1911.

KASHIRAM MANSING v. RAJARAM.

the Collector should be free to act simply upon a difference of opinion between himself and the Mamlatdar as to the value or probative effect of parts of the evidence recorded by the Mamlatdar. We are not prepared, as at present advised, to hold that the word 'improper' has any different meaning from the word 'irregular' as occurring in the expression 'irregularity' in section 622 of the Code of 1882, or section 115 of the present Code. We are, therefore, of opinion that the Collector was not authorised by section 23 to interfere with the findings of fact of the Mamlatdar which were on their face legal and regular and arrived at after a consideration of the evidence recorded.

For these reasons we set aside the order of the Collector and restore that of the Mamlatdar with costs throughout.

The Rs. 100, deposited with the Collector, should be refunded to the applicant.

Order set aside.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Rao.

1911. *July* 19.

THE MUNICIPALITY OF HUBLI (ORIGINAL DEFENDANT), APPELLANT, *v.* LUCUS EUSTRATIO RALLI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

District Municipal Act (Bom. Act III of 1901), sections 50 and 54—Hubli Municipality—Reclamation of the bed of a tank for Municipal Cotton Market—Damage caused to plaintiffs' goods by sudden and extraordinary heavy rain—Suit for damages against Municipality—Burden of proof as to negligence in the reclamation work—Suit not maintainable—Vis major.

The Hubli Municipality, a body corporate under the District Municipal Act (Bom. Act III of 1901) took steps to provide a Municipal Cotton Market and they selected for that purpose a site of a large and ancient tank which had largely silted up. The southern boundary of the tank was an embankment. In reclaiming the bed of the tank, the Municipality utilized a part of the embankment and made provision to prevent the flow of water. In the month

* First Appeal No. 194 of 1909.

1911.

MUNICIPALITY OF HUBLI v. LUCUS EUSTRATIO RALLI.

of June 1907 there was a sudden and extraordinary heavy rainfall at Hubli which practically overflooded the whole Municipal area and a quantity of goods in the plaintiffs' Ginning Factory which was to the south of the tank was washed away or damaged. Thereupon the plaintiffs brought a suit against the Municipality to recover damages alleging negligence on the part of the defendants in carrying out the reclamation work. The defendants denied the plaintiffs' allegation and answered that the damage to the plaintiffs' goods was the result of the abnormal heavy rain in June 1907 and that no precautions on the part of the defendants could have averted the damage.

Held, that the suit was not maintainable. The onus of proof of negligence lay on the plaintiffs, and if the neglect in the execution of their statutory powers and duties was not brought home to the Municipality, a suit against them must fail as being unsustainable in law, howsoever great the damage the plaintiffs might have suffered from the extraordinary flooding uncontrolled by the old tank dam.

RAO, J.:—The damage was mainly, if not wholly, attributable to the extraordinary fall of rain. It was an occurrence in the nature of *vis major* for which the defendants were not responsible.

FIRST appeal against the decision of R. G. Bhadbhade, First Class Subordinate Judge of Dharwar, in Suit No. 780 of 1907.

The plaintiffs sued to recover from the defendants, the Municipality of Hubli, Rs. 10,145-15-6, being the amount of damages caused to their goods which they had stored in certain factories at Hubli on the 7th June 1907 by the rush of water from a tank under reclamation by the defendants. The circumstances under which the damage was caused were alleged as follows:—

To the north of the factories, wherein the plaintiffs' goods, cotton, &c., had been stored, there was an area of land which, some time before the suit, formed a tank known by the name of Gulkawa's tank, enclosed along its southern boundary by an embankment or dam. The tank was under reclamation by the defendants for the purpose of extension of Municipal Cotton Market. The defendants, in the course of their reclamation operation, removed the dam at the southern extremity of the tank, altering the levels of the tank bed and its surroundings and diverting the natural and customary flow of water, having formed a tank at the north-east corner of the dam and directed a considerable flow of water into it, also for their own purposes. Such was the situation of things on the 7th June 1907, when

1911.

