land may yield an annual rent of not more than Rs. 2-12 as alleged; but it does not necessarily follow that the conversion of the one biga of paddy land into a tank is on the whole beneficial to the property. This cannot be ascertained without considering carefully the general position of the parties and of the land, and looking to the purposes to which the land has been ordinarily applied, and to which it may be

applied. Although, therefore, in the present case there is a finding that the digging of the tank is an improvement, the mode in which this conclusion has been arrived at, and the evidence on which it is is based, are such that the finding is of little or no value.

The defendant having to answer the *primâ facie* case made by the plaintiff, has in fact proved nothing. He has not proved what the nature of Jitu's tenure was, nor that that tenure was legally transferred to him. It is possible that Debnarayan is not entirely to blame for this: for the Moonsiff evidently was of opinion that, whatever the nature of the tenure might be, Debnarayan could not possibly have any right to dig this tank. In this state of the case, however, Debnarayan has not proved any right, as against the plaintiff, to dig this tank. I do not say that under no circumstance could he have the right dig it; but, in the absence of clear proof of the nature of his tenure, he must at least show that the digging the tank is a fair and reasonable use of the land which he holds,—a use which will not be to the material detriment of the zemindar.

The defendant has not explained his reasons for digging this tank; but he has attempted to prove that there is a local custom which gives tenants a right to dig tanks without the consent of the landlord. Some tenants have deposed that they themselves have dug tanks without having obtained the consent of the zemindar. The evidence, however, is far short of what is requisite to prove such a custom: and there is moreover neither precision nor distinctness in the custom attempted to be proved.

On the whole, therefore, it seems to me that the plaintiff is entitled to a decree.

It is said that we ought not to order that the tank shall be filled up, because the plaintiff is not entitled to *khas* possession. Whether he is entitled to *khas* possession or not, he is entitled to such an order as that made by the Moonsiff, namely that the defendant shall either fill up the tank himself, or pay the plaintiff Rs. 100, and allow the plaintiff to fill it up. The plaintiff may not be entitled to *khas* possession now; but he retains a certain interest in the land which in this case entitles him to ask that the injury done to his property may be removed, which, doubtless, it can be much more easily now, than hereafter.

The unreported case of the 29th July 1870, decided by Kemp and E Jackson, JJ., has very little bearing on the matter before us. The defendants, it is stated, had merely dug a hole to take earth wherewith to repair their house, and it was decided that they had a right to do so.

For the above reasons, we set aside the decree of the lower Appellate Court, and direct that the decree of the first Court be restored and affirmed with costs, both of this Court and of the lower Appellate Court (1).

(1) See *Sheo Churun* v. *Bussunt Singh*, and 3 N. W. P. H. C. Rep., 282. *Pamjathun Singh* v. *Moonshee Mehdee*,