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damages within the meaning of sub-section (*x*). No other ground for inclusion in this section has been urged before us. Therefore we would answer the matter referred by stating the opinion that a suit for land revenue does not fall under section 3 of the Dekkhan Agriculturists' Relief Act, 1879.

Order accordingly.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

1900.
September 18.

MOHANCHAND NEMCHAND GUJAR (ORIGINAL DEFENDANT), APPELLANT, *v.* ISAKBHAI TANAJI (ORIGINAL PLAINTIFF), RESPONDENT.*

Tenants-in-common, rights of against each other—Trespass—Exclusion from common property.

Laying a drain in land and the incidental temporary interference with the soil necessary for that purpose cannot be regarded as an ouster or destruction or an act of waste, and will not entitle a tenant-in-common of the land to maintain an action against another tenant-in-common.

SECOND appeal from the decision of H. F. Aston, District Judge of Poona, confirming the decrees of Ráo Sáheb V. V. Vagh, Subordinate Judge of Talegaon.

Suit for an injunction restraining the defendant from laying a drain pipe in land held in common by the plaintiff, the defendant and others.

The plaintiff Isakbhai and defendant Mohanchand respectively were owners of certain plots of land with houses thereon which abutted on the strip of land in question in this suit. This strip of land belonged to the several owners of the land abutting upon it as tenants-in-common, and was only used by them as a means of access to their respective lands.

The defendant commenced to lay a drain pipe under the land and along one side of it for the purpose of carrying off the drainage from his premises. The plaintiff now sued to restrain him from allowing the waste water from his house to pass through this land either through a drain or otherwise. The plaintiff alleged that the said waste water would be a nuisance to him.

* Second Appeals Nos. 261 and 262 of 1900.

There was also a suit by Mohanchand against Isakbhai praying for an injunction restraining Isakbhai from preventing him from constructing his drain.

The lower Court held that Mohanchand had no right to conduct the waste water of his house over the abovementioned strip of land and granted the injunction prayed for in the first of the above suits and refused it in the second.

On appeal the decrees in both suits were confirmed.

Mohanchand (defendant in the first suit and plaintiff in the second) thereupon preferred two separate second appeals (Nos. 261 and 262 of 1900).

Mahadev V. Bhat for the appellant Mohanchand (defendant in the first suit and plaintiff in the second) :—The lower Courts were wrong in granting the injunction. We have a right to make a drain under the land which is held by us in common with the plaintiff and others. This drain is necessary for our house. It will be underground and will not interfere with the use of surface by the other tenants-in-common. We have a right to use the land as we propose, provided only that we do not interfere with the rights of the other tenants-in-common.

Narayan M. Samarth for the respondent Isakbhai (the plaintiff in the first suit and defendant in the second) :—We say the drain will be a nuisance to us and to all the other tenants-in-common of this land. Moreover, the user which the appellant desires will have the effect of destroying the right of the other tenants-in-common to the subsoil.—*Rajendro Lall* v. *Shama Churn*[1]; *Kanakayya* v. *Narasimhulu*.[2]

JENKINS, C.J.:—The plaintiff and defendant are neighbouring owners, and the relative position of their premises is shown by the plan, which is one of the exhibits in this case. The plaintiff owns those premises which are coloured red, while those that are coloured yellow belong to the defendant, and it will be seen that all these premises abut on a strip of land which is uncoloured on the plan. This strip of land belongs, according to the lower Court's findings, to the several owners of abutting premises

(1) (1879) 5 Cal. 188. (2) (1895) 19 Mad. 38.

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as tenants-in-common, and the only use to which it is put is as a means of access to those abutting premises.

The defendant proposes, and has commenced to lay a drain pipe under the surface of this piece of land and along its north side for the purpose of carrying off the drainage from his premises. To this the plaintiff as the owner of the yellow strip objects, and he has accordingly brought this suit praying for an injunction restraining the defendant "from conducting the waste water of his house through the land which is the way of the plaintiff either by laying out a drain or without a drain." There is a companion cross-suit by the present defendant, in which he seeks to restrain the present plaintiff's interference with his laying of the drain, and the appeal in that is No. 262 of 1900.

As the parties must for the purposes of this appeal be taken to be tenants-in-common, the question for our determination is, whether the acts and proposals of the plaintiff are in excess of his rights as a tenant-in-common. There can be no question that one of two tenants-in-common does exceed his rights if by any act he ousts his co-tenant either actually or constructively from enjoyment of the common property, and as a consequence of this if he destroys it. Thus it is laid down by Lord Hatherly in *Jacobs* v. *Seward*[1]: "The cases in which trover would lie against a tenant-in-common are reducible to this. They are cases in which something has been done which has destroyed the common property, or where there has been a direct and positive exclusion of the co-tenant-in-common from the common property, he seeking to exercise his rights therein and being denied the exercise of such rights."

