APPELLATE CIVIL

Before Mr. Justice Vyas.

1952
Oct. 10

ABBASALI HASANALI PEERJADE, AND ANOTHER (ORIGINAL DEFENDANTS NOS. 2 AND 3), APPELLANTS *v.* SHAIKH MUNIR SHAIKH DAGU, AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT NO. 1), RESPONDENTS.*

Riparian owners—Rights of—Whether entitled to store water by constructing a dam.

The plaintiffs, some of whom were lower riparian owners, brought a suit against the defendants, who were higher riparian owners, for a declaration that they had a right of taking water of a stream which passed by their village by constructing a dam within the limits of the village with a view to storing water in order to raise crops and also for an injunction to restrain the defendants from doing any act to obstruct the stream and thereby disturbing such right. On the question whether the plaintiffs were entitled to store water for raising crops by constructing a dam,

Held, (1) that those of the plaintiffs, whose lands did not actually abut on the stream, were not riparian owners at all and had no natural right to use the water of the stream;

(2) that although such of the plaintiffs as were lower riparian owners were entitled to take water of the suit-stream for their domestic use and for other uses connected with the lands which actually abutted on the stream, they had not the right as riparian owners to store the water by construction of a dam across the flowing water.

The Secretary of State v. *Sannidhiraju Subbarayudu*,[1] *Lyon* v. *Fishmongers' Company*,[2] *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*,[3] *McCartney* v. *Londonderry and Lough Swilly Railway*,[4] and *Gaved* v. *Martyn*,[5] referred to.

Second Appeal against the decision of T. K. Chapatwala, Civil Judge (Senior Division) with Appellate powers, at Dhulia confirming the decision of H. S. Tadvi, Civil Judge (Junior Division) at Nandurbar.

The plaintiffs, who were sixteen in number, filed the suit, out of which the present appeal arose, for a declaration that they had a right, many years old, of taking water of the stream which passed by their village of Girasgaon by constructing a dam within the limits of that village with a view to storing water in order to raise Bagayat crops and also for

* Second Appeal No. 1144 of 1949.

[1] (1931) 34 Bom. L. R. 500 P. C.
[2] (1876) 1 A. C. 662.
[3] (1875) L. R. 7 H. L. 697.
[4] [1904] A. C. 301.
[5] (1865) 19 C. B. (N. S.) 732.

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an injunction to restrain the defendants from doing any act such as the construction of a dam within the limits of Dhekwad village or digging of water channels for irrigating lands in Narayanpur Digar, so as to obstruct the stream and thereby disturbing the right of the plaintiffs to take water from that stream for growing Bagayat crops.

The stream in question passed through several villages, viz., Dhekwad Digar and Narayanpur Digar, then by the side of the village Girasgaon and then flowed through several villages until it met the river Tapti. The villages Dhekwad Digar and Narayanpur Digar were Jahagir Inam villages which originally belonged to the ancestors of defendants Nos. 2 and 3 respectively. Defendant No. 1 was a tenant of defendant No. 3.

Defendants Nos. 1 and 2 (appellants) contended, *inter alia,* that the plaintiffs had no right to use the water of the stream after first storing it by constructing a dam across the stream in the village of Girasgaon.

The trial Court granted a decree to the plaintiffs declaring that they had a right and also an easement extending over many years to grow Bagayat crops by constructing a dam within the limits of the village of Girasgaon and thereby storing the water of the stream flowing through it. It also granted an injunction restraining the defendants permanently from interfering with such rights and easement.

The appellate Court confirmed the decree of the trial Court with a slight variation.

Defendants Nos. 1 and 2 appealed.

B. N. Gokhale, for the appellants.

S. G. Patwardhan, for respondents Nos. 1 to 8 and 11 to 18.

Vyas J. [After setting out the facts and dealing with some points which are not material to the report proceeded.]

