

enlarging the time fixed in the decree, and whether, if time ought to be enlarged, the plaintiff ought to be put on any terms. The plaintiff, it is true, did not make any application expressly for an enlargement of the time; but following *Rango v. Bhomshetti* (1) we think his present application may well be treated as one made for such enlargement to be followed by an order for the execution of the decree. The *darkhast* ought to be dealt with from that point of view, and the Appellate Judge should consider, after taking or directing to be taken by the Subordinate Judge, such evidence as the parties may adduce, firstly whether there is good cause shown for enlarging the time fixed by the decree, and then, if he is of opinion that it should be enlarged, whether the plaintiff ought to be put on any terms.

We reverse the decree of the lower Appellate Court and remand the *darkhast* for disposal with reference to the remarks made above.

Costs to follow result.

Decree reversed. Darkhast remanded.

(1) (1901) 26 Bom. 121.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), APPELLANT, v. BALVANT GANESH OZE (ORIGINAL DEFENDANT), RESPONDENT.*

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August 19.

Bombay Irrigation Act (Bom. Act VII of 1879), sections 3, sub-section (2), 5, 8, 23, 27, 28 (1)—Nālā—Water-course—Canal—Irrigation Department—Right to control water or to obstruct the use thereof—Riparian Proprietor—Enjoyment and benefit of water—Strict construction of statutes encroaching on the rights of subjects.

The defendant was in possession of a plot of land, Sarvey No. 13, and a *nālā*, that is, a water-course, ran past that plot of land. The *nālā* was crossed at a

* Appeal No. 86 of 1902.

(1) Sections 3, sub-section (2), 5, 8, 23, 27, 28 of the Bombay Irrigation Act (Bom. Act VII of 1879):

3. In this Act, unless there will be something repugnant in the subject

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considerable distance to the north of the defendant's land by a Government Irrigation Canal. The water flowing in the *nālā* was derived from two sources: (1) from the rain water from the hills and catchment area of the *nālā*, and (2) from percolation of water or waste from the canal. Apart from abnormal periods of drought, the second of the two sources was perennial and the mere

or context,—

(1) "canal" includes

- (a) all canals, channels, pipes and reservoirs constructed, maintained or controlled by Government for the supply or storage of water ;
- (b) all works, embankments, structures, and supply and escape channels connected with such canals, channels, pipes or reservoirs, and all roads constructed for the purpose of facilitating the construction or maintenance of such canals, channels, pipes or reservoirs ;
- (c) all water-courses, drainage-works and flood-embankments as hereinafter respectively defined ;
- (d) any part of a river, stream, lake, natural collection of water, or natural drainage channel, to which the Governor in Council may apply the provisions of section 5 or of which the water has been applied or used before the passing of this Act for the purpose of any existing canal ;
- (e) all land belonging to Government which is situate on a bank of any canal as hereinbefore defined, and which has been appropriated, under the orders of Government, for the purposes of such canal.

(2) "water-course" means any channel or pipe not maintained at the cost of Government, which is supplied with water from a canal, and includes all subsidiary works connected with any such channel or pipe, except the sluice or outlet through which water is supplied from a canal to such channel or pipe.

5. Whenever it appears expedient to the Governor in Council that the water of any river or stream flowing in a natural channel, or of any lake, or any other natural collection of still water should be applied or used by the Government for the purpose of any existing or projected canal.

The Governor in Council may, by notification in the *Bombay Government Gazette*, declare that the said water will be so applied or used after a day to be named in the said notification, not being earlier than three months from the date thereof.

8. Any canal officer duly empowered in this behalf and any person acting under the general or special order of any such canal officer may enter upon any land, building, or water-course, on account of which any water-rate is chargeable, for the purpose of inspecting or regulating the use of the water supplied, or of measuring the land irrigated thereby or chargeable with a water-rate, and of doing all things necessary for the proper regulation and management of the canal from which such water is supplied.

