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and being liable to be excluded by any uncle or aunt, as the case may be, if one happens to survive the *propositus*. The similarity between the succession of these nephews with that of the remoter *gotraja sapindas* is more complete than that between the succession of the latter and that of lineal descendants. And this is a consideration which supports the application of the rule of succession *per capita*, in preference to that of *succession per stirpes*, to the case of the remoter *gotraja sapindas*.

We must, therefore, vary the decree of the Court below by substituting, in lieu of the third share awarded therein, a sixth share, which is admitted to be what the plaintiff is entitled to, according to the genealogy held proved by the Assistant Judge and to the opinion above expressed. But as this point was made for the first time in this Court, the appellant cannot be allowed the costs of this appeal.

Decree varied.

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[307] ORIGINAL CIVIL.

Before Mr. Justice Parsons.

DHONDIBA KRISHNAJI AND OTHERS (*Plaintiffs*) *v.* THE MUNICIPAL COMMISSIONER OF THE CITY OF BOMBAY (*Defendant*).*

[5th March, 1892.]

Negligence—Easement—Right of support of house by adjoining soil—Principal and agent or contractor—Liability of principal for acts of contractor—Bombay Municipal Act (III of 1888), s. 527—Notice of suit—What is sufficient notice.

The plaintiffs were owners of a house consisting of a ground floor and upper storey and measuring 77 feet in length. On the south side of the house was a gully, 3 feet 6 inches wide, separating it from another upper-storied house. The plaintiffs in this suit complained that in January, 1891, the defendant by his servants dug a trench, 8 feet deep, along the whole length of the gully for the purpose of laying a drain pipe, and that the work was done so negligently that the plaintiffs' house was injured and became in such a dangerous condition that it had to be pulled down. The plaintiffs claimed Rs. 3,996 as damages. The defendant denied the negligence, and alleged that the work was not done by his servants or agents, but by a contractor.

Held, that the defendant was liable for the act of his contractor. The work was necessarily attended with risk, and the defendant could not free himself from liability by employing a contractor. The defendant, as well as the contractor, was liable to the plaintiffs.

For the defendant it was contended that the notice of action given by the plaintiffs under s. 527 of the Bombay Municipal Act (III of 1888) was insufficient. The notice stated "that one S. L., a contractor under you, and as such being your agent and servant, excavated a trench, &c." It was argued that this was not a good notice, as it only alleged a cause of action arising out of the acts of the defendant's servants and agents, and not out of the acts of a contractor.

Held, that the notice was sufficient. The section only required the notice to state with reasonable particularity the cause of action, and this was done. The individual by whom the damage was done was specified, and the acts which caused the damage were clearly set forth.

SUIT to recover Rs. 3,996-13-0 as damages for loss caused to the plaintiffs by the negligence of the defendant.

The plaint set forth that the plaintiffs were owners of a chawl situate in Haines Road in Bombay, consisting of a ground floor and upper storey and measuring 77 feet in length and 19 feet and 6 inches in breadth ;

* Suit No. 241 of 1891.

that on the south of this chawl was a gully, 3 feet 6 inches wide, separating the plaintiffs' chawl from another upper-storied chawl; that in January, 1891, [308] the defendant by his servants excavated a trench, 8 feet deep, in the said gully for the purpose of laying a drain pipe; that the trench was made along the whole length of the plaintiffs' chawl at one time instead of being done in short lengths; that the sides of the trench were left unsupported, and that the whole work was done so negligently that the foundation of the south wall of the plaintiffs' chawl was undermined and slipped outwards, carrying the superstructure with it, so that the whole building became in a dangerous condition, and in consequence thereof, the defendant, under the provision of the Municipal Act, caused the chawl to be pulled down, and the materials removed. The plaintiffs claimed Rs. 3,996-13 as damages.

The plaintiffs further alleged that prior to bringing the suit, *viz.*, on the 27th January 1891, they had given the defendant the notice required by s. 527 (see note*) of the Bombay Municipal Act (III of 1888). The notice was from the plaintiffs' solicitors (Messrs. Payne, Gilbert, and Sayani), and stated (*inter alia*) as follows:—

"We are instructed that one Sitaram Luxmon, a contractor under you, and as such being your agent and servant, during the last week excavated a trench 8 feet [309] deep in the gully situate on the south of our clients' chawl for the purpose of laying down a drain pipe, with the result that the foundations of the south wall of the chawl were undermined and slipped outwards, carrying the superstructure with it, so that the south wall and other portions of the building were put into the dangerous condition attributed to it by the Municipality, and which necessitated the proceedings taken by them to remove the chawl.

"The shock caused by the slipping of the south wall has also broken the north exterior wall of the chawl, and this wall has an horizontal crack along its whole length at a height from 2 to 3 feet above ground level, and the masonry to this wall and to the said exterior walls which are also cracked will have to be rebuilt.