MUNICIPALITY OF HUBLI v. LUCUS EUSTRATIO RALLI.

there was rain at Hubli. The direct consequence was that a large body of water, by force of the defendants' operation, flowed into the tank at the north-east corner of the dam and into the area under reclamation, and owing to the changes of levels and diversion of water and the removal of the dam by the defendants without due provision for the control or disposal of water thus collected, the same flowed into the plaintiffs' factories and damaged their goods in spite of their efforts to save them. The damage sustained was the direct result of the action of the defendants, by reason of their negligence and wrongful acts. They were therefore liable to pay the damages.

The defendants answered :—

They were not responsible for the damages sustained by the plaintiffs because the rain that fell on the 7th June 1907 was extraordinary and excessively heavy, having been 2 inches and 91 cents within 30 or 40 minutes. It was a case of *vis major* and no precaution on the part of the defendants would have averted the damage, which would have occurred even if the old state of things, that is, the height of the south dam and level of the tank bed, had not been changed in the least. The claim was time-barred, being not within six months from the date of the act complained of. The damages claimed were excessive and the allegation in the plaint as to neglect and wrongful act on the defendants' part was not true.

The Subordinate Judge found that the claim was not time-barred, that the defendants' action in removing the dam and altering the levels of the tank bed, &c., as alleged in the plaint caused the overflow of water into the plaintiffs' factories and that the plaintiffs had suffered damages to the extent of Rs. 9,677-9-7. He, therefore, passed a decree accordingly. The following are the extracts from the Subordinate Judge's judgment :—

The witnesses' evidence shows that the precautionary measures adopted by the defendants before this flood as to the drainage of the reclaimed site were faulty and insufficient and that the small tank with its low mounds on two sides could not have drained the adjacent reclaimed site and the waste-weir works were also not satisfactory.

* * * * * * *

Vis major or an act of God means not a mere misfortune, but something overwhelming, such as storming, lightning and tempests which could not happen by the intervention of man and loss from which could not have been prevented by any reasonable amount of foresight, pain or care (Stroud's Judicial Dictionary). To be regarded as an act of God, the occurrence must not only be unforeseen, but incapable of being foreseen (per Tayabji, J., at p. 926, 4 Bom. Law Reporter, citing Encyclopædia of Law), and absolutely incapable of being prevented or guarded against. Even supposing that the flood and rainfall of the 7th June was in the nature of *vis major*, which I think it was not, *vis major* to afford a defence must be the proximate cause—*causa causans* and not merely a *causa sine qua non* of the damage complained of. The mere fact that *vis major* co-existed or followed on the negligence of the defendants is no adequate defence (*Municipal Corporation of Bombay* v. *Vasudeo*, VI Bombay Law Reporter, 899).

* * * * * * * * *

On the whole, then, I have no doubt in finding that the defendants' act in removing the big *bund* before completing their drainage works was most unwise, that the drainage provided for before the storms was insufficient, that the reclamation works were undertaken and executed unsystematically and without taking the required levels of the adjacent sites and without an estimate of the quantity of water that would run into the small tank, and providing means for its proper discharge without flooding the neighbouring sites.

The defendants appealed.

Weldon with *N. A. Shiveshvarkar* for the appellants (defendants).

Strangman (Advocate-General) and *Jardine* with *Little & Co.* for the respondents (plaintiffs).

SCOTT, C. J.:—This is an appeal from a decree of the First Class Subordinate Judge of Dharwar awarding Rs. 9,677 to the plaintiffs as compensation for injury done to their cotton by water which the defendants in breach of their duty allowed to escape on to the plaintiffs' premises.

The defendants, the Municipality of Hubli, are a body corporate under the District Municipal Act (III of 1901). By virtue of section 50 of that Act property of various kinds is vested in them to be held and applied by them as trustees subject to the provisions and for the purposes of the Act and includes all public markets, tanks and works connected with or appertaining thereto, drains and culverts, and by section 54 it is provided that it shall be the duty of every Municipality to make reasonable provision

1911

MUNICIPALITY OF HUBLI v. LUCUS EUSTRATIO RALLI.

for *inter alia* the constructing, altering and maintaining all public markets, drains, drainage works, culverts, tanks, dams and the like.