28. On receipt of any such application the canal officer shall serve notice on the owner to show cause why such authority should not be granted, or such declaration

important of the two. Before the canal was made there was a surface flow in a portion of the *nālā* and this flow lasted through the rains and for a portion of the cold weather and there was no flow after December. For seven hundred yards below the point of contact of the canal and the *nālā*, the *nālā* was normally dry and gravelly for many months, but at a point some seven hundred yards lower down the canal there was a spring and thence downwards there was a perennial stream. The *nālā*, however, throughout the rainy months held a fair body of water. In the year 1897, the Irrigation Department put a dam across the *nālā* and thereby infringed the defendant's riparian rights. The defendant thereupon brought a summary suit against the Executive Engineer for Irrigation and his subordinates in the Court of the Mámlatdár of Haveli for the removal of the dam and obtained a decree in his favour. Thereupon, the Secretary of State for India, as plaintiff, brought the present suit against the defendant praying that his right to control the water in the water-course (*nālā*) in suit and to obstruct the use of such water therein by the defendant

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should not be made and, if no objection be raised, or if any objection be raised and be found insufficient or invalid, shall, subject to the approval of the Collector, either authorize the applicant to use the water-course, or declare him to be a joint owner thereof on such conditions as to the payment of compensation or rent or otherwise as may appear to him equitable.

27. Every person desiring to have a supply of water from a canal shall submit a written application to that effect to a canal officer duly empowered to receive such applications, in such form as shall from time to time be prescribed by Government in this behalf.

If the application be for a supply of water to be used for purposes other than those of irrigation, the canal officer may, with the sanction of Government, give permission for water to be taken for such purposes under such special conditions and restrictions as to the limitation, control and measurement of the supply as he shall be empowered by Government to impose in each case.

28. The supply of water to any water-course or to any person who is entitled to sue shall not be stopped except—

- (a) Whenever and so long as it is necessary to stop such supply for the purpose of executing any work ordered by competent authority;
- (b) whenever and so long as any water-course by which such supply is received is not maintained in such repair as to prevent the wasteful escape of water therefrom;
- (c) whenever and so long as it is necessary to do so in order to supply in rotation the legitimate demands of other persons entitled to water;
- (d) whenever and so long as it may be necessary to do so in order to prevent the wastage or misuse of water;
- (e) within periods fixed from time to time by a canal officer duly empowered in this behalf, of which due notice shall be given.

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subject to the conditions imposed by the Bombay Irrigation Act (Bom. Act VII of 1879) should be declared. The first Court rejected the suit. The plaintiff having appealed,

Held, confirming the decree, that the water-course with which the defendant was concerned was a stream as that word is legally understood. It was a natural channel and not one constructed under the provisions of the Bombay Irrigation Act. It was not in direct communication with the canal; there was no agreement, for the supply of water under the Act and such water (if any) as found its way from the canal into it, came there by percolation. The defendant got the water from the canal, not because he was entitled to it, but because it came to him, and it would be open to the canal authorities to take such measures as would prevent the percolation.

As defendant had the right of a riparian proprietor to the usufructuary interest in the water in the *nálá*, which was incidental to the possession of the adjacent soil, it followed that whatever might be the nature of the tenancy, he as the occupant of the land abutting on the stream, and not the Government, was entitled to the enjoyment and benefit of the water as it flowed past.

A natural stream, though its flow of water be in part derived by percolation from a canal, is not a canal until the Governor in Council has applied to it the provisions of section 5 of the Bombay Irrigation Act.

Statutes which encroach on the rights of subjects whether as regards person or property must receive a strict construction.

APPEAL from the decision of F. C. O. Beaman, District Judge of Poona, in original suit No. 1 of 1901.

Suit for a declaration of right to control water in a *nálá* (water-course) and to obstruct the use of water therein by the defendant.

The plaintiff alleged that—In the second half of the 24th mile of the Mutha Right Bank Canal in the Poona District, a *nálá* crossed the canal and was taken under it by a culvert. After crossing the canal the *nálá* passed through the lands of village Loni Kalbhar in Haveli Taluka. The canal came into operation in this part of the district about the year 1877. Since then leakage water of the canal and of the distributary channels found its way into the *nálá* and the supply in the *nálá* had become perennial and was utilized for irrigation. Low earthen dams were erected across the *nálá* to divert the stream for irrigation.