"Our clients charge that the damage to their said chawl was caused by the careless manner in which the excavation of the aforesaid trench was done. The sides of the trench were not shored or supported in any way, and the trench was opened the full length of the gully instead of in short lengths. The work, having regard to the depth of cutting, the narrowness of the gully and its close proximity to our clients' chawl, required the utmost care, yet the most ordinary precautions were neglected.

"Our clients estimate their damages at Rs. 4,000, and unless their claim is settled within one month from the date hereof they will take legal proceedings against you in the High Court to enforce it, which please note.

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* *Note.*—Section 527 of Act III (Bombay) of 1888, is as follows:—

(1) No suit shall be instituted against the Corporation, or against the Commissioner, or a Deputy Commissioner, or against any Municipal officer or servant, in respect of any act done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act:—

(*a*) until the expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief Municipal Office, and in the case of the Commissioner, or of a Deputy Municipal Commissioner, or of a Municipal officer or servant, delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney or agent if any, for the purpose of such suit: nor

(*b*) unless it is commenced within six months next after the accrual of the cause of action:

(*c*) the plaintiff shall not be permitted to go into evidence of any cause of action except such as is set forth in the notice delivered or left by him aforesaid:

(2) At the trial of any such suit:

(*d*) the claim, if it be for damages, should be dismissed if tender of sufficient amends shall have been made before the suit was instituted, or if after the institution of the suit a sufficient sum of money is paid into Court with costs.

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"Our client Dhondiba Krishnaji resides at the bazaar opposite the Victoria Garden; Harriba Tukaram resides on the Parel Road; and Raghoba Ramji resides at No. 107, Haines Road. They all live on their properties."

The suit was filed on the 1st May, 1891.

The defendant filed a written statement. He denied the statements made by the plaintiffs as to the excavation of the trench, the negligence, &c., and stated that the excavation was made not by the defendant, his agents or servants as alleged in the plaint, but by a contractor. He also stated that, even if no excavation had been made, the plaintiffs would have been required to pull down the chawl as being in a dangerous condition, and that its said condition was not attributable to the excavation. The defendant also submitted that the notice of action given by the plaintiffs was not sufficient under s. 527 of the Municipal Act, and that the plaintiffs were not, therefore, entitled to bring this suit.

Latham (Advocate-General) and *Jardine*, for plaintiffs :—The fact that the defendant gave the work to a contractor does not [310] exonerate him from liability—*Hughes* v. *Percival* (1); *Bower* v. *Peate* (2); *Dalton* v. *Angus* (3).

Russell and *Scott* for defendant :—They contended that the notice of suit of the 27th January 1891 was not sufficient under s. 527 of Bom. Act III of 1888, and they cited *Ullman* v. *The Justices of the Peace for the town of Calcutta* (4); *Steel* v. *The South-Eastern Railway Company* (5).

JUDGMENT.

PARSONS, J.—In dealing with this case it will be advisable to consider the points of law first, *viz.*, as to the sufficiency of notice and the liability of the defendant for the action of his contractor.

The material part of the notice before suit given to the defendant by the plaintiffs is as follows : (His Lordship read the notice of the 27th January above set out and continued :) It is contended that this alleges a cause of action arising out of the acts of the defendant's agents and servants only, and not out of the acts of a contractor, and that therefore the plaintiff cannot recover if the contractor has been in default and the defendant guilty of a breach of duty. The law, however, (s. 527 of the Bombay Municipal Act, III of 1888) only requires the notice to state with reasonable particularity the cause of action, and I am of opinion that this has been done when it is stated that "one Sitaram Luxmon, a contractor under you, and as such being your agent and servant, excavated a trench, &c." The proposition that he was an agent and servant may not be strictly tenable in law, but the individual was specified by the use of the word "*contractor*," his position was particularised, and the various acts which caused the damage are clearly and plainly set out. While therefore the plaintiffs must of course be limited to the cause of action in the said notice set forth, I hold that the cause of action is wide enough to enable the plaintiffs to maintain this suit, and I find the 5th and 6th issues accordingly.

The next point is whether the defendant is liable for the acts of his contractor in the present suit. The case of *Ullman* v. *The Justices of the Peace for the town of Calcutta* (4) has been cited to [311] show that if a person has to do a lawful act, and he employs a competent person to do that lawful act, and damage occurs, the original employer is not liable;

(1) 8 Ap. Ca. 443. (2) 1 Q. B. D. 321. (3) 6 Ap. Ca. 740 (790, 829, 831).
(4) 8 B.L.R. 265. (5) 16 C.B. 550.

(see also *Steel* v. *The South-Eastern Railway Company* (1)). Since, however, this case was decided, the law has been somewhat modified. The case of *Dalton* v. *Angus* (2) must now be taken as embodying the law on the subject. In that case, at p. 829, Lord Blackburn says: "Ever since *Quarman* v. *Burnett* (3) it has been considered settled law that one employing another is no liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot relieve himself from liability to those injured by the failure to perform it—*Hole* v. *Sittingbourne Railway Company* (4); *Pickard* v. *Smith* (5); *Tarry* v. *Ashton* (6)." And at p. 831, Lord Watson says: "When an employer contracts for the performance of work, which, properly conducted, can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is, therefore, liable, as well as the contractor, to repair any damage which may be done."