The next point which is pressed by Mr. Gokhale for the appellants is an important point which goes to the root of the case and that point is: Even assuming that the plaintiffs as lower riparian owners have got a natural right to the use of the water of this stream, are they entitled to construct a *bandhara* across the stream, in their own village of Girasgaon? What the plaintiffs are obviously wanting to do in this case is to build a *bandhara* across the stream in Girasgaon, store the water by that contrivance and use that water for their own domestic requirements and agricultural purposes and also

permit that water to be used by several of them who are not riparian owners in so far as their own lands are not abutting on the stream itself. I have already pointed out above that plaintiffs Nos. 1, 2, 3, 4, 6, 7, 8, 11, 12, 14, 15 and 16 are not riparian owners at all; and yet the plaintiffs are seeking to build a *bandhara* and store water of this stream so that the water may be made available even to such of them who are not riparian owners for their agricultural operations. The question before us thus is: Whether the plaintiffs are entitled to store or collect the water for the abovementioned purposes by the construction of a dam?

Now, a riparian owner is a person whose land actually abuts on a stream and there is no doubt that he has got a natural right to use the water of that stream primarily for domestic purposes and also for carrying out agricultural operations upon the lands abutting on the stream. Now, the contention of Mr. Gokhale, which, in my opinion, is a perfectly correct contention, is that it is not a natural right of a riparian owner to put an obstruction across the path of a flowing stream and collect water by that artificial means. The point which is sought to be made by Mr. Gokhale is that a riparian owner is entitled to the use of the water in its natural flowing state, that is to say, as it flows along in a natural way in a stream. It is submitted by him that even the quantity of water which is reasonably required by a riparian owner cannot be stored by him by the erection of a dam because storage in that manner is an artificial contrivance. There is a great deal of difference, says Mr. Gokhale, between constructing water channels or employing oil engines or *mots* to carry the water from a running stream to agricultural holdings abutting on the stream and construction of *bandharas*. Mr. Gokhale is right. The former, i.e., water channels, oil engines or *mots*, are no doubt artificial contrivances in a way, but those are contrivances without which it would be impossible to make the water available even to the lands which are actually situated on the bank of the stream, in other words impossible to exercise even the natural right of a riparian owner. On the other hand, the storage of water by erecting a *bandhara* is a mechanical or artificial contrivance of a different category altogether. Clearly it could not be said that non-resort to an artificial method of storage by the construction of a *bandhara* would make it impossible for a riparian owner to exercise his natural right to the use of the water. It is next contended

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by Mr. Gokhale that in no case can a riparian owner store water more than what is reasonably required for his ordinary purposes, namely, domestic and agricultural purposes. In this case, there is every likelihood that the quantity of water sought to be stored by the plaintiffs by constructing a dam across the stream would be a quantity far in excess of the reasonable requirements of the plaintiffs for their domestic purposes and agricultural operations and that says Mr. Gokhale the plaintiffs are not entitled to do under the guise of a natural right to use the water. Finally, Mr. Gokhale's contention is that in this particular case, by the construction of a *bandhara* across the stream, the plaintiffs are not merely seeking to exercise the natural right of riparian owners, but are wanting to make water available to those persons who not being riparian owners have not got a natural right to the use of the water, and this they are not entitled to do in any event. As I have stated above, I see considerable force in all these contentions of Mr. Gokhale.

In the case of *The Secretary of State for India* v. *Sannidhiraju Subbarayudu*,[1] it was held by the Privy Council that—

"the right of a riparian owner to take water from the stream for all ordinary purposes (namely for domestic use and for irrigation of his own property alone) is a natural right, analogous to an easement but not in the strict sense of the word an easement."

In the body of the judgment of Their Lordships which was delivered by Viscount Dunedin, it was observed (p. 505):—

"A riparian owner is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream. In ordinary cases the fact that his land abuts on the stream makes him the proprietor of the bed of the stream *usque ad medium filum*. But he may not be. He may be ousted by an actual grant to the person on the other side, or he may be and often is ousted by the Crown when the stream is tidal and navigable, because where the stream is tidal and navigable, the solum of the bed belongs to the Crown. Yet in neither of these cases are his rights as a riparian owner to take water affected. He would have no right in the two cases put to erect an *opus manufactum* in the bed of the stream even if from the point of view of navigation or diversion of the direction of the flow it was unobjectionable, for the land is not his, but his right to take water remains."