One Narayan Shankar Javeri had been irrigating his field, Survey No. 17, for a long time in this way and twenty other cultivators had used the leakage at some time or other and paid water rates to the Irrigation Department.

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The *nálá* in dispute had a drainage area of $1\frac{1}{2}$ square miles, of which only about half a mile was above the canal. Except during and for a few days after actual rainfall there was no natural flow in the *nálá*. The *nálá* bed was usually dry above the canal, but there was a constant supply in the bed below the canal and its irrigation distributaries. The *nálá* was a water-course within the meaning of section 3, clause (2), of the Irrigation Act (Bombay Act VII of 1879).

In 1891 the defendant acquired Survey No. 13 which was next to the abovementioned Survey No. 17 lower down the water-course which ran through it (Survey No. 13) also.

On the 3rd June, 1897, the defendant obtained a decree in the Court of the Mámlatdár of Haveli against the said Narayan Shankar Javeri, owner of Survey No. 17, for the removal of a dam put by him across the said *nálá* and the said dam was accordingly removed by the village officers. Thereupon, in June 1897, an earthen dam was erected under the order of Mr. LeQuesne, who was Executive Engineer for Irrigation at the time. This was done to give water to the said Narayan Shankar Javeri, who had applied for water, and to prevent the water going down to the defendant, who had not so applied and who was not willing to pay water-rate.

The defendant then instituted a summary suit, No. 5 of 1898, in the Court of the Mámlatdár of Haveli against the Executive Engineer for Irrigation and his three subordinates for the removal of the dam. The Mámlatdár decided the suit against the Irrigation Department on the 22nd July, 1899.

The plaintiff contended that the defendant (plaintiff before the Mámlatdár) had no right to the user referred to in the order passed in the summary suit, that the water of which the defendant claimed the user was water derived by surface flow through the *nálá*, by percolation or leakage from the canal, and that the defendant was neither duly authorized to use the *nálá* as a water-course, nor entitled as of right and without any application, to a supply of water under the Act, that the *nálá* being supplied with water from the canal, thereby became a water-course within the meaning of sub-section (2) of section 3 of the Bombay Irrigation Act of 1879 and was included within the definition of a canal under clause (c) of sub-section 1 of

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section 3, that the canal officer had, therefore, power to do all things necessary for the proper regulation and management thereof under section 8 of the Act, and under section 28 of the Act was competent to stop the supply to the defendant under clause (c) of that section in order to supply the legitimate demands of those entitled to receive water for their lands and that the cause of action accrued on the 22nd July, 1899, the date of the Mámátdár's decision in the summary suit.

The plaintiff prayed that—(a) His right to control the water in the said water-course and to obstruct the use of such water by the defendant, except under conditions imposed by the Bombay Irrigation Act, 1879, should be declared; (b) the cost of the suit might be awarded to the plaintiff; and (c) all orders necessary for granting adequate relief and for doing full justice might be passed.

The defendant contended that—(1) The suit could not lie in the form it was brought. (2) The suit was barred by section 42 of the Specific Relief Act (I of 1877). (3) The plaintiff was not entitled to the relief he claimed unless and until the Mámátdár's order in the summary suit was set aside. (4) Survey No. 13 at Loni Kalbhar belonged to him (defendant). On the 27th July, 1891, the said survey number was transferred to him by the Forest Department in exchange of Survey No. 55 with all rights of ownership over the land, trees and wells, water-courses, &c., comprised within the boundaries of the said Survey No. 13. (5) Through the said Survey No. 13 there ran a *nálá* which took its rise in the hills to the south of Loni and after flowing through several fields ultimately discharged itself into the Mutha Mula river. (6) The Mutha canal crossed the *nálá* at the distance of over a mile from the said Survey No. 13. (7) The said *nálá* was a natural stream and had been in existence from time immemorial. The water of the said *nálá* was a natural spring water and was not derived by leakage or percolation from the irrigation canal or its distributaries by surface flow or otherwise. (8) The said *nálá* was not a "water-course" or a "canal" as defined by section 3 of the Bombay Irrigation Act and the Irrigation authorities had no right to regulate or stop its water-supply under section 8 or 28 of the Act. (9) The defendant was the owner of

