

## APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

RAJENDRALAL MANEKLAL (ORIGINAL PLAINTIFF), APPELLANT, v.  
THE SURAT CITY MUNICIPALITY (ORIGINAL DEFENDANT),  
RESPONDENT.\*

1908.

February 11.

*Negligence—Municipality—The Municipality not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Misfeasance.*

The plaintiff sued to recover damages from the defendant Municipality for injury done to his property by storm water. The water had collected in an adjoining ditch, which the Municipality had not kept in a state of repair, but had allowed it to be choked with the rubbish of the town. They constructed a dam in the adjoining creek, but allowed the sluices at the dam to be choked up with weeds, sedges and silt. The consequence was that the storm water, which had collected in the creek passed on to the plaintiff's land and did damage.

*Held*, that there was misfeasance on the part of the Municipality, for they had turned their works by their negligence into a nuisance so as to throw the water collected on their property—the creek—on to the plaintiff's land, and that, therefore, they were liable for the damage caused thereby.

*Borough of Bathurst v. Macpherson*<sup>(1)</sup>, followed.

APPEAL from the decision of Jehangirji E. Modi, First Class Subordinate Judge at Surat.

The facts of this case are set forth in the judgment at length.

*Baptista* with *N. M. Samarth*, for the appellant.

*The Government Pleader*, for the respondent.

KNIGHT, J.:—The facts of this case are set forth in the able and elaborate judgment of the learned First Class Subordinate Judge. Briefly, the plaintiff sues to recover damages from the Surat Municipality on account of injury done by storm water to certain garden land of his known as the Gopitaláo, alleging that it was owing to the negligence of the Municipality that the water first broke into his garden, and that having broken in, it did not drain off.

\* First Appeal No. 124 of 1909.

(1) (1879) 4 App. Cas. 256.

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The negligence alleged is of three kinds: firstly, improper and inadequate construction of the sluice gate known as the Macca dam; secondly, defendant's refusal or omission to drain the water off the garden by means of a disused culvert that once connected it with the main ditch; and thirdly, defendant's failure to keep the ditch cleared from obstruction and the sluice gate in proper working order.

Now, the first of these allegations is demonstrated to be unsustainable by the plaintiff's own expert witness, as the learned Subordinate Judge has shewn. Mr. Maneklal, Engineer (Exhibit 23) deposes that "if the sluice gates had been kept open, the Gopitaláo would not have suffered any damage from the overflow of the waters." Evidently, therefore, plaintiff cannot assert that the damage was caused to his property by faulty construction of the original works.

The second, we think, discloses no good cause of action against the Municipality. It seems that at one time the Gopitaláo was used as an overflow reservoir from the Macca ditch itself, and, in order to subserve this end, was connected with it by a culvert designed, not to drain the water from the Gopitaláo, but to draw it off from the ditch. This arrangement was abandoned, many years ago, in 1875, when the culvert was finally closed. It is probable perhaps that if it had been opened after the irruption of the heavy flood which has given rise to this suit, much of the damage caused to the garden that now occupies the bed of the Gopitaláo might have been averted. But we are not satisfied upon the evidence that it was reasonably possible to re-open it at the time. The plan put in indicates that it had become deeply embedded in silt or rubbish on the ditch side, while on the Gopitaláo side it was many feet under water. Under any circumstances, it was just as easy for the plaintiff to open it as for the Municipality; and, although the latter declined to undertake the job when the plaintiff suggested that they should do so, it is not pretended that they offered any objection or hindrance to his doing it himself.

We are now left with the third allegation of negligence, *viz.*, that the Municipality allowed the ditch to become choked by silt and rubbish, and that the sluice gates were not in proper

working order. This demands more serious treatment than the other two, and we think that it has not received adequate consideration in Mr. Modi's otherwise excellent judgment.

To commence with, this item of negligence was explicitly asserted in the plaint. "The defendant Corporation has, instead of preserving the ditch in its original condition, filled up the greater portion of it with the rubbish of the town;" and again, "this rush (of water) was owing to the defendant having filled up the ditch as above and the consequent incapacity of the ditch to contain the rain water;" and, "the sluices in the dam had not been kept in the condition in which they ought to have been kept, . . . . . the openings having been kept closed."

