PRIVY COUNCIL.

P. C.*
1902.
Nov. 20, 21.
1903.
February 10.

THE GAEKWAR SARKAR OF BARODA AND ANOTHER (DEFENDANTS) *v.* GANDHI KACHRABHAI KASTURCHAND (PLAINTIFF).

Railway Company—Negligence in construction of railway—Suit for damage to land by causing water to flood it—Indian Railways Act (IX of 1890), sections 7-12—Acting in excess of statutory powers in construction of railway—Suit for damages.

The defendants, by the negligent construction of a railway made in exercise of their powers under the Indian Railways Act (IX of 1890), caused the plaintiff's land to be flooded in the rainy season and consequently damaged. That Act provides that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the Land Acquisition Act, 1870.

Held, it being shown that the defendants had exceeded or abused their statutory powers, that the plaintiff's remedy was by suit for damages, and not for compensation under the Act.

Statutory powers under such an Act are to be exercised with ordinary care and skill and with some regard to the property and rights of others: they are granted on the condition, sometimes expressed and sometimes understood—expressed in the Railways Act of 1890, but if not expressed always understood—that the undertakers "shall do as little damage as possible in the exercise of their statutory powers."

Lawrence v. *Great Northern Railway Company*,(1) *Broadbent* v. *Imperial Gas Company*,(2) *Bagnall* v. *London and North-Western Railway Company*,(3) *Ricket* v. *Metropolitan Railway Company*,(4) and *Geddis* v. *Proprietors of the Bann Reservoir* (5) referred to.

APPEAL from a decree (12th February, 1900) of the High Court at Bombay, which affirmed with modifications a decree (17th April, 1899) of the Subordinate Judge of Ahmedabad in favour of the respondent in a suit in which he was plaintiff.

The suit was brought for damages for injury alleged to have been caused in 1894, 1895 and 1896 to the plaintiff's fields by the negligence of the defendants in the construction and working of

* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR ARTHUR WILSON, and SIR JOHN BONSER.

(1) (1851) 16 Q. B. 643.
(2) (1857) 7 DeG. M. & G. 436.
(3) (1861) 7 H. & N. 423: (1862) I. H & C. 544.
(4) (1867) L. R. 2 E. & I. App. 175 (202).
(5) (1878) 3 A. C. 430 (455).

the Viramgam-Mehsana Railway, which was owned by the first defendant, the Gaekwar of Baroda, and had since it was opened been under the control and management of the second defendant, the Bombay Baroda and Central India Railway.

The plaint, filed on 17th June, 1897, alleged that the plaintiff was owner and occupier of certain fields near and in the village of Kokta under Viramgam; that the Gaekwar of Baroda in or about 1891 caused to be constructed and opened for traffic a Railway line between Viramgam and Mehsana, a portion of which line was on an embankment and lying within the village of Kokta; that the second defendant had worked and managed the said Railway line under an agreement of 17th June, 1893, made between the Government of the Gaekwar and the second defendant; that in the course of constructing the Railway the defendants made on each side of the embankment between Dabhla, some four miles north of Kokta, and Kokta, excavations or burrow pits, from which to supply the earth necessary to make the embankment for the line; that the burrow pits when first made had divisions of earth between them, but from the neglect or other acts or omissions of the defendants, such divisions were removed or destroyed or washed away, so that such burrow pits formed continuous water-courses or gutters on each side of the embankment, extending at least from Dabhla to Kokta, down which in the rainy season the water flowed; that prior to the construction of the said Railway, during the rainy season, the surface water from the villages of the first defendant, the Gaekwar of Baroda, in the Kádi Pargana, lying to the north of Kokta, passed westward from Kariana to Chanothia and thence away to the west and never reached Kokta, but after the construction of the Railway embankment which ran between Chanothia and Kariana, and in consequence of the insufficiency of the culverts and waterways provided by the defendants, and in consequence of their negligence in permitting the formation of the said gutters, the flow of such surface water had been altered and it now was discharged and overflowed on to the plaintiff's fields at and near Kokta; that in consequence of the flooding of his land the plaintiff had been compelled to relinquish some of his fields, had had to sell others at small prices,

1902.