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the *nálá* so far as it passed through his land and was entitled to the use and enjoyment of the water of the *nálá* without obstruction by the plaintiff or his subordinates. (10) Even assuming that any water flowed into the said *nálá* by leakage or percolation from the main canal or its distributaries, the irrigation authorities had no right to follow it up and claim it as their own. (11) There had been a dispute for many years between the defendant and the Irrigation Department about the use of the water of the said *nálá*. The question was pending the consideration of the Revenue authorities. The suit, therefore, could not lie until the defendant's appeal from the order of the Revenue Commissioner, Central Division, No. R-3906 of 1895, dated the 23rd September, 1885, was finally decided by Government. (12) On the 18th July, 1896, Mr. H. T. Ommanney, Collector of Poona, after a careful investigation held that the Irrigation Department had no right to claim any leakage or percolation rates from the defendant for the use of the water of the *nálá*. On the 10th April, 1899, the High Court of Bombay decided (*see* 23 Bom. 761) that the Irrigation Department had no right to obstruct the defendant in using the water of the *nálá* by erecting a dam across the bed of the stream. Notwithstanding these decisions the present suit was filed without any cause of action. It should, therefore, be dismissed with costs.

The Judge found that the suit was defective by reason of the plaintiff not having asked for an injunction under section 42 of the Specific Relief Act (I of 1877) to stop the defendant's use of the water in question or to set aside the Mámlatdár's order, that the *nálá* in dispute was not a water-course or canal as defined in section 3 of the Bombay Irrigation Act, that the plaintiff was not estopped from disputing the defendant's right to the use of the water in question by reason of any transfer by Government to defendant of any right in Survey No. 13, that the suit was not premature by reason of the defendant having made an appeal to Government against the order of the Revenue Commissioner, dated the 23rd September, 1895, that the plaintiff had not proved his right to control the water of the *nálá* in suit and to obstruct the use of such water by the defendant except under the conditions imposed by the Bombay Irrigation Act.

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The Judge having dismissed the suit, the plaintiff preferred an appeal.

Scott (Advocate General with *Ráo Bahádur V. J. Kirtikar*, Government Pleader) for the appellant (plaintiff).

Raikes (with *G. S. Ráo*) for the respondent (defendant).

JENKINS, C. J. :—The plaintiff by this suit prays that his right to control the water in the water-course mentioned in his plaint, and to obstruct the use of the water therein by the defendant except under the conditions imposed by the Bombay Irrigation Act, 1879, should be declared. The defendant is in possession of Survey No. 13 in the village of Loni Kalbhar in the Haveli Táluka of the Poona District, and the water-course is a *nálá* that runs past that plot of land. One of the questions in the suit is whether the *nálá* is a canal within the meaning of the Bombay Irrigation Act of 1879, for if not, then plaintiff is not entitled to the declaration sought in this suit. The *nálá* is crossed at a considerable distance to the north of this survey number by the Mutha Right Bank Canal, which is a Government irrigation canal. On the *nálá* and between the canal and Survey No. 13 is Survey No. 17, which is in the occupation of Narayan Shankar Jaweri, a cultivator, who, for the purpose of irrigating his field, erected a dam in the *nálá*. On the 3rd of June, 1897, the defendant obtained a decree in the Court of the Mámlatdár of Haveli against Narayan for the removal of this dam, and the dam was accordingly removed by the village officers. In the same month an earthen dam was erected under the order of Mr. LeQuesne, the Executive Engineer for Irrigation at that time. The defendant Balwant thereupon instituted another suit in the Court of the Mámlatdár of Haveli, this time against the Executive Engineer for Irrigation and his three subordinates, for the removal of the dam. The Mámlatdár decided against the Irrigation Department on the 22nd of July, 1899. Hence it is that the present suit is brought. The District Judge of Poona has decided in the defendant's favour, and dismissed the suit. The Secretary of State has appealed to this Court, urging (amongst other things) that the Court below erred in holding that the *nálá* in question is not a water-course within the meaning of section 3 of the Bombay Irrigation Act of 1879. The essential facts in

