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the 4th September, in respect of liability to contribute for the services rendered. I think the total salvage on whatever freight, if any, is recovered should be calculated at one-eighth of such freight; and that one-fourth of such salvage, or, in other words, one thirty-second part of the freight, if any, recovered, should be paid to the present claimants as their share, to be divided amongst themselves in accordance with the above apportionment. The owners' claim I have nothing to do with in this suit, and, moreover, it has been already settled. Costs to be paid by defendants.

Solicitors for the plaintiffs.—Messrs. *Prescot and Winter.*

Solicitors for the defendants.—Messrs. *Craigie, Lynch and Owen.*

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

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THE FIRST ASSISTANT COLLECTOR OF NASIK AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHAMJI DASRATH PATIL AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Water of a river—Diversion—User—Relative rights of riparian proprietors and occupiers—Rights of the Government—Khalsa or rayatvadi land.

A dam had been in existence across a river for upwards of 280 years, and during all that time the villages of D. and P. had received an equal supply of water from separate sluices in the dam. The Government authorities, being of opinion that D. required less water than P., reduced the size of the D. sluice, and consequently the amount of water flowing to the D. village. The village of D. was *khalsa* or *rayatvadi, i.e.*, was held immediately of Government. The inhabitants of D. appealed against the action of Government.

Held that the Government had no such right of interference, neither (1) as riparian proprietors (supposing them to be such) since the right to the enjoyment of the water of a river belongs to the occupant of the river-bank, whatever the nature of his tenancy; nor (2) by any other imaginable rights existing in the Government as such, since if any such rights ever existed, the long user for upwards of 280 years of the water from the dam by the village of D. would be amply sufficient to justify a presumption of an original *animus dedicandi* in the Government.

THIS was an appeal from the decision of Rav Bahadur G. R. Deshmukh, Joint Judge of Nasik, in Original Suit No. 3 of 1875.

This suit was instituted by the villagers of Dabhade for the removal of an obstruction to their water-course. The plaint

* Second Appeal, No. 47 of 1877.

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alleged that an ancient dam had existed on the river Girna ; that the dam had two openings or sluices each 5 feet wide, through which respectively the two neighbouring villages Dabhade and Patna had always received their water-supply ; that in 1869 the Assistant Collector (defendant No. 1) reduced the size of the plaintiff's sluice from 5 feet to $3\frac{1}{2}$ feet, and thus diminished the quantity of water coming to them from the river ; that the order of the Assistant Collector was upheld by the Collector and the Revenue Commissioner (defendants No. 2 and 3) on appeal.

The defendants answered (*inter alia*) that Dabhade was a *rayatvadi* village ; that Government were the proprietors of the soil and had a right to the water of the river as riparian proprietors ; that it was competent to the Assistant Collector to regulate the distribution of the water to the villagers as he deemed proper ; that the area of cultivated land was much larger in Patna than in Dabhade ; that it was, therefore, necessary for the authorities to give a proportionately larger supply of water to the former than to the latter.

The Joint Judge held on the evidence that the plaintiffs were entitled to the enjoyment of the same water-supply that they had enjoyed before the obstruction caused by defendant No. 1, and that Government was not justified in diminishing the water-supply of Dabhade and increasing that of Patna, on the ground that there was more cultivated land in the latter. He accordingly made a decree in favour of the plaintiffs.

The defendants appealed to the High Court.

The Hon. *J. Marriot*, Advocate General (with him *Nanabhai Haridas*, Government Pleader) appeared for the appellants, and contended that as Government was the owner of the soil, it had a right to the water of the river, and was competent to stop the supply whenever it pleased. The learned counsel quoted *Ponnusawmi Tevar* v. *The Collector of Madura* (1) and *Kristna Ayyan* v. *Venkata Chella Mudali*(2).

Macpherson (with him *M. C. Apte*) for the respondents was not called upon.

(1) 5 Mad. H. C. Rep., 6. (2) 7 Mad. H. C. Rep., 60.

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WESTROPP, C. J.—This was an action brought by the villagers of Dabhade in the Malegàon Taluka of the Nasik District against certain revenue authorities to remove an obstruction to a water-course placed by the First Assistant Collector in charge of the taluka and confirmed by his superiors. It is sufficient for the purposes of this appeal to note that a dam had been in existence for a great number of years across the river Girna by means of which the lands of the neighbouring villages of Dabhade and Patna were irrigated through separate channels. Constant disputes had taken place from time to time between these two villages as to the quantity of water to which each was entitled, and eventually the Assistant Collector took up the matter with the view to putting an end to the quarrels, and finding that there was more cultivated land in Patna than in Dabhade, he determined to reduce, and did reduce, the opening of the Dabhade sluice, thereby diminishing the supply of water to that village.

The sole question for our consideration is whether this act was justifiable. The village of Dabhade is admittedly "*khalsa*" *i. e.*, it is held immediately of Government, the State being the manager, and it has been throughout broadly contended on behalf of the revenue authorities, the appellants, that that being so, the Government are proprietors of the soil and have therefore a right, as riparian proprietors, to the water of the river, and can stop the supply at pleasure. But the position taken up by Government appears to us to be wholly indefensible. There is nothing apparently to show how the dam came to be constructed, or the date of its construction but it has been found by the Court below, and the correctness of that finding has not been disputed here, that the village of Dabhade has enjoyed the right of receiving from this dam an equal supply of water with Patna for upwards of 280 years. Assuming, then, for the sake of argument, that the Government of this country has primarily something more than a mere usufructuary interest in the water of rivers and natural streams in which no rights have been acquired, that is to say, that it has the right to regulate in the interests of the public the enjoyment and benefit of the water, and assuming further that the said dam was constructed by the Government of the time in order to turn the water of the river into the lands of

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these two villages for purposes of irrigation, it seems to us that the user found proved is amply sufficient to justify a presumption of an original *animus dedicandi:* see *Reg.* v. *East Mark* (1) and the cases collected in 1 Taylor on Evidence, para. 114, 4th edition. It is difficult to understand on what principle of law the circumstances of the village being *khalsa*, or, as the appellants style it, "*rayatvadi*", could justify the action of the Government in this matter; for, taking it as they allege, that they are riparian proprietors, they can have, quâ such proprietors, no property in the water, and the usufructuary interest being incident to the possession of the adjacent soil, it seems to follow that whatever may be the nature of the tenancy, the occupants of the land abutting on the stream, and not the Government, are entitled to the enjoyment and benefit of the water as it flows past. No doubt, all the occupants of land on the banks being equally entitled, each occupant or set of occupants is bound to use his right so as not materially to interfere with an equally beneficial enjoyment of it by the other occupants; but although an action will lie where the user by any of the occupants of the common right is unreasonable, we know of no authority for the doctrine that the Government have, at any time during the occupancy, the power arbitrarily to curtail or interfere with the right of each occupant to the enjoyment of the water as it existed at the commencement of his occupancy—a right which must have constituted a most important consideration in fixing the amount of land assessment which each occupant agreed to pay. Two cases have been cited by the learned Advocate General: *Ponnusawmi Tevar* v. *The Collector of Madura* (2) and *Kristna Ayyan* v. *Venkata Chella Mudali* (3), but neither of these has any application to the present case, the circumstances of which are entirely different, and there is nothing in either that we can see to support the position claimed by the revenue authorities.

For these reasons we confirm the decree of the Joint Judge with costs.

Decree confirmed.

(1) 11 Q. B., 877. (2) 5 Mad. H. C. Rep., 6.
(3) 7 Mad. H. C. Rep., 60.