This law is affirmed in *Hughes* v. *Percival* (7). The propositions of law so laid down apply to the present case. The work here to be performed was hazardous, and a duty was cast on the [312] defendant in respect of it by reason of the plaintiffs having a right of support from the ground on which the defendant was operating. I find the 1st and 7th issues accordingly.

It only remains to deal with the question of fact raised in the 2nd, 3rd, and 4th issues. (His Lordship referred to the evidence and continued:—) It is clear that the trench was affecting the stability of the house; while the trench was there, the house was sensibly getting into a more and more unsafe condition; and nothing shows this more conclusively than the fact that it was hurriedly filled up immediately the condition of the house became known, and was not proceeded with until after the house had been pulled down. There is a great conflict of evidence as to the way in which the trench was dug. Practically speaking, I do not think that it makes very much difference whether the trench was dug all at one time and along the whole front of plaintiffs' house, or by lengths or along part of the front only, or whether it was shored at all or not, or whether a bridge of earth was left or not. To lay the drain so deep and so near to the plaintiffs' house was admittedly a hazardous operation, and one that required great care and precautions. The worse the condition of the plaintiffs' house, the more care and the greater precautions were necessary. There is no doubt that sufficient care and precautions were not taken, and the result was that the plaintiffs' house was undermined, its foundations slipped, its floor and walls cracked and became unsafe and ruinous. The evidence of H. A. Kanga as to the condition of the trench when he saw it is very

(1) 16 C. B. 550. (2) 6 Ap. Ca. 740. (3) 6 M. & W. 499.
(4) 6 H. & N. 488. (5) 10 C. B. (N. S.) 473. (6) 1 Q. B. D. 314.
(7) 8 Ap. Ca. 443.

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strong; there is no evidence on the defendant's side at all to be compared with it for certainty or credibility. I must believe him fully as to the facts on which he has given evidence. It is quite clear that there was no shoring used in the trench. No two witnesses for the defendant agree as to the extent of the shoring they allege was there. Moreover, if there had been shoring, it would have been known what was done with it when the trench was so hurriedly filled up. Not much reliance can be placed on witnesses, who, we find, see shoring which never existed, and who do not see a trench 12 feet long by 2 feet deep, which the contractor of the work, Kesow himself, a witness called by the defendant, says that he excavated. If the witnesses would [313] not see this trench, it is hardly surprising that they would not see the much deeper trench that evidently was there.

It is unnecessary to say more or discuss the evidence at any greater detail. I have purposely not gone into the expert evidence, the evidence, that is, of persons who examined the premises after the mischief had been done and the plaintiffs' house demolished, for, as I said before, it is, in my opinion, almost useless. It is no assistance to be told in one breath that a crack might be caused in one way, and in another breath that it might also be caused in two or three other ways. No doubt such injuries as this house had sustained might have been caused in other ways than by the disturbance of the trench, but they could have been caused by it; and on the evidence it is clear that, in point of fact, they were caused by it, and by nothing else.

I find the issues 2, 3 and 4 accordingly. The amount of damages claimed has hardly been disputed, and is proved in the case. I pass a decree for the plaintiffs for Rs. 3,812-7-0 and costs.

Attorneys for the plaintiffs:—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for the defendant:—Messrs. *Crawford, Burder, Buckland and Bayley.*

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17 B. 313.

INSOLVENT JURISDICTION.

Before Mr. Justice Farran.

IN THE MATTER OF HORMARJI ARDESIR HORMARJI, AN INSOLVENT. [13th, 20th, 26th, 27th and 28th July and 4th, 5th and 6th August, 1892.]

Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21), ss. 50 and 51— Conduct of insolvent amounting to offences within those sections—Conduct of insolvent considered with reference to the following charges filed against him by opposing creditors, viz., reckless speculation; contracting debts without reasonable expectation of paying them; misconduct in contracting debts; concealment of property; obtaining forbearance by false representations; contracting debts by false pretences; undue preference.

The insolvent had for many years carried on business in Bombay as a merchant. His firm (Messrs. B. and A. Hormarji) had been established in 1830 by his uncle and father. On the death of the latter in 1882 the insolvent was left the sole surviving partner, and from that time until his failure he carried on the business [314] alone. The failure took place in April, 1891, and on the 1st May 1891 he was adjudicated an insolvent. His liabilities were stated to be Rs. 47,98,591, his good assets Rs. 5,13,903 and his doubtful assets Rs. 60,014. His discharge was opposed by six banks in Bombay with which he had had dealings. The grounds of opposition were as follows:—

(1) Reckless speculation; (2) contracting debts without any reasonable expectation, at the time when the same was contracted, of paying the same; (3) gross