the case have been ascertained by two Commissioners appointed by consent of the parties, and from their report it appears that the water flowing in the *nálá* is derived from two sources: (1) from rain water from the hills and catchment area of the *nálá*, and (2) from percolation water or waste from the canal. Apart from abnormal periods of drought, the second of the two sources is perennial and the more important of the two. The Commissioners, however, are of opinion that "there was a surface flow, in the portion of the *nálá* under consideration, before the canal was made, that this flow lasted through the rains and for a portion of the cold weather, and that there was no flow after December. This flow was certainly small and not considered sufficient for irrigation in those days. It may have been, and certainly did not exceed, four *mots* or about one-fourth cubic foot per second in the rains, two *mots* or about one-third cubic foot per second in the month of October, and one *mot* or about one-sixteenth cubic foot in the month of December."

It is only necessary to add, as the Judge has found, "that this *nálá* existed long before the canal; that the canal crosses it nearly a mile above the place where this dispute has arisen; that for seven hundred yards below the point of contact the *nálá* is normally dry and gravelly for many months, but that at a point some seven hundred yards lower down than the canal there is a spring, and that thence downwards there is a perennial stream; that quite apart and independent from that, the *nálá* does throughout the rainy months hold a fair body of water, and that it may be justly regarded as a source of water-supply as late as the end of November at least." These then are the facts on which this case must be determined.

Now it is clear that, apart from the Act under consideration the defendant has the right of a riparian proprietor to the usufructuary interest in the water, which is incident to the possession of the adjacent soil, and it follows that whatever may be the nature of the tenancy he, as the occupant of the land abutting on the stream, and not the Government, is entitled to the enjoyment and benefit of the water as it flows past: *The First Assistant Collector of Nasik v. Shamji Dasrath Patil*⁽¹⁾.

(1) (1878) 7 Bom. 209 at page 212.

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But the defendant's riparian right has been infringed: so the only question is, whether that infringement is justified by the Act. It is a well established rule of construction that statutes which encroach on the rights of the subjects, whether as regards person or property, must receive a strict construction, and so in *Harrod v. Worship*⁽¹⁾ we find the Lord Chief Justice Cockburn says: "I have always understood according to the course adhered to by the Legislature, and according to the canon of construction in cases of this kind, that when the rights of individuals are to be interfered with, it is done by express enactment coupled with the provision giving compensation to those persons whose rights are to be interfered with." So again in the *Metropolitan Asylum District v. Hill*⁽²⁾ it is said by Lord Blackburn: "It is clear that the burden lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears." It is then with the guidance this canon of construction affords that we must approach the question now arising under the Bombay Irrigation Act of 1879. The prayer to the plaint is expressed in the widest possible terms, but it is clear from paragraph 7 of the plaint that the powers which are claimed in this suit are those under sections 8 and 28 of the Act, and the question therefore for us to decide is whether under those sections the canal officer was entitled to stop the supply to the defendant by erecting the dam of which complaint was made in the Māmlatdār's suit. The plaintiff's argument is that the *udlé* in question is a canal, inasmuch as by section 3 of the Act "canal" includes amongst other things all water-courses, and under section 3, sub-section 2, "water-course" means any channel not maintained at the cost of Government which is supplied with water from a canal and includes all subsidiary works connected with any such channel or pipe except the sluice or outlet through which water is supplied from a canal to such channel or pipe.

Now, section 8 provides as follows:—"Any canal officer duly empowered in this behalf and any person acting under the general or special order of any such canal officer, may enter upon

⁽¹⁾ (1861) 30 L. J. M. C. 165 at p. 167. ⁽²⁾ (1881) 6 A. C. 193 at p. 208,

any land, building, or water-course, on account of which any water rate is chargeable, for the purpose of inspecting or regulating the use of the water supplied, or of measuring the land irrigated thereby or chargeable with a water-rate, and of doing all things necessary for the proper regulation and management of the canal from which such water is supplied."