GAEKWAR SARKAR OF BARODA v. GANDHI KACHRABHAI.

and the remainder had for the most part become incapable of cultivation and the crops raised in them had suffered material damage.

The plaintiff therefore claimed as damages Rs. 29,050, and prayed also for an injunction and decree directing the defendants to make arrangements by which the rain-water in the monsoon should pass by Kariana to the west as it formerly did and should not cause injury to the plaintiff's fields.

The defendants, in their written statements, denied the plaintiff's allegations as to the damage and put him to proof of them. They also pleaded that if the plaintiff has suffered any damage he should have proceeded in accordance with the provisions of the Indian Railways Act (IX of 1890) and not otherwise, and that the suit was not maintainable; that under the provisions of section 10 of the said Act the plaintiff was debarred from bringing his suit; that if the plaintiff had suffered any damage, such damage could have been foreseen, and should have been assessed under the provisions of section 10 of the said Act, and the Land Acquisition Act (X of 1870); that any damage was caused by the heavy rainfall, and that such rainfall being due to the act of God, the defendants were not liable; that the suit was barred by the Indian Easements Act (V of 1882); and that the line of Railway having been constructed with all such accommodation works as in the opinion of the Governor-General in Council were necessary and sufficient under the provisions of the Indian Railways Act (IX of 1890), section 11, the Court had no jurisdiction to grant an injunction or pass a decree as claimed by the plaintiff.

The issues raised these defences.

The Subordinate Judge of Ahmedabad found that the damage had been caused to the plaintiff's fields by the negligent and careless construction and management of the Viramgam-Mehsana Railway, and by the burrow pits that had been made to supply earth for the embankment having been permitted to become channels through which the water flowed southwards; and held that the plaintiff was not debarred by any provisions of the said Acts from maintaining his suit. He gave the plaintiff a decree for Rs. 17,507-6-8 and ordered that the defendants

should within six months raise a construction on their line to the north of Kokta, and make the necessary arrangements to prevent the water going to the gutters, side-cuttings and trenches of the Railway, and flooding the plaintiff's land.

From that decision the defendants appealed, and the High Court (*Parsons* and *Ranade*, JJ.) varied the decree of the Subordinate Judge only as to the amount of damages, giving a decree for Rs. 12,132. In other respects they confirmed the decree of the lower Court.

As to the question that the suit was not maintainable, the High Court said:

PARSONS, J.:—The next objections taken, on behalf of the defendants, are based on sections 10 and 11 of the Railways Act. It was argued that compensation should have been asked for under section 10, and that the present suit will not lie. The answer to the argument depends on the answer to be given to another question, namely, in doing what they have done in the present case have the defendants been exercising the powers conferred on them by either section 7, section 8 or section 9 of the Act? Sections 8 and 9 have no application and can be disregarded. Section 7, clause (*a*), gives the power to make embankments, culverts, &c. No compensation, however, has been awarded in respect of the exercise of these powers. Clause (*b*) gives power to divert and alter the course of rivers, brooks, streams or water-courses, or raise or sink the level thereof in order the more conveniently to carry them over, or under, or by the side of the Railway. The defendants have not exercised these powers, because, as found by the Subordinate Judge, no water-course exists, and it is the flow of surface water only that has been obstructed and diverted. Even, however, if it be assumed that the course of flow of this surface water from Kariana to Chanothia and thence westward amounted to a water-course, I fail to see how the act of the defendants in allowing the water to flow for some four miles by the sides of their line and then discharging it on to the land of the plaintiff can be said to have been an exercise of the power conferred by this clause. It was evidently not the intention of the contractors of the line to so divert the flow of water. They intended that it should flow, as before, to the west, and for that purpose they made a culvert in the embankment at Dabhla. This apparently answered its purpose, because for some years we find no complaint was made, and the water was not turned south. The cause of the diversion evidently was the negligence of the defendants in allowing the excavations on the sides of the line that had been made to supply earth for the embankment to become channels for the water to flow southwards. Had it not been for this negligence, it is clear, as I have before said, that all the water that had actually passed through the culvert would have pursued its original course, and although there might have been an accumulation of water on the east of

1902.