Mr. Gokhale for the appellants relies upon these observations of their Lordships and contends that as the land of the bed of the stream passing by the village of Girasgaon did

[1] (1931) 34 Bom. L. R. 500 P. C.

not belong to the plaintiffs, they were not entitled to erect an *opus manufactum* in the shape of a *bandhara* across the stream and that the only right which they were entitled to was the right to take water.

In the case of *Lyon* v. *Fishmongers' Company*,[1] certain important propositions were laid down in the judgments of Lord Chancellor Cairns, Lord Chelmsford and Lord Selborne, and those propositions were: "(1) The right of a riparian owner to the use of the stream does not depend upon the ownership of the soil of the stream; and (2) The right of a riparian owner to take water is, first of all, for domestic use, and then for other uses connected with the land of which irrigation of the lands which form the property is one." It is clear, therefore, that such of the plaintiffs as are lower riparian owners are entitled to take water of the stream first of all for their domestic use and thereafter for other uses connected with the land, for instance the irrigation of the lands which actually abut on the stream. They would not be entitled to store the water by the construction of a dam across the flowing water, for that is not the right which they have got as riparian owners.

In *Swindon Waterworks* v. *Wilts and Berks Canal Navigation Company*,[2] it was observed by Lord Cairns (p. 704):—

"Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said *ad lavandumet ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use."

Mr. Gokhale is right in contending that the storage of water by an artificial contrivance of the construction of a dam cannot be said to be an ordinary purpose for which a riparian owner is entitled to use the water of a stream on which his lands abut. In *McCartney* v. *Londonderry and Lough Swilly Railway*,[3] also, it was observed (p. 307):—

"In the ordinary or primary use of flowing water, a person dwelling on the banks of a stream is under no restriction.....The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."

[1] (1876) 1 App. Cas. 662. [2] (1875) L. R. 7 H. L. 697.
[3] [1904] A. C. 301.

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Clearly thus the plaintiffs, as lower riparian owners, are under no restriction in the ordinary or primary use of flowing water of this stream. As I have pointed out above, the storage of water by an artificial contrivance of a dam can be said to be neither an ordinary use nor a primary use of the flowing water. Besides, as was observed in the above-mentioned case, the use of water must be reasonable and I cannot agree with Mr. Patwardhan in this case that the plaintiffs are seeking to make a reasonable use of water when they want to make the water available to as many as 12 of the plaintiffs who are not even riparian owners. Only 4 out of the 16 plaintiffs, namely, plaintiffs Nos. 5, 9, 10 and 13 whose lands abut on the stream are entitled to the use of this water for their tenements and irrigation of their lands.

Gale, in his treatise on the Law of Easements, 12th Edition (1950), has observed at page 231 that "the natural rights of a riparian owner may be shortly defined as three-fold; First he has a right of user. He can use the water for certain purposes. Secondly, he has a right of flow. He is entitled to have the water come to him and go from him without obstruction...." We are not concerned in this case with the third right. It is clear, therefore, that the lower riparian owners still further down, namely, the residents of the villages of Fulsar, Nimboni and other villages whose lands abut on this stream which also passes through those villages are entitled to expect that the riparian owners above them, namely, the plaintiffs, would let the water of this stream go to them without obstruction. It is true that no resident of any of the villages of Fulsar, Nimboni and other villages is before us as a party to this litigation. But that would not, in my opinion, alter the merits of the position when we are considering the question whether the plaintiffs are entitled to obstruct the flow of the water at Girasgaon by constructing a *bandhara* across the stream there. The point is that they have not got a natural right to do so, because the lower riparian owners further down are entitled to the water of the stream going to them without any obstruction.