In or about the year 1904 the Municipality of Hubli took steps to provide a Municipal Cotton Market. They selected for the purpose the site of a large and ancient tank known as Gulkawa's tank which had largely silted up. The southern boundary of the tank was an embankment. The tank received the drainage of the land to the north of it and at the south-eastern corner was a weir for the discharge of surplus water. The tank area occupied about two-thirds of a quadrangular space, of which the northern boundary was a public road known as the Station Road, and the western boundary, another road running from north to south. The scheme of the Municipality was to drain the water coming to the culverts under the Station Road into a nálla on the eastern side of the quadrangular area and to conduct it into a small tank to be formed in the south-eastern corner of that area whence the water would discharge eastwards over the old weir which it was proposed to deepen so as to allow of the passage of a larger body of water. This scheme would leave such part of the old tank as was not included in the small new tank free for reclamation as a cotton market.

In 1904 or 1905 the Municipality formed the smaller tank and utilized that part of the southern dam of the large tank which was not wanted to hold up the water of the small tank as spoil to fill in the area marked out for the market.

The levels taken by the Commissioner as shown upon the map prepared by him for the purpose of the suit in the year 1908 indicate that over the centre of the reclaimed area there was nowhere a difference in level of more than one foot.

At the same time the Municipality deepened and cleaned out the old nálla running along the east of the area and connected it up with culverts passing under the Station Road so that the water draining under that road passed into the nálla and thence into the small tank and discharged in time of flood over the weir.

This scheme of drainage and reclamation during the monsoons of 1905 and 1906 caused no trouble. The monsoons were not particularly heavy ones and there was no day marked by any sudden and extraordinary rainfall. In the year 1907 however upon the 7th of June an extraordinarily heavy fall of rain occurred at about 6 p.m., amounting to nearly three inches in less than an hour. The result was that practically the whole of the Municipal area was flooded, and a quantity of cotton owned by the plaintiffs was washed away or damaged.

It appears that the plaintiffs in the year 1907 were doing business in the Ginning Factory of Ratanji Hormasji, using it for the purpose of storing ginned and unginned cotton, cotton-seeds and cotton bales. This Ginning Factory was situated immediately to the south of the area of the old tank and adjoined the new Municipal Cotton Market. It was however at a very much lower level than either the market or the bed of the old tank, and before the tank was drained and filled in, its water was prevented from flooding the Factory area by the southern dam.

On the 10th of June 1907 the plaintiffs' Agent wrote to the Vice-President of the Municipality informing him that owing to the dam of Gulkawa's tank adjoining the Ratanji Hormasji Ginning Factory having been unwisely removed by the Municipality and owing to the insufficient and faulty drainage in reclaiming the cotton-market extension area all the water on the 7th instant, instead of taking its proper course in the tank, rushed in the Ratanji Hormasji and the Alexandra Press Factory and caused serious loss amounting to Rs. 90,000 or thereabouts. The latter claimed damages on the ground that the loss had occurred owing to the negligence of the Municipality and requested them to take immediate steps to ascertain the extent of the loss.

In consequence of this notice a Panch was formed which between the 9th and 20th of June inquired into the damage done and estimated it at something under Rs. 3,000. This presumably was done under the provisions of section 165 (2) which provides that the Municipality may make compensation out of the Municipal fund to any person sustaining any damage by reason of the exercise of any of the powers vested in them under the Act.

1911.

MUNICIPALITY OF HUBLI v. LUCUS EUSTRATIO RALLI.

The plaintiffs were not satisfied with this award and accordingly filed this suit, in the plaint in which they charge defendants with negligence in the following terms :—

"The defendants have for some time been carrying on their work of reclamation of the tank. In the course of their operations they removed the dam at the southern extremity of the tank, altering the levels of the tank bed and its surroundings and diverting the natural and customary flow of water, having formed a tank at the north-east corner of the dam and directed a considerable flow of water into it also for their own purposes. This was the situation of things on the 7th June 1907, when there was rain in Hubli. The direct consequence was that a large body of water by force of the defendants' operations flowed into the tank at the north-east corner of the dam aforesaid and into the area under reclamation and owing to the change of levels and diversion of water and the removal of the dam by the defendants without due provision for the control or disposal of water thus collected, the same flowed into the aforesaid factories and there damaged the plaintiffs' goods to the extent of Rs. 10,145-15-6 at the lowest, in spite of the plaintiffs' efforts to save them."