GAEKWAR SARKAR OF BARODA v. GANDHI KACHRABHAI

the line, that, unless very large, would not have flowed down south. Again section 10 can only be applicable to damage which was the result of the exercise of the powers and could have been foreseen. Here the power exercised was the erection of an embankment and the making of a culvert. This did no injury. It might reasonably have been supposed that the culvert had been made sufficiently large to carry off the water. The chief, if not the sole, cause of the injury, namely, that the side trenches were allowed to become water-courses, was quite unconnected with the exercise of any power conferred by section 7 and was the result of negligence, that could not have been foreseen, the mischief probably growing worse only gradually year after year.

I am, therefore, of opinion that the present is a case in which the plaintiff could not have asked for any compensation under section 10, and that the suit is not barred by it.

It is a little difficult to understand the ground of the objection taken, that the suit would not lie having regard to the terms of section 11 of the Act. That section says that a Railway administration shall make such accommodation works 'as will, in the opinion of the Governor-General in Council, be sufficient at all times to convey water as freely from or to the lands lying near, or affected by, the Railway as before the making of the Railway, or as nearly so as may be.' There may be force in the argument that the law has thus left it to the Governor-General in Council to decide upon the sufficiency of the works to be erected for the purpose specified, and that the person, whose lands might be affected by insufficient works, must apply to that authority for redress and could not sue in a Civil Court either for damages for what he alleged to be the result of insufficient accommodation, or for an order directing additional works to be constructed; but this argument clearly cannot apply to the plaintiff. The purpose stated in the section for which the works are to be constructed is to convey water as freely as before from, or to, certain lands, and the aggrieved person is the owner of those lands. The lands of the plaintiff, before the making of this Railway, had the water from Kariana conveyed neither to, nor from, them. He could, therefore, have made no application in respect of them. There is no provision in the Act for recovery of compensation for damage caused by the construction or non-construction of the works enumerated in this section. If, therefore, persons, who own lands other than those mentioned in the section, are injured, their remedy must be the ordinary one by suit, and there is nothing in the Act which bars this remedy, still less can there be any bar to the present suit, in which the plaintiff alleged and has proved injury, not so much by the construction or non-construction of accommodation works as by the construction of the Railway line itself generally, and especially by the negligence in that the line was allowed to become a channel for discharging on to his land water which, before the construction, never came near it.

RANADE, J. :—The fact of negligence being thus proved, the question of law, whether plaintiff was entitled to bring this suit for damages and injunctions, has next to be considered. It is quite plain that, if there had been no

proof of negligence and the injury had been the unavoidable result of the proper exercise, by the Railway Company, of the powers vested in it by law, the defendants would have been protected from any civil suit, even if damage had resulted from the exercise of that power. Section 10 of the Act expressly provides that as little damage as possible should be done in the exercise of powers conferred by sections 7, 8 and 9 and that a suit shall not lie to recover compensation, and plaintiff's remedy would obviously be to apply to the Governor-General in Council, who alone is vested with control over these matters. If special or larger accommodation works were needed, that relief also could be claimed only under section 11 or under section 12, but by means of an appeal to the same authority. The case is, however, altered when the act, which has caused the damage, is not the result of a proper exercise of the powers conferred, but is due to the neglect or carelessness of the Railway Company in the execution of its powers. The distinction has been well illustrated in the case of accidental fires caused by a spark. Where the damage done by the spark was not shown to have been the result of negligence, the Company was held not to be liable, the reason assigned being that, when the Legislature sanctioned and authorized the use of a particular thing, and it is used for that purpose, the sanction carries with it the consequence that, if damages result from it, the Company is not responsible: *Vaughan* v. *Taff Vale Railway Company* (1) and *Halford* v. *The East India Railway Company*. (2) But where negligence is proved in the matter of a fire caused by the spark, the damage done was held to be actionable. Action lies even for authorized acts if they are done negligently. If the damage could have been prevented by the reasonable exercise of powers conferred, it was held to be a case in which an action can be maintained. The decision in *Rylands* v. *Fletcher* (3) may also be consulted with advantage on this point. Applying this principle, the defendants in this case are obviously not protected, as the damage is proved to be the result of their Agent's carelessness and neglect. Neither section 10 nor section 12 of the Railways Act prevents such a suit. In the present case, the Governor-General in Council has expressly permitted this suit, as one of the parties is His Highness the Gaekwar of Baroda, and it is not likely that this permission would have been granted if the Government had been satisfied that other relief could be given to the plaintiff under the provision of that Act. I therefore agree with Mr. Justice Parsons on both the points raised in this appeal.

