

(1971) 06 KL CK 0029

High Court Of Kerala

Case No: S.A. No. 824 of 1968

Narayanan

APPELLANT

Vs

Sankaran

RESPONDENT

Date of Decision: June 8, 1971**Citation:** (1971) KLJ 599**Hon'ble Judges:** P. Subramonian Poti, J**Bench:** Single Bench**Advocate:** M.B. Kurup, Jose K. Kochupappu and M.V.C. Menon, for the Appellant; N.K. Sreedharan and M.A. Thrivikrama Pai, for the Respondent**Final Decision:** Allowed

Judgement

P. Subramonian Poti, J.

The courts below have concurrently decreed the suit for mandatory injunction compelling the defendant in the suit to fill up a trench that he has dug on the boundary of his property immediately adjoining the plaintiff's property. The dispute concerns the right of lateral support by the adjacent and subjacent soil in regard to the property of the plaintiff. Admittedly the property belonging to the plaintiff is at a higher level than the property of the defendant. About the actual difference in level there is dispute. The Commissioner has noted that the difference is 1 ½ feet though the plaintiff's case is that it is very much higher. On the boundary separating the plaintiff's property from the defendant's the plaintiff has paved the mottom (embankment) with laterite stones. It is referred to in the judgment as putting up of a wall I do not think the evidence in the case justifies this description. The embankment itself was formed by raising that portion. Plaintiff's property was originally paddy land, but now only a portion of it is such and the portion adjoining the defendant's is the raised embankment whereon coconut trees stand. Before the suit the defendant is alleged to have dug a trench on the northern most boundary of his land adjoining the property of the plaintiff. As a result of this the laterite stones paved on the embankment are set to have been displaced and the

embankment is said to have collapsed due to subsidence of soil. Though in this suit, as originally instituted, only injunction was prayed for, by an amendment compensation for damages caused by the act of defendants was also sought. Both the Courts have agreed in granting a decree to the plaintiff compelling the defendant to fill up the trench he has dug on the boundary of the property. The Appellate Court however gave a decree also for damages for Rs. 202/50, being the loss caused by the laterite stones being displaced. It is the defendant who has filed this second appeal. The contention urged before me by counsel Mr. Prabhakaran Nair appearing for the appellant is that the plaintiff burdened his own land by the construction of the embankment and therefore he cannot have a complaint against the defendant that the lateral support to his property, which is a natural right of the plaintiff as owner, has been taken away. According to counsel the natural right extends only to bearing the burden in the natural state of the dominant heritage and if any additional burden is imposed the enforcement of the right of lateral support cannot be sought by the owner of the dominant heritage. According to counsel the only process by which right to support for his additional burden could be claimed is by acquisition by prescription and on the facts of this case a plea that it was so acquired cannot stand as admittedly the burden was imposed on the dominant heritage only a few years earlier, far within the period required to found a claim on prescription. That an owner of the servient heritage is not bound to bear any additional burden and that right to seek lateral support in the event of such additional burden being imposed can be acquired only by prescription is well settled. I need only refer to the decision of the Bombay High Court in [Rasiklal Manilal Bhatt and Others Vs. Savailal Hargovindas Sur](#), in this matter. The decision of this Court reported in [Gopalakrishna Panicker Vs. Thirunakkara Devaswom](#), is also relied upon by the counsel as supporting his stand. I do not think this contention of the counsel is a matter of controversy. But there is the further question, namely, whether by reason of imposition of an additional burden on the dominant heritage the right of lateral support in its natural condition is also lost. In other words, though an owner of land who constructs buildings thereon or deals with it in such a manner as to materially impose an additional burden on the owners of the subjacent and adjacent soil, may not be entitled to seek the right of lateral support for the additional burden, is he nevertheless entitled to claim that support which his property would have had in its natural condition? I do not see my way to accept the proposition that by substantial or material alteration of the dominant heritage resulting in an additional burden on the servient heritage the right of support to the dominant heritage even as it was in its original condition would also be lost.

2. In *Wyatt v. Harrison* (110 ER K. B. 320) Lord Tenterden C.J. considering a case of a person who built to the utmost extremity of his own land complaining of the owner of the adjoining land digging the ground there so as to remove some part of the soil which formed the support of the building so erected said,

It may be true that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it.

In *Hunt v. Peake* (70 ER 603) the plaintiff complained that his houses were injured by the mining operations carried on by the defendant in the adjoining land resulting in the soil subsiding. Even without the additional weight of the houses that would have been the case. The court said,

The evidence appears to me to establish beyond any rational doubt the fact that the additional weight of the houses had nothing whatever to do with the subsidence of the soil, and that if no buildings had ever been erected it would have yielded in exactly the same way. If it were necessary to determine the point of law, I must say that, having considered all the authorities, I find that, though there may be no very precise decision upon it the dicta are strongly in favour of the plaintiff.

Again the Court said,

The plaintiff had a clear right to build as he thought fit upon his land, upon the assumption that sufficient support would be left to bear the burden of the soil itself. The damage to the houses is a consequence of the removal of lateral support to which the plaintiff was entitled, and must therefore be the subject of compensation.

In view of what I have stated above the relevant question would be not only whether there are additional structures or additional weight imposed on the land of the plaintiff but whether even without such an imposition the acts of the defendant are likely to cause damage to the plaintiff. If it is likely to cause damage to the plaintiff, then plaintiff would be entitled to the injunction he has prayed for. But the question of a decree for damages stands on a different footing altogether. In order to succeed plaintiff must show that it is because of the digging of the trench that the laterite stones paved on the face of the embankment were dislocated and thereby loss was caused to the plaintiff. For that there is no evidence. The courts below seem to think that the fact that the trench has been dug and the laterite stones paved on the face of the embankment have been displaced must necessarily be related as cause and effect. This assumption is unwarranted. But I have to examine whether in the circumstances of the case, irrespective of the additional burden which is said to have been imposed by raising the level at the boundary and thus causing an additional burden, the property in its natural condition would withstand such acts as are committed or attempted to be committed by the defendant. It is necessary here to appreciate the fact that even originally the property of the plaintiff was situate at a higher level than that of the defendant and if so any operation such as the one

started by the defendant, namely, digging a fairly deep trench exactly at the boundary is necessarily bound to cause subsidence of the soil in the plaintiff's property, if not immediately, at least in course of time. Whether the damage has actually been caused or not I am not concerned with in deciding the question of imposition of restraint by way of injunction. If by allowing the trench to remain the lateral support to which the plaintiff is entitled in regard to his property in its natural condition will be lost to him, the Court must protect the plaintiff. I would therefore agree with the Courts below in regard to the decree for injunction against the defendants. But I would set aside the decree against the defendants for damages as there is no proof that by their act such damages has been caused. The second appeal is allowed to this extent and dismissed in other respects. Parties will suffer costs throughout.