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gages are legislatively recognised, and I have only to observe that in no true mortgage of this class will any debt be apparent. It is idle, therefore, to criticise mortgages by conditional sale by reference to the essential conditions of a mortgage in the English sense of that word. It only needs to peruse the judgments of the Courts relating to these mortgages to observe how necessary it is to bear this in mind when the question is whether upon an interpretation of documents alone the result is a mortgage by conditional sale or an out and out sale.

Appeal allowed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar and Mr. Justice Beaman.

1914.
March 27.

IN THE MATTER OF THE ARBITRATION BETWEEN THE BOMBAY GAS COMPANY, LIMITED AND THE BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY, LIMITED.

M. R. JARDINE AND STUART MENTETH, PETITIONERS.

Indian Electricity Act (IX of 1910), sections 14 and 19—Responsibility of licensee to make full compensation for any damage, detriment or inconvenience caused by him or by anyone employed by him—Damage, whether caused in the exercise of the powers granted to the licensee.

A gas company laid a 3-inch main in a street in Bombay. Subsequently an electric supply company caused cables contained in troughing to be laid over this main in such a manner that the main for the distance of some 36 feet was rendered inaccessible for the purpose of removing the same except by slinging the electric company's cables, by reason of the position of the cables. It was found that the work of laying the cables had not been executed, nor must it be deemed to have been executed, to the reasonable satisfaction of the gas company.

Subsequently the gas company desired to replace their 3-inch main with a 4-inch main and for this purpose opened up the street in question, when they discovered the position of the cables. On account of the position of these cables the gas company were compelled to make a diversion in the route taken

by their 4-inch main and claimed that the electric supply company should pay the cost thereof; the latter company refused to do so.

Held, that the damages, if any, suffered by the gas company were damages recoverable under section 19 of the Indian Electricity Act of 1910 as the damage alleged lay in the gas company being deprived of access to its own property (the main) which was inflicted once and for all when the electric supply company laid their cables over the main, and that it was a question of fact whether such damage had been committed.

Held further, that the gas company were not compelled to proceed under section 14 of the Act and did not lose their remedies against the electric supply company by reason of their not having availed themselves of the provisions of that section.

Quære, whether a licensee causing only as little damage, detriment and inconvenience as may be is liable for damages under section 19 of the Indian Electricity Act (IX of 1910)?

DISPUTES having arisen between the Bombay Gas Company and the Bombay Electric Supply and Tramways Company the same were referred to the arbitration of two arbitrators appointed under section 52 of the Electricity Act of 1910, namely, the petitioners. After hearing certain evidence the arbitrators submitted to the High Court a special case, stating certain questions of law involved in the reference on which they craved the opinion of the High Court pursuant to the provisions of section 10, clause (*b*), of the Indian Arbitration Act of 1899.

The facts of the case were as follows :—For many years previous to the year 1907 a 3-inch gas main of the Bombay Gas Company ran along Bapu Khote Street on the south side, the level of the top of the main for the distance material in this arbitration being from 2 feet 2½ inches to 2 feet 5 inches below the level of the surface of the road.

Previous to October 1907 the Bombay Electric Supply and Tramways Company had been carrying on through contractors the work of laying electric traction cables in the said street up to within two feet of the said main.

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On the 28th of October 1907 the Bombay Gas Company received written notice that the contractors were about to proceed with the work of laying cables in Bapu Khote Street, such notice being held to have been sufficient notice under section 15 (1) of the Indian Electricity Act of 1903. Thereafter on the 30th of October 1907 and on the following days the contractors carried out the work of laying the abovementioned cables from the point already reached by them and laid their cables in earthenware troughing diagonally over and across the Bombay Gas Company's 3 inch main so as to totally cover the same for the distance of 12 feet and to partially cover the same for the distance of 6 feet 5 inches at the south end and of 4 feet 5 inches at the north end thereof. For the 12 feet where the troughing totally covered the main the level of the bottom of the troughing was 3 to $3\frac{3}{4}$ inches above the level of the top of the gas main; for the 6 feet 5 inches partly covered at the south end the difference between the levels was $1\frac{1}{2}$ to 3 inches; and for the 4 feet 5 inches at the north end the difference was from $3\frac{3}{4}$ to $7\frac{1}{4}$ inches. The work on this site was finished in a week.

