(1870) 01 CAL CK 0011

Calcutta High Court

Case No: Regular Appeal No. 132 of 1869

The Court of Wards Bahadur and Another		APPELLANT
	Vs	
Raja Lilanand Singh and Others		RESPONDENT

Date of Decision: Jan. 12, 1870

Judgement

Phear, J.
I am of opinion that the decision of the Subordinate Judge is right, precisely for the reasons which he himself gives in his judgment. It is to be regretted that the plaint has been framed with, apparently, a very vague apprehension of the plaintiff"s right in the matter. The prayer runs shortly thus : to adjudicate prescriptive right to irrigate the lands of certain mauzas; to remove two bands on the named river at specified places; and to obtain an order for the flow of water of the said river, as far as the villages comprising the Pergunna of Havelli Kharrakpore.

2. Now it is conceded, I think, that the plaintiff"s right is simply such a right, as a riparian proprietor has, to have the water of a stream allowed to come down to him substantially in its natural state, not materially diminished by the user and acts of proprietors above him. This is not a prescriptive right; it is a right naturally incident to his property in the land through which the stream passes, and he can have no claim to remove bands situated in the stream upon land which is not his except so far as the removal may be necessary to prevent them from interfering with his natural right to the water; and it seems to me almost nonsense in the mouth of an educated man, such as I suppose the Government pleader at Bhaugulpore must he, to pray to obtain an order for the flow of the fiver to a specified place.

3. But, treating this suit as a complaint against the defendants for having, by means of certain specified bands, taken away an excessive quantity of water from the river to the damage of the plaintiff below, I think that the matter of that complaint is not made out by the plaintiff"s evidence. I quite agree with the Subordinate Judge that the oral testimony

of the plaintiff"s witnesses is not to be depended upon. More than one of them, as it seems to me, contradicts himself; and in more than one instance, the witnesses are contradictory of each other. But, moreover, as the Subordinate Judge observes, it is the main object of them all to make out that there were no bands in the river at the places mentioned until so late as 1274 (1867); and yet it is quite clear from the complaints which have been made by the plaintiff, or by the plaintiff"s predecessors, in the Criminal Court, that such bands have existed ab different times before 1274, even so far back as 1845. The evidence, therefore, of the plaintiff"s witnesses is essentially untrue, and I have no doubt with the Subordinate Judge that bands have been erected in the river by the defendants for the purpose of taking waters from it during a long course of time whenever there was need. That being so, and there having been clearly, as far as I can see, no continuous maintenance of a band, each one of the acts of setting up a band constituted a separate cause of action, and the plaintiff"s complaint ought to have been specifically directed to one or more of these, Had the plaint been so framed, or in other words had this been a suit for damages and for a declaration of right based on the alleged erection of these bands in 1274, then, supposing the fact of erection proved, the next principal question would have been,--Did the defendants by erecting these bands abstract water from the river in excess of a reasonable user of the stream, and to the damage of the plaintiff?

4. Upon this point the Subordinate Judge makes remarks, which I am perfectly willing to adopt as the grounds of my judgment. He says:--"As "the plaintiff has failed to give any evidence of by how much the volume "of water was diminished, the Court is not in a position to adjudicate "that point. As to the general question of the owner of servient lands having a right to the water of a running stream, it may be answered in the affirmative in the same manner that the owner of dominant lands has the same. All depends upon the volume of water in the river; and "unless the precise quantity of the usual flow and of the diminution be given, no conclusion can be arrived at."

5. That is exactly what I think is the state of case here. It is quite impossible, in the absence of any evidence as to the quantity of water in the river, to come to any conclusion as to whether the plaintiff"s rights have been infringed or not.

6. I would, therefore, affirm the decision of the Subordinate Judge, and dismiss this appeal with costs.

Jackson, J.

7. I am quite of the same opinion. I think that the Subordinate Judge has very properly dismissed the suit, because in my opinion the plaintiff has not proved the cause of action on which be preferred his suit. I am not satisfied on the evidence, as the Subordinate Judge equally was cot satisfied, that the bands were erected for the first time by the defendants, in the year alleged by the plaintiff. There seems to be no doubt that these bands have been constantly erected; even from the plaintiff"s evidence this fact is proved.

The circumstance that they have not been before this objected to, shows that such bands can be erected without injury to the plaintiff, The evidence of the defendants is to the effect that, although the bands are erected, a passage for water is left open, and this is probably the case. It may be that the defendants have been appropriating more of the water than they are entitled to, but of that the plaintiff has given no evidence upon which we can form any judgment. It would appear also that fresh bands are erected every year; and, therefore, the question as to how far the band injures the plaintiff must depend on the circumstances connected with each band, and the water in the river at the time it is erected. I concur with the Subordinate Judge that the present dispute has arisen entirely from the fact that in that particular year the volume of water in the river was less than in other years. I would also dismiss the appeal with costs.