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Present: Bertram C.J. and Garvin J.

APPUHAMY *et al v.* SINGHO *et al.*

326—D. C. Chilaw, 6,582.

Riparian owners—Right to dam up stream—Damage to owner of land higher up.

A proprietor of a land adjoining a stream or water-course is not justified in doing anything to dam up the stream in such a way as to cause an accumulation of water injurious to the land of a proprietor higher up the stream.

IN this case the plaintiffs-appellants, as owners and cultivators of the field described as lot No. 3,347 in plan No. 184,989, alleged that the defendants-respondents wrongfully obstructed the flow of surplus water running along a water-course through the appellants' land and caused it to be inundated, whereby the paddy crop was destroyed, and claimed a sum of Rs. 207.50 as damages, in the Court of Requests.

The respondents pleaded that the said field was a portion of a tank, and that they had no right to cultivate it or let out the surplus water, and claimed a sum of Rs. 1,000 alleged to have been sustained by them by reason of the appellants allowing the water to escape from the appellants' field.

On an application to the Supreme Court the case was transferred to the District Court for trial.

The following eleven issues were framed at the trial:—

1. Was lot No. 3,347 part of the tank in 1877 ?
2. Have the plaintiffs' predecessors acquired title to lot No. 3,347 by Crown grant No. 4,535 dated June 9, 1877 ?
3. Have the plaintiffs or their predecessors acquired title to the said lot by prescription ?
4. Whether the tank as shown in the plan was necessary for cultivation of defendants' land ?
5. Had the plaintiffs the right to cultivate lot 3,347 in July, 1919 ?
6. Were the plaintiffs entitled to keep the bund open in September, 1919 ?
7. Did such opening of the bund empty the tank ?
8. Were the defendants entitled to conserve water in the said tank for the cultivation of these fields by maintaining the bund for both or either of the cultivations maha and yala ?
9. Was plaintiffs' cultivation destroyed as a result of the alleged obstruction by the defendants ?
10. If so, are plaintiffs entitled to claim damages; and, if so, how much ?
11. Did plaintiffs cut the bund in October, 1918; and, if so, what damage have defendants sustained ?

The District Judge delivered the following judgment:—

In this case, though a large volume of evidence has been recorded, the chief question to be decided is simple. The first and second plaintiffs are the owners of a piece of land bearing lot No. 3,847. It is a low-lying land lying on the north of a tank (*vide* plan P 5). The defendants are the owners of the land on the south of the tank. There is a bund between the tank and the defendants' land. The difficulty arises in the cultivation of the two lands. The defendants' land is of a higher level than the plaintiffs' land. There is a water-course by the side of the plaintiffs' land which feeds the tank in question.

The plaintiffs cannot cultivate the land during the wet season, unless the bund is kept open and the water allowed to flow away. The defendants, on the other hand, say that the plaintiffs' land form part of the tank which was meant for the cultivation of the lands belonging to defendant and others. Therefore, the defendants say, they are entitled to keep the bund closed or open according to the requirements. There is not a scrap of documentary evidence in support of the defendants' contention. On the other hand, there is ample evidence to show that that the plaintiffs' land and the tank in question were originally the property of the Crown. There is also reason to think that the defendants' land also belonged to Crown, and was asweddumized long after the Crown sold away the plaintiffs' land. There can be no doubt whatever that in 1877 the plaintiffs' land did not form part of the tank. The Crown grant (P 1) in favour of Don Alexander Weerasinghe has annexed to it a plan.

The survey appears to have been made in 1875. This plan clearly shows the plaintiffs' land as distinct and separate from the tank. I therefore hold that the Crown had every right to sell that land. The defendants' land which bears lot No. B 822 appears to have been surveyed only in October, 1892 (*vide* P 2), and title plan for this lot was not issued till January, 1904.

Therefore, it seems to me that the tank in question was in existence long before the defendants' land was asweddumized, and it cannot be said that this tank came into existence for the purpose of cultivating defendants' land.

Whatever it is, it is clear that both plaintiffs' and defendants' lands have been under cultivation for a fairly long time. Perhaps the good sense of the owners prevailed, and both lands were cultivated till trouble appears to have arisen about ten or twelve years ago. From that time there has been frequent trouble over the bund: one party trying to keep it open and the other blocking up each for his own purpose. Now, from the evidence it appears to me that it is necessary for the defendants to get water from this tank also for their cultivation.

Realizing the difficulties of the parties, the Mudaliyar of the pattu made an arrangement sometime ago by which the plaintiffs' field was cultivated for yala or the dry season, and the defendants' fields for the maha or the wet season. Of course, it is clear that the plaintiffs could not cultivate during the wet season if the bund is closed, nor would it be possible for defendants to cultivate them if the bund is kept open and all the water allowed to run out. The defendants cannot also cultivate their land during the dry season, the arrangement made by the Mudaliyar appears to me to be the only solution of the difficulty under the circumstances. Neither the plaintiffs nor the defendants can get all they ask for. The only order that I can make under the circumstances is that the plaintiffs will have control of the bund during the yala season and the defendants during the maha season.