No responsible representative of the Bombay Gas Company attended the work as it was going on and it was found by the arbitrators that the work of laying the electric cables at this spot was not executed to the reasonable satisfaction of the Bombay Gas Company nor must it be deemed to have been so executed. It was also found that the 3-inch main for the distance of at least 36 feet was rendered inaccessible for the purpose of removing the same, except by slinging the electric cables, by reason of the position of the latter.

Early in 1913 the Bombay Gas Company being desirous of replacing their 3-inch main with a 4-inch main opened the Bapu Khote Street and found the cables of the Bombay Electric Supply and Tramways Company

in the position above described. Owing to the position of these cables the Bombay Gas Company were compelled to abandon the 3-inch main so far as the same was affected by the cables and laid their 4-inch main to the east of the line of the old main.

The Bombay Gas Company claimed from the Bombay Electric Supply and Tramways Company the cost of the diversion of the gas main but the latter company refused to pay the same. The Bombay Gas Company thereon applied to Government.

The questions of law stated by the petitioners were the following :—

1. Whether upon a true construction of Act IX of 1910 the damage claimed to have been suffered by the Gas Company is the subject of compensation under section 19 of the said Act?

2. Whether by reason of the Gas Company not having availed themselves of the provisions of section 14 of the said Act they are entitled to any remedy in respect of the position of the cables?

Strangman, for the Bombay Electric Supply and Tramways Company :—There was no dispute till 1913 when the Gas Company wanted to replace the 3-inch pipe with a 4-inch pipe.

The Gas Company's remedy was to follow the procedure, which was quite feasible, laid down in section 14 of the Act of 1910.

There is damage, etc., caused by reason of the exercise of the powers but not "in the exercise". It is admitted that no damage or inconvenience arose till the Gas Company wanted to lay a new pipe.

The damage must be occasioned at the time: see *Swansea Corporation* v. *Harpur*[1].

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Under section 18 of the Act of 1903 we are not liable for detriment, etc., but only for damage. Damage means damage over and above as little damage as possible.

If we cut a trench and cause as little inconvenience as reasonably may be we are not liable, but if our conduct is unreasonable we are liable.

The claim is for Rs. 45-12-6; where are the substantial damages required by section 19?

Binning, for the Bombay Gas Company:—Damage must include detriment and inconvenience.

There is no qualification of the word "any" before damage.

The damage occurred when the pipe was laid down and not when we discovered it. In *Swansea Corporation* v. *Harpur*[1] the work had been done properly; in this case there was default, as the work had not been done to the satisfaction of the Gas Company.

There is no resemblance between this case and the cases contemplated by section 14 which is only a permissive section.

Having damaged our property they want us to pay to make it good.

Nicholson, for the Arbitrators.

Strangman replies:—It is incorrect to say that we have been found to have been in default; we did all that we were bound to do.

It is impossible to suppose that section 19 contemplated any damage, though literal reading of section renders the company liable for any damage they may commit.

The Gas Company were really doing new work.