Notice of suit was duly given within six months of the date of the injury complained of and no exception is taken in this appeal as to the sufficiency of the notice. In order to establish their allegations of negligence the plaintiffs called only one witness, namely Mahalingappa, who describes himself as the plaintiffs' Bazar-man. He says his duties are to buy and sell goods for plaintiffs, to take delivery and prepare goods for sale and supervise all goods. He states that between Gulkawa's tank and the factories there was a big dam; that until the demolition of the dam the water from the tank side never came into the factories, but that great damage was caused on the 7th of June to goods in the factories as the dam had been removed and used by the defendants to level up the tank bed. He says that a small bund to the north of the tank shown on the Commissioner's map was demolished by the defendants a few days before the rainfall and that that bund had been intended to prevent the running water from the culverts on the north side getting into the tank and to turn it into the nálla on the east. Then he says that the mouth of the nálla on the east was formerly wider, but that its width had been lessened by cuttings made by the defendants, although he admits that the nálla bottom had been deepened and the bank raised. He says that

formerly the ground at the northern end of the nálla sloped from south to north, but that the defendants had shortly before the rains cut the bank and made the ground level by which reason the greater portion of the water did not run into the nálla but over the marked area into the factory ground.

I will first consider the last of these charges. I do not think any negligence is proved on the part of the defendants. No question was put to any of the defendants' witnesses upon the point nor is the charge made in the plaint. Assuming the defendants did this work the levelling of the ground which had formerly sloped from south to north would obviously facilitate the flow of water from the eastern Station-Road culvert into the nálla and even if the bank of the nálla had been cut into in order to afford access for the purpose of levelling the bed, the levels show that there was a rise of a foot and half to the west of that cutting which would have tended to direct the flow of the water into the nálla. Moreover negligence is a relative term and I do not think defendants can be held guilty of it because at the moment they were engaged on a small improvement which left a gap in their system this extraordinary fall of rain came upon them: see the observations of Bramwell B. in *Ruck* v. *Williams*[1]. The alleged narrowing of the mouth of the nálla does not appear to me evidence of negligence in view of Mahalingappa's statement that the bottom was deepened and the banks raised and Mr. Coen's evidence that the nálla was widened and cleaned out.

In view of the evidence of Mr. Coen who designed the drainage works, I am unable to accept the statement of Mahalingappa that there was any small bund to the north of the tank. There was the water-channel 4½ feet wide from the western culvert to the nálla on the sides of which the excavated earth had been thrown up. Mr. Coen cannot recollect whether the channel had been filled up before or after the flood of 1907 and replaced by another channel parallel with the Station Road.

It is to be observed that none of the acts of negligence alleged by the plaintiffs' witness supports the case made in the plaint which

(1) (1858) 27 L. J. Ex. 357.

1911.

MUNICIPALITY OF HUBLI v. LUCUS EUSTRATIO RALLI.

alleges the collection of water in the small tank and on the old tank area and that the defendants failed in controlling and disposing of it, suggesting a case similar to that of *Rylands* v. *Fletcher*[1].

There was in fact no collection of water upon the reclaimed area, and it appears to me that the plaintiffs' case so far as it rests on the removal of the dam must be based upon something in the nature of a servitude on the owner of the tank area to retain the dam by way of insuring his southern neighbours against floods from the north even after the tank site had been drained and filled in. Such a servitude could only be acquired by prescription and there is no suggestion of the existence of any such right.

The proximate cause of the injury to the plaintiffs' land was the extraordinary rainfall and it is difficult to see how in the general flooding of the town which must necessarily have followed, and which is deposed to by Shankar Raoji Apte and most of the defendants' witnesses, the plaintiffs' factory could possibly have escaped injury lying as it did at a much lower level not only than the tank area but also than the other surrounding land. It is possible that if the old southern dam had remained, extending from the western road to the point where the weir discharged flood water, the floods to the *north* of the dam would have been checked or even carried off without injury to the plaintiffs. It may I think be assumed that the officers of the Municipality thought in June 1907 that the work which involved the removal of part of the southern dam had contributed to the damage done to the plaintiffs and for that reason assessed the compensation payable.

This compensation would be payable at the option of the Municipality to mitigate a hardship consequent on the execution of authorized works. If the removal of the dam was not authorized by the provisions of the Statute under which the Municipality acted, or was conceived and carried out negligently and not as part of a reasonable scheme, then only would the plaintiffs be entitled to recover damages from the defendants by suit.