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The marginal note therefore is somewhat misleading. This section only empowers a canal officer *to enter* on any land, &c., and in no way defines what he may do for the proper regulation and management of the canal

As we understand the facts of this case nothing turns on the mere entry by the canal officers on any lands; the grievance on the one side and the claim on the other are concerned with the erection of the bund, or, to be more accurate, with the hindrance thereby caused to the flow of water.

Now, the bund must manifestly have been erected under section 28, which provides :

"The supply of water to any water-course or to any person

Power to stop water-supply. who is entitled to such supply shall not be stopped except

(a) whenever and so long as it is necessary to stop such supply for the purpose of executing any work ordered by competent authority ;

(b) whenever and so long as any water-course by which such supply is received is not maintained in such repair as to prevent the wasteful escape of water therefrom ;

(c) whenever and so long as it is necessary to do so in order to supply in rotation the legitimate demands of other persons entitled to water ;

(d) whenever and so long as it may be necessary to do so in order to prevent the wastage or misuse of water ;

(e) within periods fixed from time to time by a canal officer duly empowered in this behalf, of which due notice shall be given."

The section then contemplates the supply of water (1) to a water-course, and (2) to a person.

But no question arises here as to the supply of water to the water-course : if there be a supply of water from the canal to the

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water-course (as will for the sake of argument be assumed), that supply has not been stopped: what has been stopped is the flow of the water when in the water-course.

Therefore it is a supply to a person that has been stopped.

But then the section does not deal with the supply to *any* person, but only with the supply of water to any person *entitled to such supply*, and that must mean *entitled under the Act to such supply*.

Then is the defendant a person *entitled to such supply*? The Act does not in so many words define who is a person entitled to such supply, but we find in the Act indications of the conditions under which a person may become entitled to a supply of water.

Thus in the latter part of section 21 it is provided that every owner of a water-course and every person duly authorized under the provisions hereinabove contained to use a water-course shall be entitled to have a supply of water by such water-course.

We think it is clear that part III deals only with one class of water-courses, *i. e.*, those constructed under its provisions.

Under sections 23 and 27 a person may become *entitled to a supply*: and not only may there be an agreement for the supply of water, but also that agreement may be transferred (*see* section 30).

-But the defendant comes within none of these descriptions: the water-course with which he is concerned is a natural channel, not one constructed under the provisions of the Act; it is not in direct communication with the canal; there is no agreement; and such water (if any) as may find its way from the canal into it comes there by percolation. Can it then be said that the defendant in respect of the water, which we assume may thus reach him by percolation, is *entitled to the supply* of such water? We think not: the defendant does not in respect of it allege an agreement or such ownership as is mentioned in part III of the Act, and it appears to us that even apart from any justifying provision in the Act, it would be open to the canal authorities to take such measures as would end the percolation. The defendant gets the water from the canal not because he is entitled to it, but because it comes to him.

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On this line of reasoning therefore it appears to us that the defendant is not a person entitled to a supply of water within the meaning of section 28, so that, so far as warrant for stopping the flow of water to him is based on anything contained in that section, it is of no avail.

There is another mode of viewing the case leading to the same result, and with this we will now deal.

It has been argued that this *nālā* is a canal; but manifestly on the facts it is not that, unless the definitions of the Act make it so. In support of the argument that they do, it is pointed out that "canal" includes all *water-courses*, and a *water-course* is defined to mean "any channel or pipe not maintained at the cost of Government, which is supplied with water from a canal and includes all subsidiary works connected with any such channel or pipe except the sluice or outlet through which water is supplied from a canal to such channel or pipe."