F. Balfour Browne, K.C., and *Mayne* for the appellants.

J. Jardine, K.C., and *Kenyon S. Parker* for the respondents.

The contentions on behalf of the appellants are sufficiently stated in their Lordships' judgment. The Indian Railways Act (IV of 1890), sections 10 and 11, was referred to.

(1) (1860) 5 H. & N. 679. (2) (1874) 14 B. L. R. 1.

(3) (1868) L. R. 3 E. & I. App. 330.

1902.

GAEKWAR SARKAR OF BARODA v. GANDHI KACHRABHAI.

Counsel for the respondents were not heard.

The judgment of their Lordships was, on the 10th February, 1903, delivered by—

LORD MACNAGHTEN :—The respondent, who was plaintiff in the suit, is the owner of lands in the village of Kokta and its neighbourhood. He complained that since the making of the Mehsana-Viramgam Railway his lands had been flooded in the rainy season. The Railway, which was constructed by the Gaekwar of Baroda, was finished in 1891. Ever since it has been under the control and management of the Bombay Baroda and Central India Railway Company, by whom it is still worked. The respondent brought his suit against the Gaekwar with the consent of the Governor-General in Council as required by section 433 of the Civil Procedure Code and also against the Railway Company. His case was that the mischief of which he complained was occasioned by the negligent manner in which the works of the Railway had been constructed and maintained. He claimed damages and an injunction.

The Subordinate Judge of Ahmedabad and the High Court of Judicature at Bombay both found in favour of the respondent on the question of negligence and concurred in awarding damages and an injunction, though the damages assessed by the Subordinate Judge were reduced in amount by the High Court. Both defendants appealed to His Majesty. But the Railway Company did not lodge a case or appear by counsel to support their appeal.

The concurrent finding of the two Courts was hardly disputed before this Board. The negligence proved appears to have been of a very gross character. Before the Railway was made the surface water of a district four miles distant from Kokta, which was abundant in the rainy season, used to pass away to the westward without coming near the respondent's lands. The Railway, which there runs north and south, was constructed on an embankment. The embankment was designed with so little skill that no proper provision was made for the passage of the surface water. The greater part of it being obstructed by the embankment flowed down by the east side of the line and

drowned the respondent's lands. The mischief was increased by the fact that a series of excavations or burrow pits, as they are called, from which earth had been taken to form the embankment, were turned into a continuous channel by the action of the water washing away the barriers left between them. A similar thing happened on the other side of the Railway and some of the water that did pass through the embankment ran down a channel formed on the western side of the line and also found its way on to the respondent's lands.

The Railway was constructed under the Indian Railways Act, 1890, and is subject to the provisions of that Act.

The Act of 1890 provides that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the provisions of the Land Acquisition Act, 1870. It also provides that the Governor-General in Council is to determine in case of difference what accommodation works are required for the convenience of adjoining owners.

In these circumstances their Lordships were much surprised to hear the arguments addressed to them at the Bar. The leading counsel who appeared for the Gaekwar contended, first, that inasmuch as the Act of 1890 authorized the undertakers to construct all necessary embankments, this embankment as constructed was an authorized work and that the statutory authority conferred by the Act of 1890 (though in fact no statutory authority was required by the Gaekwar for the construction of an embankment on his own land) actually protected the Gaekwar from any claims connected with or arising out of negligent or defective construction. In the second place he contended that although the statutory authority of the Act of 1890 might have been abused or exceeded, no suit would lie, and that the respondent's only remedy was by proceeding for compensation under the Land Acquisition Act, 1870. And, lastly, he gravely argued that what the respondent really required in order to protect himself from the mischief caused by the negligence of the appellants was some additional accommodation works or something in the nature of

1902.