All this is definite enough. The allegation re-appears in the first material issue framed by the Subordinate Judge who commenced the trial, Mr. Chimanlal:—"Whether the rain water on July 16th, 1902, rushed into the Gopitaláo, knocking down its western gate, on account of the defendant's negligence in not keeping its ditch on the north in proper order, and in not adopting measures, etc., etc." It is noticeable that this is practically the only allegation of fact embodied in the issues, which make no explicit reference to the other two items of negligence. Judging from the pleadings and the issues, the ordinary reader would conclude that plaintiff complained of little or nothing beyond the failure of the Municipality to maintain the drainage arrangements in proper order, and that what Mr. Modi terms the main charge of negligence, to which he has devoted the bulk of his judgment, was more in the nature of formal or subsidiary pleading. No doubt, the course adopted by the learned counsel engaged for the plaintiff, who even in the argument which he addressed to us seemed to have failed to grasp the strong point of his client's case, was primarily answerable for this; though it is difficult to understand how after his own expert witness' admission in examination-in-chief (quoted above) he can have thought it worth while to prosecute the so-called main charge of negligence further. The result, however, was important, for it not only diverted the attention of the Court from the real matter in dispute to others which hardly

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needed discussion, but, as we shall shortly shew, led everyone concerned to ignore the most important piece of evidence on the record.

In his detailed report (Exhibit 25) Mr. Maneklal, Engineer, after reciting a number of positive facts that he had observed, wrote: "From these facts it can easily be admitted that the old channel has been filled up with enormous quantities of silt which the defendants appear never either to have noticed or taken care to remove." The channel here means the ditch, as the context shews, and not, as plaintiff's counsel supposed, the abandoned culvert. There is certainly room for misunderstanding, inasmuch as the preceding portion of the paragraph is mainly occupied with the culvert; but the passage immediately succeeding—"This channel runs with almost a uniform slope till it reaches Macca dam"—places the meaning beyond doubt. The stream, Mr. Maneklal continues, cuts a number of narrow passages all along through the silt. "There are no regular side slopes, and the bed seems to have been in some places on or about the same level as the surrounding ground." The picture delineated is clear and intelligible, and we must express our regret that the misapprehension to which we have referred caused these important assertions to pass almost unnoticed in the oral examination of the witness.

They received however very substantial corroboration. Mr. White, the Executive Engineer of Surat, writing in 1876, observed: "The lower sluices of the Macca dam . . . . are very much silted up, about 5 feet of silt having accumulated on the up stream side of the dam." If that was the state of affairs in 1876 (we are not sure as to the precise year, but the argument would be as strong even if it were 1896), it can easily be conjectured what the condition of the ditch must have been in 1902. For here we may observe that the defendant Municipality have not asserted, much less attempted to prove, that they ever spent one farthing, or employed one single coolie, in keeping the ditch clear.

With this the plaintiff can claim to have laid a very solid foundation for his charge of negligence against the Municipality in the detail indicated. Placing wholly on one side the rest of

his oral evidence, we now come to the very important evidence to which we referred above; a document buried completely out of sight under the silt of irrelevant discussion, and exhumed, not by the efforts of the Counsel for the plaintiff, but by our own unaided researches.

This document is to be found below Exhibit 39, which is an application made by the plaintiff to the Municipality on July 28, 1902, only twelve days after the flood, and while the water was still standing in his garden. He begged the Managing Committee to inquire into the damage that was being done to his property; and the application was forwarded with an endorsement over the Municipal Secretary's signature to the following effect:—

“With reference to the above, the undersigned begs to state that on the day mentioned by Mr. Maneklal (*i. e.*, July 17th, the day after the flood, but perhaps the day of the flood itself is intended) it was found by the Municipal Overseer that the openings of the sluice under the Macca bridge were choked up with weeds, sedges and silt and were rendered unworkable; and as fears were entertained of a rising in the Tapti, it was imperatively necessary to keep (*i. e.*, put) the sluices in working order. The Municipal Overseer had therefore sent a party to clear off the sluices, as is usually done on such occasions.”

This is dated 29th July 1902.

Now how the writer of this endorsement could have the impudence to stand in the witness box and swear that “he knew that the sluices used to be kept open,” and that he merely sent and made inquiries in order to make certain, we find it difficult to understand. Still more marvellous is it that he should have been allowed to leave the witness box without being confronted with this endorsement and asked to reconcile it with his evidence. Exhibits 34, 37, 38 and 40 were shown to him, it appears, but the vitally important Exhibit 39 was wholly overlooked.

In the light of that endorsement however it is an easy task to appraise at its true value both the evidence of the Secretary and that of the Fire Brigade Superintendent (Exhibit 67) who supports him. The latter gentleman would have us believe that “the strict rule is that the sluices are always to be kept open.

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All the sluices in the city are cleaned and oiled in the beginning of June." He being the head of the Department charged with the duty of seeing this done, it is natural enough that he should pretend that he punctually discharged the duty during the year in question. It is significant however that the private diary which he produced in Court shewed that the sluices were greased on July 31st, but contained no such entry prior to that date ("but there is no entry in May and June; for that was done at the usual time punctually"); and that other entries show that on August 29th some silt was cleared away, and on the 7th September the sluices were again greased. That is to say, the book indicates that a great deal of attention was paid to the dam *after* the flood, and none at all before. It is also to be noted that this witness proves that the Secretary visited the dam during the flood; so that the contents of the endorsement cannot be cast aside as mere hearsay.