Though the word *water-course* in its natural and ordinary meaning is the course of water, it may mean not only the flowing of water in its ordinary course, but the corporeal thing through which the water flows (*Taylor v. Corporation of St. Helens*⁽¹⁾), and here we have it expressly provided that it means a channel. Now the word channel would *primò facie* include the *nālā*, for its primary meaning is the bed of a stream of water, or the course or hollow in which a stream flows. But, we think, some restriction must be placed on the meaning of the word channel. If no restriction be placed on the word channel it would include a river or stream, and if we accept the plaintiff's argument that by the entrance into the river or stream of water by percolation (be it ever so little) from the canal the river or stream is supplied with water from the canal within the meaning of sub-section 2, then such river or stream would be a canal without the application by the Governor in Council of the provisions of section 5. But we cannot so read the Act: in relation to the water of any river or stream flowing in a natural channel there would almost of necessity be both natural and conventional rights, sometimes of great value, and it

(1) (1877) Ch. D. 264.

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appears to us that the intention of the Legislature must have been that those rights should be dealt with only under section 5. Any other conclusion might involve a most serious inroad on private right without any provision for compensation: by reason of a small and useless leakage into a river in which valuable riparian rights exist it would, if the plaintiff be right, become a canal with the result that those rights would within the provision of the Act be under the control of the canal authorities with the far reaching consequences that involves.

The learned District Judge and Counsel before us have also placed stress on the words "which is supplied with water" as negating the plaintiff's contention, and we think they are not without value. We have carefully gone through the whole Act more than once, and on an examination of all its provisions the conclusion to which we come is that a natural stream, though its flow of water be in part derived by percolation from a canal, is not a canal until the Governor in Council has applied to it the provisions of section 5.

We now have to consider whether this *nálá* is a stream. A stream of water is water which runs in a defined course (*Taylor v. St. Helens Corporation, supra*), nor is a perennial flow a necessary condition to the legal conception of a stream provided the source, though irregular, be one of constant recurrence, and not merely fortuitous or temporary.

On the facts therefore we are of opinion that this *nálá* is a stream, as that word is legally understood; it is clear that before the existence of the canal and any accession to its stream by percolation from the canal, for about half the year the *nálá* was a running stream, deriving its flow of water from sources which though not perennial were constant in their recurrence.

It may be, as the Commissioners say, that the more important of its sources now is the canal but none the less is it a natural stream; and it may be too that the defendant is, under section 48, liable to the rate thereby prescribed, but we are now concerned with the canal authorities' claim to stop the supply to the defendant under clause (c) of section 28 of the Act. The rule of law apart from the Act we take to be, that as the defendant has the right to the natural stream as incident to his holding Survey

No. 13, he has a right to all the water which actually forms part of that stream as soon as it becomes part, whether such water comes by ordinary natural means, as from springs or from the surface of the adjacent hills, or from rains, or is added by percolation from the artificial channel of the canal: and if the canal water has by percolation augmented the stream and became part of it, no distinction can be made between the original natural stream and the accession to it (*Wood v. Waud*⁽¹⁾).

Whatever rights the Act may give, it certainly does not entitle the canal authorities, as things now stand, to stop the flow to the defendant of the natural stream.

Though the prayer in the plaint is expressed in the widest terms, the real object (as we have already indicated) is to obtain an affirmation of the claim advanced by the canal authorities to stop under clause (c) of section 28 the supply of water to the defendant (who claims the same by virtue of his riparian rights arising out of his interest in Survey No. 13) in order to supply the legitimate demands of those entitled to receive water for their lands.

This claim is (in our opinion) misconceived and the decree must therefore be confirmed with costs.

Decree confirmed.

(1) (1849) 3 Ex. 748.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

BAI KASHI (ORIGINAL OPPONENT), APPELLANT, v. PARBHU KEVAL
(ORIGINAL APPLICANT), RESPONDENT.*

1903.

August 20.

Succession Certificate Act (VII of 1889)—Enquiry under the Act—Debts, existence of—Payment of money due into Court—Certificate in respect of the money so paid—Practice.

The Succession Certificate Act (VII of 1889) is intended for the protection of debtors, but this only means that where a debtor of a deceased person either

* First Appeal No. 51 of 1903 from order.