(1) (1868) L. R. 3 H. L. 330 at p. 338.

Now in my judgment the scheme was a perfectly reasonable one. The Municipality for the benefit of the cotton merchants at Hubli were providing a market at a convenient spot. They were also providing for a drainage scheme which would take the place of the old primitive arrangement of a large tank and the evidence afforded by its success in the years 1905, 1906 and 1908 is strong reason for holding that there was no rashness or negligence in the design.

The learned Judge has found that negligence was proved in carrying out the scheme in that the defendants' act in removing the big bund before completing their drainage work was most unwise, that the drainage provided for before the storm was insufficient, that the reclamation works were undertaken and executed unsystematically and without taking the regular levels of adjacent sites and without an estimate of the quantity of water that would run into the small tank and providing means for its proper discharge without flooding the neighbouring sites. It does not appear to me that the evidence of Mahalingappa, the plaintiffs' Bazar-man, who had no practical experience of drainage works and whose evidence was contradicted on various points by the defendants' more experienced witnesses, justifies these conclusions. The scheme had stood the test of two monsoons, the rainfall of the 7th of June was far heavier than any which had occurred during the recollection of any of the witnesses who were examined upon the point and there is good evidence to show that the works that were in progress on the 7th of June were all works calculated to improve rather than impede the drainage.

The respondents' Counsel endeavoured to persuade us that we had to deal here with the case of a natural stream diverted by the operations of an unauthorized stranger into a channel which was not sufficient in time of extraordinary flood to carry off its waters without injury to the plaintiff, in that case, it was said the defendants would on the authority of *Fletcher* v. *Smith*[1] be liable if the combination of the removal of the dam with the extraordinary rainfall resulted in damage to the neighbouring

(1) (1877) 2 App. Cas. 781.

1911.

MUNICIPALITY OF HUBLI v. LUCUS EUSTRATIO RALLI.

land owner. The facts above set out show however that we are not here dealing with a natural stream and that the defendants can appeal to statutory authority with regard to their general scheme of operations.

In a suit of this nature the onus of proof of negligence lies on the parties alleging it, see *Whitehouse* v. *Birmingham Canal Company*[1], and if neglect in the execution of their statutory powers and duties is not brought home to the Municipality a suit against them must fail as being unsustainable in law however great the damage the plaintiffs may have suffered from the extraordinary flooding uncontrolled by the old tank dam; see *Dunn* v. *Birmingham Canal Company*[2].

For these reasons I am of opinion that the decree appealed from should be reversed and the suit be dismissed with costs throughout.

RAO, J.:—The facts of this case are as follows:—The plaintiffs are owners of certain Ginning factories at Hubli. To the north of the factories there lies an area of land which until recently formed a public tank separated from the plaintiffs' premises by a dam 7 or 8 feet high which was the southern boundary of the tank. Plaintiffs' land was on a lower level than the bed of the tank. The tank was fed principally by the water from the nálla coming from the north side and running parallel to the tank. The defendant-Municipality in whom the tank was vested resolved to reclaim the bed of the tank for the purpose of extending the Municipal Cotton Market. In December 1904 they removed the dam and formed a small tank at the south-east corner of the dam. On 7th June 1907 while the reclamation works were in progress there was an unusually heavy fall of rain amounting to nearly three inches within half or three-fourths of an hour. The rain water accumulating on the reclaimed area flowed down to the plaintiffs' land, entered the factories, and caused considerable damage to the goods lying in their godowns. On 23rd November 1907, the plaintiffs filed the present suit to recover from the defendants Rs. 10,145-15-6 as damages for the loss sustained. The cause of action alleged in the plaint was

(1) (1857) 27 L. J. Ex. 25. (2) (1872) L. R. 8 Q. B. 42.

negligence on the part of the defendants in carrying out the reclamation works.

The defendants contended, *inter alia*, that the damage to the plaintiffs' goods was the result of the abnormal heavy rain which fell on the 7th June 1907, that no precautions on their part could have averted the damage even if the old state of things, *viz.*—the height of the southern dam and the level of the tank-bed—had not been changed in the least. The Subordinate Judge who tried the suit held that the damage complained of was wholly due to the defendants' negligence in carrying out the reclamation works and that, therefore, they were liable to make good the loss sustained by the plaintiffs. He, therefore, passed a decree awarding to the plaintiffs Rs. 9,677-9-7, as damages.