GAEKWAR SARKAR) OF BARODA v. GANDHI KACHRABHAI.

accommodation works which it was the respondent's business to define and submit for the approval of the Governor-General in Council.

It would be simply a waste of time to deal seriously with such contentions as these. It has been determined over and over again that if a person or a body of persons having statutory authority for the construction of works (whether those works are for the benefit of the public or for the benefit of the undertakers, or, as in the case of a Railway, partly for the benefit of the undertakers and partly for the good of the public) exceeds or abuses the powers conferred by the Legislature, the remedy of a person injured in consequence is by action or suit, and not by a proceeding for compensation under the statute which has been so transgressed. Powers of this sort are to be exercised with ordinary care and skill and with some regard to the property and rights of others. They are granted on the condition sometimes expressed and sometimes understood—expressed in the Act of 1890, but if not expressed always understood—that the undertakers "shall do as little damage as possible" in the exercise of their statutory powers: *Lawrence* v. *Great Northern Railway Company* (1); *Broadbent* v. *The Imperial Gas Company* (2); *Ricket* v. *Metropolitan Railway Company* (3); *Geddis* v. *Proprietors of the Bann Reservoir* (4); *Bagnall* v. *London and North-Western Railway Company*.(5)

Their Lordships are, therefore, of opinion that the appeal must be dismissed, but they think that it will be better that the injunction should be in general terms, restraining the defendants from flooding the lands of the respondent or causing or permitting them to be flooded by the works of the Mehsana-Viramgam Railway. It would be inconvenient if the Court were to direct the execution of specified works which it has no power to supervise, which might not be approved by the paramount authority, and which after all might not effect the object in view.

(1) (1851) 16 Q. B. 643.
(2) (1857) 7 DeG. M. & G. 436.
(3) (1867) L. R. 2 E. & I. App. 175 (202).
(4) (1878) 3 A.C. 430 (455).
(5) (1861) 7 H. & N. 423: (1862) 1 H. & C. 544.

1902.

GAEKWAR SARKAR OF BARODA v. GANDHI KACHRABHAI.

Their Lordships will, therefore, humbly advise His Majesty that with this variation the order appealed from should be affirmed and the appeal dismissed. As regards costs, the order will be against both the appellants.

Appeal dismissed.

Solicitors for the appellant—*Messrs. Dollman and Pritchard.*

Solicitors for the respondent—*Messrs. Holman, Birdwood & Co.*

PRIVY COUNCIL.*

1903.

Feb. 11, 12.

VINAYAK WAMAN JOSHI RAYARIKAR (ONE OF THE DEFENDANTS) *v.* GOPAL HARI JOSHI RAYARIKAR (PLAINTIFF) AND OTHERS (DEFENDANTS).

Partition—Inâm village granted by Peishwa—Right of management of Inâm property—Claim that Inâm village was impartible—Right of succession—Custom.

The defendant in a suit for partition alleged that his branch of a joint family to which an *inâm* village had been granted by the Peishwa had, under the grant acquired a right to the perpetual management of the village, and claimed on this and other grounds that the village was impartible.

Held, by the Judicial Committee (affirming the decision of the High Court), that "neither by the terms of the original grant nor of the subsequent orders of the ruling power, nor by family custom, nor by adverse possession..... has the defendant's branch of the family acquired a right to perpetual management of the village of Ahire, or in consequence to resist its partition."

Adrishappa v. *Gurushidappa*(1) referred to.

APPEAL from a decree (7th January, 1896) of the High Court at Bombay which reversed a decree (28th October, 1893) of the Subordinate Judge of Poona, by which the suit brought by the first respondent had been dismissed.

The suit was brought against the present appellant and the other members of a joint family for partition of an *inâm* which was granted to six brothers of the family in 1762, but which

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR JOHN BONSER.

(1) (1880) L. R. 7 I. A. 162 : I. L. R. 4 Bom. 494.