In *Swindon Co.* v. *Wilts Co.*,[1] where the appellants, being riparian owners on the bank of a stream, claimed the right to collect the water of the stream into a permanent reservoir for

[1] (1875) L. R. 7 H. L. 697.

the supply of an adjacent town, it was held that this was not a reasonable use of the water within the meaning of the rules. Now, the use of the water which the plaintiffs are wanting to make in this case is analogous to what the appellants wanted to do in that case. There the appellants wanted to collect water into reservoir so that the water may be supplied to the adjacent town. Here the plaintiffs are seeking to collect the water by constructing a dam across the stream at Girasgaon, so that the water may be made available to as many as 12 of the plaintiffs whose lands do not abut on the stream but may be said to be adjacent lands. On the authority of the decision in the English case cited above, I hold that the use which the plaintiffs are seeking to make of the water of this stream is not a reasonable use and they have not got a natural right to make such a use. Then again, in *McCarteny* v. *Londonderry Co.* Lord Macnaghten said (p. 306):—

> "There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes—sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all."

Now, what the plaintiffs here are wanting to do would fall within the category of the third case because the use which they are seeking to make of the water of this stream is foreign to or unconnected with the riparian tenements, in so far as plaintiffs Nos. 1, 2, 3, 4, 6, 7, 8, 11, 12, 14, 15 and 16 are concerned. Plaintiffs Nos. 5, 9, 10 and 13 have no right to build a dam or *bandhara* across the stream at Girasgaon and to store the water in order to make the water available to those tenements which are not riparian tenements. In *Gaved* v. *Martyn*,[1] Erle C. J. observed (p. 759):—

> "The flow of a natural stream creates mutual rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality."

It is thus clear that each one of the riparian owners whose lands are situated on this stream has got mutual rights and

[1] (1865) 19 C. B. (N. S.) 732.

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liabilities and each one is bound to see, while making a reasonable use of the water by himself, that every other riparian owner gets the use of the water without the flow or the quantity or quality of it being altered. Gale in his book on Easements, which I have referred to already above, says at page 236:—

> "To this may be added that as between himself and lower riparian owners, the upper owner is not only bound to allow the water to flow on, but is entitled to insist that it shall flow on. 'He has the right to have the natural stream come in its natural state, in flow, quantity and quality, and to go from him without obstruction.' Any obstruction by lower riparian owner of such a character that it might reasonably be expected that injury would be caused to an upper riparian owner is actionable at the suit of the latter."

Mr. Gokhale is relying on these observations, and I think quite rightly, in support of his submission that defendants Nos. 2 and 3 who are the upper riparian owners are entitled to insist that the plaintiffs who are the lower riparian owners, but not the lower-most, shall allow the flow of the water to continue forward and downward in its natural state, both as regards quantity and quality. As it was pointed out by Erle C. J. in *Gaved* v. *Martyn,* there are mutual rights and liabilities as between all the riparian owners. There is clearly an obligation on defendants Nos. 2 and 3 to let the plaintiffs who are lower riparian owners have a reasonable quantity of water for their domestic requirements and agricultural purposes. But what the plaintiffs are wanting to do here is to make that obligation more onerous. There is a mutual obligation between all the riparian owners, from uppermost to lowermost of them, to see that the water flows down without its quantity being changed or quality altered. That obligation, so far as defendants Nos. 2 and 3 are concerned, becomes clearly more onerous if they have to allow plaintiffs to build a *bandhara* across this stream at Girasgaon and yet to see that the stream flows down to the lowermost riparian owners in its natural state. In another manner also, the obligation upon defendants Nos. 2 and 3 to see that the plaintiffs get a reasonable quantity of water for their ordinary or primary purposes and domestic uses becomes more onerous if they are subjected to a position in which they will be compelled to let the plaintiffs have water far in excess of what is reasonably required for their domestic and agricultural purposes. There is every probability that the water which the plaintiffs want to store will be much in excess of what they, in pursuance of their natural right as riparian owners, would reasonably want for

their own domestic and agricultural requirements. This is clear enough, because the stored water is sought to be made available to those who have got no lands abutting on the stream. Defendants Nos. 2 and 3 are being obliged to suffer such a position and that is a position clearly contrary to the law of rights and liabilities of riparian owners. Mr. Gokhale is right in submitting that the plaintiffs are not entitled to impose an obligation on defendants Nos. 2 and 3 to suffer such a position.