Against this decree the defendants appealed to the High Court.

At the hearing of the appeal the only question that was argued was whether the defendant-Municipality was liable for the damage caused to the plaintiffs' goods by the flood water on 7th June 1907. I am of opinion that the defendants are not liable. The old tank was a public tank vested in the local Municipality and in exercise of the powers conferred upon them under section 54, clauses (*g*) and (*i*) of Bombay Act III of 1901 the defendant-Municipality reclaimed the greater part of the tank for the purpose of extending the Municipal Cotton Market. In so doing they would not render themselves liable for any injury or damage caused to the neighbouring land owners, unless they acted with negligence in carrying out the reclamation works. The burden of proving such negligence lies on the plaintiffs. The Subordinate Judge found that the defendants' act in removing the big dam before completing the drainage works was most unwise, that the drainage provided before the storm was insufficient, that the reclamation works were carried out unsystematically without taking the required levels of the adjacent sites and without estimating the quantity of water that would run into the small tank and without providing means for its proper discharge. I am unable to accept this finding as warranted by the evidence recorded in the case. The only witness examined by the plaintiffs who speaks to the alleged wrongful acts on the part

1911.

MUNICIPALITY OF HUBLI v. LUCUS EUSTRATIO RALLI.

of the defendants is Mahalingappa who is plaintiffs' clerk (Exhibit 63). He states that the damage done to the plaintiffs' goods was due (1) to the removal of the big dam which formed the southern boundary of the old tank, (2) to the removal of a small dam to the north of the tank which was intended to prevent the rain water from the culvert on the northside getting into the tank, (3) to the width of the nálla being lessened by the earth cutting made on its sides and (4) to the removal of the slope at the mouth of the nálla, with the result that the greater portion of the rain water did not run into the nálla but found its way along the course shown by the Commissioner on the map Exhibit 26. There is no dispute that the big dam was removed at the end of 1904, but no damage was done to the plaintiffs' property in the rainy seasons of 1905 or 1906. Those were years of normal rainfall, and if no damage was done during those years it is clear that the damages caused by the flood of 1907 was not attributable to the removal of the big dam. As to the small dam to the north of the tank, Mahalingappa is contradicted by Mr. Coen (Exhibit 120) who was the Chairman of the Hubli Municipality in 1904-05. He says that after the removal of the big dam a temporary channel was made by the defendants about four-and-a-half feet wide and two-and-a-half feet deep for the purpose of diverting the small quantity of water coming from the culvert in the north; that water had no bearing on the flooding of the mills; that the soil was removed and put on either side of the channel *but no dam was made*. It is clear, therefore, from Mr. Coen's evidence that there was no dam in existence to the north of the old tank and none was removed. As to the width of the nálla being lessened, Mahalingappa is again contradicted by Mr. Coen who says that the channel leading to the tank instead of being lessened was widened and cleaned out. The Secretary to the Municipality (Exhibit 107) says that the Municipality not only cleaned but also deepened the nálla coming from the Station Road, and this is admitted by Mahalingappa. Lastly with respect to the removal of the slope at the mouth of the nálla, neither the Secretary nor the Chairman of the Municipality have been cross-examined on this point. Mahalingappa's evidence standing by itself and uncorroborated by any other evidence on the