C. A. V.

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The judgment of the Court was delivered by—

DAVAR, J. :—In the special case submitted to us by the Arbitrators there are two questions for our consideration. In our opinion the first question referred must be answered in the affirmative. Large powers are conferred upon licensees under the Act, but these are accompanied by certain obligations. Thus, under section 19 of the Act of 1910, the licensee is under the obligation of causing as little damage, detriment or inconvenience as may be in exercise of the powers conferred upon him "and shall make full compensation for *any* damage, detriment or inconvenience caused by him or by anyone employed by him". The question is thus worded :—"Whether upon a true construction of Act IX of 1910 the damage claimed to have been suffered by the Gas Company is the subject of compensation under section 19 of the said Act?" Clearly it is. For the damage claimed to have been suffered lies in the Gas Company having been deprived of access to its own property by acts done by the Supply Company in the exercise of its power. The Supply Company's contention is that such damage could not be the subject of compensation under section 19 because it was not caused in the "exercise of the power" but was a mere consequence of what was otherwise in all respects rightly done by the Supply Company in the exercise of that power. This, in our opinion, is wrong. Whether there was in fact damage or not, what is alleged as damage was clearly caused once and for all in the exercise of the power conferred upon it by the Supply Company when by laying its wires over the Gas Company's pipe it cut the latter off from reasonable access to its own property. The case of *Swansea Corporation* v. *Harpur*[1], cited in support of this contention, is so different, both in its facts and the principle upon which

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it is decided, that we think it unnecessary to discuss it. It is further contended on behalf of the Supply Company that if in the exercise of the powers conferred upon it, it has caused as little damage, detriment or inconvenience as may be, it cannot be liable in damages under section 19. Whether it has, in fact, caused as little damage as may be, is not a question of law but of fact, and must be answered by the Arbitrators. But assuming that that is the true construction of the sentence, notwithstanding the words immediately following "make full compensation for *any* damage" it would still be a question of fact whether and to what extent that minimum damage had been exceeded, and, if exceeded even by one rupee, the licensee would be bound to pay that rupee. The point of the Gas Company's complaint is that more than this minimum of damage, detriment or inconvenience *was* caused by the Supply Company, and that is a question yet to be answered by the Arbitrators.

In our opinion the second question must be answered in the affirmative. What the question really invites us to do, although it might perhaps have been more happily worded and the Honourable the Advocate-General admits this, is to decide whether in this matter the Gas Company was bound to proceed under section 14 or in other words, whether that section applies; for, if it does, there is an end of the Gas Company's case. There could be no claim for damages by the operator against the owner under that section, of the nature of the damages now claimed by the Gas Company. All acts done under that section are done by the operator or by the owner at his request and expense. It is, therefore, perfectly clear that the operator could not claim damages for acts of his own or done on his behalf and at his expense by the owner. Here the claim is quite differently grounded. What in effect the Gas Company complains of is that it was cut off from access to its

own property by acts done in the exercise of its power by the Supply Company, and that those acts were not so done as to cause the least damage, detriment or inconvenience to the Gas Company that might be.

Costs of the reference to be dealt with by the Arbitrators.

Attorneys for the Arbitrators :—*Messrs. Little & Co.*

Attorneys for the Gas Company :—*Messrs. Crawford, Brown & Co.*

Attorneys for the Bombay Electric Supply and Tramways Company :—*Messrs. Craigie, Blunt & Caroe.*

H. S. C.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.

MADHAVRAO MORESHVAR PANT AMATYA (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMA KALU GHADI (ORIGINAL DEFENDANT), RESPONDENT.*

1914. *August* 26.

Provincial Small Cause Courts Act (IX of 1887), Schedule II, Article 13—Revenue Jurisdiction Act (Act X of 1876), section 5, clause (c)[1]*—Civil Procedure Code (Act V of 1908), Order VIII, Rule 6—Suit by an Inamdar against a Khatedar for recovery of sums—Dues—Suit not cognizable by a Small Cause Court—Set-off claimed in a capacity different from that in suit, not allowable.*

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* Second Appeal No. 798 of 1913.

[1] Section 5, clause (*c*) of the Revenue Jurisdiction Act (Act X of 1876) is as follows :—

5. Nothing in section 4 shall be held to prevent Civil Courts from entertaining the following suits :—

(*a*) * * * * *

(*b*) * * * * *

(*c*) Suits between superior holders or occupants and inferior holders or tenants regarding the dues claimed or recovered from the latter