Starting, then, with this general principle we have to see whether this case falls within it. In our opinion when regard is had to the character of the common property, neither what the defendant has done, nor what he proposes, is an infringement of the rights of his co-tenant giving rise to a cause of action; for the laying the drain and the incidental temporary interference with the soil cannot, as it seems to us, be regarded either as an ouster or destruction or even an act of waste. This view is in accord-

(1) (1872) L. R. 5 E. & Ir. App. 464 at p. 474.

ance with the opinion expressed in *Cubitt* v. *Porter*,(1) and later adopted in *The Standard Bank of British South America* v. *Stokes* (2) by Sir George Jessel, where he says (pages 71 to 73) :

"But supposing I were driven to the conclusion that the plaintiffs and defendant were tenants-in-common, what would their rights be? Now as to that, the very case to which I have been referred enables me to give an answer, and that case is the case of *Cubitt* v. *Porter*.(3) All the three Judges there, and very eminent Judges they were, were agreed that you cannot have an action by a tenant-in-common against another tenant-in-common merely because he pulls down the wall which belongs to them as tenants-in-common, if it is a temporary thing; 'a temporary removal with a view to improve part of the property on one side at least, and perhaps on both.' 'There is no authority to show that one tenant-in-common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy-in-common, the party removing it having at the same time an intention of making a prompt restitution. It was not a destruction. The object of the party was not that there should be no wall there, but that there should be a wall there again as expeditiously as a wall could be made.' I read that from the judgment of Mr. Justice Bayley.(4) Then Mr. Justice Holroyd says this (5) : "Taking it to be the law that where there is a complete destruction by one tenant-in-common of that which he has in common with others, so that that other is wholly deprived of the use of it, an action of trespass will lie, I think the act done by the defendant in this case cannot be considered as a destruction of the wall, the removal of the old wall having been effected merely for the purpose of rebuilding another on its site as speedily as possible.' Then Mr. Justice Littledale says (6) : "If two persons be tenants-in-common of land on which there is a wall, and one refuses to repair and the other pulls down the wall and sells the materials and builds a better wall, it may be said that there has been a total destruction of the original wall, more especially if he sold the materials. Still, if he did that for the purpose of getting other materials to make the new wall better than the old one was, and he builds the new one, though there was a destruction of that which was originally the subject-matter of the tenancy-in-common, an action of trespass will not be maintainable;' and then he says if it is partial damage you must have an action on the case.

"The result, therefore, is this: that what the defendant is doing, namely, the removing of the foundation of the old wall, be it for the purpose of putting in as good a foundation or better one,—for he is doing it, as it is stated, by beautiful concrete—it is not a destruction by a tenant-in-common. All that has been done has been done in this case with the *bonâ fide* intention of sup-

(1) (1828) 8 B. & C. 257.
(2) (1878) 9 Ch. D. 68.
(3) (1828) 8 B. & C. 257.
(1828) 8 B. & C. at p. 265.
(5) (1828) Ibid at p. 267.
(6) (1828) Ibid at p. 270.

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porting the wall, and will not entitle the other tenant-in-common to maintain an action, of course still less an injunction. I am not now speaking of a case of danger, which is not, as I understand, the case here. That being so, it appears to me that at common law there would have been no right of action as far as the wall is concerned."

Therefore this appeal, No. 261 of 1900, must be allowed and the decree of the lower Court reversed. The result is that this suit will be dismissed with costs throughout. As the defendant has offered to abide by any terms that may be imposed with a view to insuring that the drain shall not be a nuisance, the following undertaking by him will be embodied in the decree:—There must be an undertaking on the part of Mohanchand to construct and use the drain so as not to create a nuisance, and there will be a reference to the lower Court to determine the character, material, level and slope of the drain, and its course and outlet, and generally so as to secure the above object. Liberty to apply to this Court if necessary.

Appeal No. 262 follows the result of the former: the decrees of the lower Court will be reversed and the injunction awarded. The respondent must pay the costs throughout.

Decrees reversed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

1900. *September* 18.

TUKARAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* ANANTBHAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sec. 257A—Decree—Mortgage—Amount of decree included in the mortgage—Agreement to give time—Satisfaction.

The agreement to which the first paragraph of section 257A of the Civil Procedure Code (Act XIV of 1882) relates is one which suspends and does not destroy the rights of execution consequent on a decree.

Where a mortgage-bond was given for an amount which included a sum due under a decree, and made the whole amount payable in instalments, it was con-

* Second Appeal, No. 306 of 1900.