plaintiffs' side is not entitled to any weight, and cannot be accepted as proving negligence on the part of the defendant-Municipality. Nor can any reliance be placed on the Commissioner's report (Exhibit 25) as to the condition of the reclaimed land on or before 7th June 1907, as it is based not on his personal knowledge but on an information given to him about 18 months after the date of the occurrence by Mahalingappa and others. On the other hand there is the evidence of both the Chairman and the Secretary of the Municipality, which shows what precautionary measures had been taken by the Municipality for the drainage of the area under reclamation. Mr. Coen says as follows:—"The dam of the Gulkawa tank was removed at the end of 1904. To prevent a rush of waters we widened the waste-weir nearly to its uttermost width and lowered the same, by two feet to two and a half feet. Also the channel leading to the tank was widened and cleaned out and the outlet channel beyond the waste-weir was cleaned and widened. A small tank was made at the south-east corner of the original tank and made five feet deeper than the original bed of the tank. The sides of the tank were raised by about two feet to two and a half feet to let the water pass on more quickly. After the demolition of the old tank these works were done. The waste-weir work was done simultaneously with the demolition of the tank Bandh and the deepening of the smaller tank was done one or two months after. The cleaning, &c., of the outlet channel was done along with the waste-weir work." Mr. Coen is corroborated by the Secretary of the Municipality (Exhibit 107). This evidence is in my opinion entitled to considerable weight. It shows the precautions taken by the Municipality for the proper drainage of the reclaimed area. In the rainy seasons of 1904, 1905 and 1908 nothing occurred to show that these precautions were insufficient. I am therefore satisfied that the Municipality acted with due care and caution in carrying out the reclamation works for the purpose of extending the Municipal Cotton Market. The real cause of the damage done to plaintiffs' goods appears to me that owing to the unusually heavy fall of rain on 7th June 1907 water from all sides entered into the plaintiffs' land, which was on a much lower level than the adjoining lands on the north and

1911.

MUNICIPALITY OF HUBLI v. LUCUS EUSTRATIO RALLI.

the west, and damaged their goods. Witness (Exhibit 120) the Chairman of the Municipality says that he had been in Hubli over 20 years, that this was the most unusual downpour, and that even if the dam had not been demolished the same flooding would have been caused by the downpour, that the total rainfall on 7th July 1907 came to 2 inches and 91 cents in 40 to 45 minutes, and that he had not known during the last 20 years of rain falling more than one inch in the course of an hour. This evidence, corroborated as it is by other evidence in the case, clearly shows that the damage in the present suit was mainly, if not wholly, attributable to this extraordinary fall of rain. It was an occurrence in the nature of a *vis major*, for which the defendants are not responsible. The present case falls within the principle laid down in *Nichols* v. *Marsland*[1].

Independently of this circumstance, I would hold that the defendant-Municipality, in exercising the powers conferred upon them by Statute for the purpose of reclaiming the tank, acted with ordinary care and skill and after taking proper precautions for the drainage of the area under reclamation. They are therefore not liable. In *Geddis* v. *Proprietors of Bann Reservoir*[2] Lord Blackburn says, "It is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone." So too in *Ricket* v. *Directors, &c., of Metropolitan Railway Co.*[3], it is laid down, "When an act is done by a company in excess of its powers, or in a wanton and careless use of them, there is an injury for which (an action lies). But things done by a company in the due execution of its powers are lawful, being duly authorized, and no action lies."

If the defendants had been private individuals and had undertaken or carried out the reclamation works in the exercise of their right of ownership, I do not think they would have been liable for the damage done to the plaintiffs' goods by the flood of 1907. Being owners of the land they were entitled to use it for every lawful purpose. They had a right to reclaim it, and make the best possible use of it they could, and in so doing

(1) (1876) 2 Ex. D. 1. (2) (1878) 3 App. Cas. 430 at p. 455.
(3) (1867) L. R. 2 H. L. 175 at p. 202.

there was no duty cast upon them by law to preserve the old dam for the benefit of the owners of the adjoining land which was situted on a lower level. They were under no legal obligation to prevent the flow of the surface water from their land to the plaintiffs' property either by percolation or gravitation. In *Rylands* v. *Fletcher*(1) Lord Cairns observes, "If, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature." These observations apply to the present case.

On these grounds I would reverse the decree and dismiss the plaintiffs' suit with costs.

Decree reversed and suit dismissed.

G. B. R.

(1) (1868) L. R. 3 H. L. 330 at p. 338.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

MAHOMED IBRAHIM VALAD ABDUL RAHIMAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHEIKH-HAMJA VALAD MAHOMEDALLI (ORIGINAL DEFENDANT), RESPONDENT.*

1911. *July* 24.

Civil Procedure Code (Act V of 1908), section 11, Explanation IV—Res judicata—*Redemption suit—Second suit in ejectment—Court—Discretion—In ejectment suit a decree for redemption can be passed—Practice and procedure.*

Where a person brings a redemption suit and fails, his second suit in ejectment against the same defendant is not barred by *res judicata*.

The question whether any matter might and ought to have been made a ground of defence or attack in a previous suit must depend on the facts of each

* Second Appeal No. 861 of 1910.