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Of course, even this will give room for clashing of interests, but it will be impossible for the Court to fix any definite time for the commencing or closing of any harvest. This will depend on the existing conditions at the time, and it must be left to the good sense of the parties to see that the two cultivations do not clash, or the revenue authorities should frame rules for the control of the cultivations.

Now there is the respective claims for damages. The plaintiffs say that their crop was damaged by the defendants obstructing the flow of water. This obstruction is said to have taken place in October, 1918. According to the Mudaliyar's arrangement, it was the maha season, and the defendants were entitled to the cultivation for that season. If the plaintiffs also cultivated they disturbed the arrangement, and if they sustained any loss they have themselves to blame. Further, there were very heavy rains, and the submersion of plaintiffs' fields was partly due to that.

Now the defendants say that the bund was cut at the instance of the plaintiffs, and thereby they sustained damage of Rs. 1,000. The defendants did not claim the damages until the plaintiffs filed the action in the Court of Requests.

From the evidence it would appear that there were unusually very heavy rains during that time, and the breach was made by the force of the water itself. I do not think that either party is entitled to any damages.

Enter decree giving the right to the plaintiffs to have the bund closed or open as they may require during the yala harvest, and the defendants to have the bund closed or open as they may require during the maha harvest. Costs will be divided.

Samarawickreme (with him *Croos-Da Brera*), for the plaintiffs, appellants.

Bawa, K.C. (with him *H. V. Perera*), for the defendants, respondents.

February 20, 1923. BERTRAM C.J.—

This is an action by certain proprietors, through whose lands a certain water-course runs, claiming damages against certain proprietors lower down the water-course for interference with the natural flow of the water-course in such a manner as to cause damage to the plaintiffs. It appears that when things take their natural course, the water-course in question flows through the lands of the plaintiffs and can be used for the irrigation of these lands. The water-course runs alongside a tank, and apparently the lands of the defendant cannot effectively be irrigated from the tank, unless the water-course is obstructed and the water turned into the tank in such a way as to raise the level of the tank. The raising of the level of the tank results in the flooding of the plaintiffs' fields, and it is in respect of the damage caused that the action is brought.

The learned District Judge does not seem to have made any attempt to determine the legal issues in the case. He has acted as a sort of arbitrator, and has given a decree based upon what

he considers to be a reasonable and equitable arrangement between the two sets of proprietors. Unfortunately this is not the function of the District Judge. The District Court is not a Court of arbitration, but is a Court of law. What the District Court and what this Court has to determine is the legal rights of the parities.

This is not the common case of the obstruction of a water-course by upper proprietors to the damage of the lower proprietors. It is a case in which the upper proprietors claim damage in respect of an extraordinary proceeding on the part of the lower proprietors, causing an accumulation of water and the flooding the lands of the upper proprietors. It appears that in the Indian Courts there was a somewhat similar case, and the general principles of the civil law regulating the matter cannot be better stated than they are stated in that case. The case in question in *Sheik Monoour Hossein v. Kanhya Lal.*[1] The principles laid down are as follows: "The riparian proprietor may deal with the stream as freely as with any other portion of his land, provided only that he must not, by so doing, sensibly disturb the natural conditions of the stream as it exists within the limits of other proprietors, whether above or below, or on the opposite side"; and it is stated that the plaintiff in that case might justify any interference what he thought it necessary to carry through, so as to remove the obstruction on the ground that "the plaintiffs' bund at the time of the defendants' trespass was either actually producing, or was on the point of producing, as a necessary result, such a disturbance of the natural conditions of the stream abreast of the defendants' land as entitled them, either forcibly to abate the nuisance, or to bring a suit to compel its removal." That is to say, a proprietor is not justified in doing anything to dam up the course of a stream in such a way as to cause an accumulation of water injurious to the land of a proprietor higher up the stream. These are the legal principles, and these are the only principles, we are competent to determine.

There are often matters arising between proprietors with regard to irrigation that cannot be settled by law, but ought to be determined by some reasonable arrangement, if possible, under the Irrigation Ordinance. It is not for us to say whether the provisions of that Ordinance could be made use of in the present instance. I would only point out that under section 12 of the Irrigation Ordinance, No. 45 of 1917, the powers of proprietors of even to a very limited area are very comprehensive for the purpose of making rules which may decide such a question as this. I do not affect to determine whether the tank in this case, together with the water-course which flows alongside of it, can be considered as an irrigation work under that Ordinance. It is eminently, however, a matter in which the rights of the parties ought to be settled by some friendly

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adjustment. It appears that the lower proprietors cannot irrigate their fields unless the tank is raised to a particular level, and the tank cannot be raised to that particular level without damaging the crops of the upper proprietors. A rotation has been suggested under which the plaintiffs could cultivate for the yala harvest, and the defendants could cultivate for the maha harvest. It seems to be eminently a case in which some equitable settlement should be made. We ourselves, however, can only determine legal rights, and, on the legal principles governing those rights, the plaintiffs are entitled to the allowance of this appeal, with costs, here and below.

GARVIN J.—I agree.

Set aside.