1950 *Present:* **Dias S.P.J. and Pulle J.**

BANDAPPUHAMY, Appellant, *and* SWAMY PILLAI, Respondent

S. C. 527—D. C. Colombo, 119 Z

Servitude—Right of lateral support—Breach of it—Quantum of damages claimable.

Plaintiff sued the defendant for damages for cutting earth from his (defendant's) premises so as to deprive of lateral support a contiguous allotment of land belonging to the plaintiff.

Held, that the damages that could be claimed should be restricted to what was incurred by, and naturally flowed from, the subsidence of soil which actually resulted from the excavations. Plaintiff was not entitled to claim the cost of putting up a retaining wall to prevent further damage.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, for the defendant appellant.

Kingsley Herat, for the plaintiff respondent.

Cur. adv. vult.

May 24, 1950. PULLE J.—

The defendant in this case appeals from a judgment awarding the plaintiff a sum of Rs. 400 as damages for cutting earth on his own land so as to deprive a contiguous allotment of land belonging to the plaintiff of lateral support.

In his plaint the plaintiff alleged that the defendant in August, 1944, cut earth not only on his own land but encroached on the plaintiff's land by excavating and cutting into his soil below the surface level. At the trial, however, the scope of the action was restricted to the issues whether the defendant in or about August, 1944, cut earth from his own

premises so as to deprive the plaintiff of his right of lateral support, and if so, to what damages was plaintiff entitled. A survey had previously established that the surface under plaintiff's land had not been cut into.

On the facts the learned District Judge found substantially in favour of the plaintiff. It would appear that the defendant's land is contiguous to and lies on the south-west of plaintiff's land. They were separated by what is described as a barbed wire live fence. The plaintiff's land was at a higher elevation and sloped gradually down to defendant's land. During the passage of rain water the plaintiff's land would not suffer from anything more than the normal wear and tear of bad weather but the position would be entirely different if along the boundary the defendant cut earth to an average depth of about five feet. Water falling on plaintiff's land would gather an abnormal momentum causing substantial loss by erosion in course of time.

It is clear from the evidence that in or about August, 1944, the defendant had cut earth on his own land practically along half the length of the boundary, a distance of seventy-two feet, causing a perpendicular drop of about five feet. Along this portion of the boundary were two trees which formed part of the fence. These and an arecanut tree collapsed as a result of the excavation and earth washed off in this area exposed the roots of other fence trees.

It is not contested that the collapse of the two fence trees and the arecanut tree and some damage to the fence were due to the subsidence of the soil caused by the excavation. Had the plaintiff sought compensation for the loss of the trees and cost of consolidating the fence, his claim would have been unanswerable. He thought, however, that he should protect himself against all damage in the future and requested a carpenter-mason to prepare an estimate for the construction of a 13-foot wall, 16 inches thick to prevent the washing away of his land. It was on the basis of this estimate that plaintiff claimed Rs. 1,090 as damages.

On the authority of the case of *Pedris v. Batcha*,[1] it was submitted to the trial Judge on behalf of the defendant that the plaintiff was not entitled to claim damages in respect of the subsidence which the plaintiff feared might occur in the future and that damages could not be assessed on the basis of the costs of constructing a retaining wall to prevent the surface erosion of the land. On this point the learned Judge expressed himself as follows:—

> "So long as there is some injurious consequence as a result of the cutting of earth from his land by the defendant the plaintiff has a cause of action against him and that the damages that may be claimed are not to be restricted to the immediate damage caused. It is obvious that even after the falling of the two trees on the boundary there must have been a gradual washaway of earth from plaintiff's land and I am unable to agree with defendant's counsel's contention which would mean that plaintiff must wait until there is some big subsidence of earth before he can claim damages."

It is clear from the authorities cited to the learned Judge that under the English Law which is applicable to Ceylon the excavations in themselves give no right of action. A right of action only accrues when damage is

[1] *(1924) 26 N. L. R. 89.*

caused by subsidence resulting from the excavations. That every new subsidence gives rise to a fresh cause of action is set out clearly by Lord Halsbury in the following passage in *Darley Main Colliery Company v. Mitchall* [1]:—

> "Since the decision in this house in *Bonomi v. Backhouse* it is clear that no action would lie for the excavation. It is not, therefore, a cause of action; that case established that it is the damage and not the excavation which is the cause of action. I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action for which damages may be recovered."

At the hearing of the appeal learned counsel for plaintiff-respondent accepted the correctness of the propositions stated above but proceeded to argue that upon the application of those propositions the assessment of damages was right. He relied on the following passage in Mayne on Damages (11th Edition p. 140):—

> "If the owner of land by working out his own minerals deprives his neighbour of the support to which he is entitled for his land, the latter has no cause of action until some subsidence results from the working. On that happening, he is entitled to claim for all damage, actual or prospective, from that subsidence, and cannot afterwards claim for any additional damage in respect thereof suffered subsequently."

Had the learned Judge awarded Rs. 400 as damages for actual physical damage caused by the subsidence and the damages flowing naturally from that physical damage one could accept the argument adduced on behalf of the plaintiff. Unfortunately for the plaintiff that was not the basis on which the damages were assessed. As I understand the judgment of the learned District Judge he assessed as damages the cost to the plaintiff of putting up a retaining wall to prevent further washaways. I fail to see how the further washaways on the whole land can be regarded as prospective damage resulting from the first and only subsidence which caused the collapse of three trees and the washing away of some soil near the fence exposing the roots of other trees along the fence. In my opinion the basis on which damages have been awarded in this case cannot be supported.

It was, however, strenuously argued that if the excavations in question caused an abnormal erosion of plaintiff's land by the rapid passage of rain water he ought to be in a position to claim the expenses which he must incur to prevent such erosion. Without expressing a concluded opinion, the position might have been different had the plaintiff alleged that his right, as the owner of a dominant tenement, to discharge rain water on his land to the defendant's along a natural gradient, was interfered with by the acts done by the defendant and that he was entitled to take all reasonable measures for the conservation of his soil. In that case the act of excavation would by itself have amounted to an infringement of plaintiff's right of property. He chose, however, to make his claim only on the basis of loss of lateral support. I think it is too late now, in the sixth year of litigation, for the plaintiff to found a claim on an additional cause of action which was not pleaded or tried in the lower

[1] *(1886) 11 A.C. 127.*

Court. I cannot say with confidence that it is possible to come to a finding on the new cause of action on the existing evidence. Besides, one should not overlook that the pleading of a new cause of action by way of amendment ought not to be allowed if it would result in depriving the defendant of a plea of prescription.

In my opinion this appeal should be allowed, with costs. It would not serve any practical purpose to send the case back for assessment of damage, actual or prospective, as a result of the subsidence. Any damages that the plaintiff is likely to be awarded on a proper basis will fall far short of the amount claimed by him and thus he might have to pay a substantial part of the costs of a fresh inquiry. In the result the plaintiff's action should be dismissed but each party will bear his own costs. The defendant took up the position that he did not make any excavations in August, 1944, that his own land extended to a ditch lying on plaintiff's land and that water falling on plaintiff's land was drained along that ditch and not into his land. On all these points the learned Judge has rightly found against the defendant.

DIAS S.P.J.—I agree.

Appeal allowed.