We may now return to the "interested" evidence of plaintiff's uncle Maneklal (Exhibit 30), armed with the means of gauging its probability. He tells us that he visited the dam on the afternoon of the flood, and found the Overseer there, with the Fire Brigade Superintendent and half a dozen coolies, busily engaged in trying to open the sluices. The Overseer told him that the gates had long been closed, and that it was therefore difficult to open them; and he came away. This of course the Overseer and other Municipal employes deny; but it accords too closely with the statements made in the endorsement not to command our credence. The Overseer, it may be noted, admits that the rubbish and silt brought down by the water were removed by the Municipality after the 16th of July (Exhibit 60); and the Fire Brigade Superintendent assures us that violent rain such as that which produced this flood would not deposit any silt near the dam. It must therefore follow that the silt removed was the result of prior accumulations.

Emphasizing once more the omission of the defendant Municipality to prove, or even to assert, that they had ever made the smallest provision for keeping the ditch clear prior to the flood, we may here quit the evidence. The conclusions to which it points are manifest. The carrying capacity of the ditch had

been greatly reduced by the gradual accumulation of silt and rubbish in its bed, and the Municipality had done nothing to maintain it in proper order. The sluices at the dam "were choked up with weeds, sedges and silt and were rendered unworkable" in the Secretary's own words; and the water therefore collected in a channel of reduced capacity, and, unable to discharge itself through the sluices, burst into plaintiff's garden. In other words, the material allegations in the plaint are fully borne out by the evidence. It now remains to determine the legal consequence of this finding.

It is argued for the respondent Municipality, on the authority of the ruling of this Court in *Achratlal v. The Ahmedabad Municipality*<sup>(1)</sup>, that the facts held proved above amount to no more than non-feasance, for which the respondent is not liable in damages at the instance of any private individual. In that case it was held that there being no duty cast upon the Municipality by the District Municipal Act to repair roads vested in it, no person injured by the non-repair of such a road could sue it for damages, because the omission of the Municipality to repair was non-feasance. But, as has been pointed out by the House of Lords in *Mayor &c. of Shoreditch v. Bull*<sup>(2)</sup>, "the distinction between non-feasance and mis-feasance might be carried too far," and "in some cases non-feasance might be equivalent to mis-feasance." And of the latter *Borough of Bathurst v. Macpherson*<sup>(3)</sup> affords an illustration. The facts of that case were as follows:—The Borough of Bathurst had constructed a barrel drain under or in proximity to the highway. The drain having fallen into disrepair, a portion of the highway subsided into it, leaving a hole into which the plaintiff's horse fell as he was riding along the highway, with the result that he sustained personal injuries. The Privy Council held upon these facts that the Municipality having constructed the barrel drain was bound to keep it in a state of repair which would prevent its causing a dangerous hole to be formed in the highway. That decision is explained in these terms by the Privy Council in *Municipal Council of Sydney v. Bourke*<sup>(4)</sup>:—

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(1) (1904) 23 Bom. 340; 6 Bom. L. R. 75. (3) (1879) 4 App. Cas. 256.

(2) (1904) 20 T. L. R. 254.

(4) [1895] A. C. 433 at p. 441.

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"The *ratio decidendi* was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair, and whether any person injured by the breach of such a duty could maintain an action. The case was not treated as one of mere non-feasance, and indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous."

Similarly here, the respondent Municipality constructed the dam in the Macca creek, and by not keeping the ditch properly clean but by allowing it to fill with silt and permitting the dam to be choked with weeds and sedges, turned their works by their negligence into a nuisance so as to throw the water collected on their property—the said creek—into appellant's land. That is a clear act of mis-feasance and falls within the principle of law illustrated in *Borough of Bathurst v. Macpherson*.<sup>(1)</sup> The respondent's act is similar to that of a man who brings water on to his own land and dams it up so that if it breaks away it must be a danger to his neighbour and must do him injury; there the man is liable, though he does nothing to let the water out, but it bursts away without any subsequent act of his. (See the judgment of Brett M. R. in *Whalley v. Lancashire and Yorkshire Railway Company*.<sup>(2)</sup>)

On the question of damages both parties through their respective pleaders agree before us to abide by the decision of the Collector of Surat acting as arbitrator in the matter. The Collector to give his award and send it to this Court within two months—the time to be extended if necessary. Liberty to apply.

[*Notes.*—Subsequently an application for a review of this judgment was refused.—Ed.]

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(1) (1879) 4 App. Cas. 256.

(2) (1884) 13 Q. B. D. 131 at p. 137.