The net result, therefore, is that defendants Nos. 2 and 3 are rightly contending that the plaintiffs have not got any natural right to the use of the water of this stream either for their domestic purposes or for their agricultural requirements by collecting the water first by constructing a dam across the stream and then making that water available to their lands. In any case, the plaintiffs have got no natural rights to make the water available to as many as 12 of them whose lands do not abut on the stream nor are they entitled to build a dam across the stream for any such purpose.

Mr. Patwardhan for the respondents has sought to support the judgment of the two Courts below and his argument is that the rights of the appellants (defendants Nos. 2 and 3) as upper riparian owners will not suffer in this case even if the plaintiffs were permitted to build a dam or *bandhara* across the stream at Girasgaon. His submission is that the stream passes first through the villages of Dhekwad Digar and Narayanpur Digar and then goes down to the village of Girasgaon and that, therefore, even if the plaintiffs collected the water by obstructing the flow of the stream by putting up a dam or *bandhara* across the stream at Girasgaon, the defendants' natural right to use the water of the stream for their ordinary or primary purposes or domestic uses would not be affected. The quantity of water available to them would always remain the same and there would be no obstruction to them in their continuing to exercise their natural right to the use of the water. In my view, this is not a correct approach to the case. The correct approach is to examine whether it is a natural right of the plaintiffs, in respect to the use of the water of this stream, to store the water first by the construction of a *bandhara* and then to make it available to their own lands and also to the lands of several of them who are not riparian owners at all. For the reasons already pointed out *in extenso*, I answer the question against

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the plaintiffs. It is beside the point to consider whether the action of the plaintiffs in constructing a *bandhara* at Girasgaon would prejudicially affect the natural right of the defendants. The point here is: Are the plaintiffs entitled to store the water by building a *bandhara* across the stream in exercise of their natural right to use the water of the stream. That point must be found against them for the reasons already stated.

[The rest of the judgment is not material to the report.]

Appeal allowed.

K. B. S.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice, Mr. Justice Gajendragadkar and Mr. Justice Tendolkar.

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Oct. 14

A. A. ANSARI, APPLICANT *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY, RESPONDENT.*

Taxation on Income (Investigation Commission), Act (XXX of 1947), ss. 5 (1), 8 (5), 3, 5 (2), and 6 (5)—Indian Income Tax Act (XI of 1922), ss. 34, 66 (2)—Excess Profits Tax Act (XV of 1940), s. 15—Evasion of payment of Income-tax—Case referred to the Investigation Commission for investigation and report on loss of revenue—Whether Commission empowered to estimate income of assessee for ascertaining loss of revenue—No appeals against the decision of the Commission—Only power to refer to High Court under s. 8 (5).

On the contention that the Investigation Commission to which a case has been referred by the Central Government under s. 5 (1) of the Taxation of Income (Investigation Commission) Act, 1947, for investigation and report had no power merely to estimate the income of the assessee,

Held, that the Commission in investigating and reporting on a case referred to it by the Central Government had jurisdiction to estimate the income of the assessee to ascertain the loss of revenue.

On the contention that as in the present case circumstances referred to in sub-s. (5) of s. 6 of the Act did not obtain the only power the Commission had was to report under s. 5 (2) of the Act,

Held, that sub-s. (2) of s. 5 of the Act deals with a case where either the Commission on the materials before it or even by exercising its best judgment is unable to decide what income has escaped taxation, or where in the opinion of the Commission no substantial evasion has

* Income Tax Reference No. 17 of 1952.