

(1919) 02 CAL CK 0041

Calcutta High Court

Case No: None

Lakshmi Kanta Hazrah

APPELLANT

Vs

Emperor

RESPONDENT

Date of Decision: Feb. 7, 1919

Acts Referred:

- Bengal Embankment Act, 1882 - Section 6, 76(b), 79, 80

Citation: AIR 1919 Cal 669 : 50 Ind. Cas. 669

Hon'ble Judges: Shamsul Huda, J; Richardson, J

Bench: Division Bench

Judgement

1. The petitioner in this case has been convicted u/s 76(6) of the Bengal Embankment Act (II of 1882), on the ground that within an area included in a prohibitory notification issued u/s 6 of the Act, he had without the previous permission of the Collector added to an existing embankment. For this offence he has been sentenced to pay a fine of Rs. 50. An order has also been made u/s 79 directing him to remove the added portion of the embankment.

2. It is contended on his behalf by his learned Counsel that the conviction is bad Firstly, because there is no proof on the record that a notification covering the land on which the embankment stands was issued u/s 6.

3. Secondly, because the petitioner holds, the land under a lease from the Government requiring him to erect embankments and maintain them.

4. Thirdly, because the petitioner, being an occupancy raiyat, has statutory right under the Bengal Tenancy Act which includes the right to erect, or add to an embankment, and fourthly, because it is said an existing embankment within the meaning of the Act is an embankment which existed at the date of the notification u/s 6.

5. We are of opinion that the conviction cannot be successfully attacked in revision on any of these grounds.

7. As to the notification u/s 6, the point does not appear to have been raised in the trial Court. It was probably well known there that such a notification had been issued and that it included the tract in the District of Midnapur in which the petitioner's land is situated. The Government Gazette containing the notification was produced by Mr. Orr at the hearing before us. It was issued many years ago and presumably it was published in the manner provided by Section 80. In any base the last clause of Section 6 is clearly directory and not mandatory *Brindabun Ghosh v. Emperor* 7 C.W.N. 286. The case of *Goverdhan Sinha v. Queen-Empress* 11 C. 570 : 5 Ind. Dec. (N.S.) 1138, contains no express decision that the last Clause of Section 6 is mandatory and on another point has been overruled by the decision of the Full Bench in *Ajodhya Nath Koila v. Raj Krista Bhar* 30 C. 481 (F.B.) : 7 C.W.N. 284.

8. The petitioner's lease is a registered document bearing date the year 1877. It is sought to use it in two ways. It is argued firstly that the lease amounts to a previous permission by the Collector to erect, or add to, embankments, secondly, it is argued that if the lease conferred a right to erect, or add to, embankments, there are no words in the Embankment Act which either expressly or by necessary implication deprive the petitioner of this right. Now the stipulation in the lease relating to embankments, " you will erect embankments and repair them," looks more like a burden or duty cast upon the tenant than a privilege. But apart from that the Act by Clause (1) of Section 76 prohibits in the notified area the creating, or adding to, an embankment without the previous permission of the Collector, and we are of opinion that to that extent the lease is superseded by the Act. The permission contemplated by the clause is clearly a permission directed specially to the projected embankment or projected addition. If the lease be regarded as a general permission to erect or add to embankments, it would defeat the object of the prohibition. The land is in the coastal area of Midnapur which is liable to floods. There is great danger that a tenant or occupier in endeavouring to protect his own land may by diverting the flood water injure his. neighbours. The restriction, therefore, is beneficial to the body of tenants as a whole. It is a legislative adoption, for the purpose in view, of the maxim, *Sic utere tuo ut alienum non lxdas*."

9. In such a case no question of compensation arises. The right of each individual to make embankments is not taken away but regulated for the good of the whole community concerned. The individual benefits by the restriction imposed on his neighbours. It is said that we ought not to give the Act a retrospective effect. But in the case of a measure, designed as this is, to protect the common interest, that is not necessarily a valid objection. According to the construction suggested on the petitioner's behalf, the object of the measure would be defeated and great mischief might ensue. The true answer, however, is that an Act which regulates the future exercise of an existing right cannot properly be described as retrospective, Such

Acts are passed every day.

10. As to the Tenancy Act, our attention was invited to such general provisions as those contained in Section 23 and in that part of Chapter IX which deals with "improvements". These general provisions do not repeal the Embankment Act, The principle applies, *generalia specialibus non derogant*."

11. The last ground taken that the petitioner did not add to an "existing" embankment, because there is nothing to show that the embankment in question existed at the date of the notification u/s 6, is also untenable. An "existing" embankment means an embankment existing when the addition is made, if authority be required, reference may be made to the case of *Ramnath Pandit v. Emperor* 9 Ind. Cas. 360 : 38 C. 413 : 13 C.L.J. 33 : 12 C.L.J. 65.

12. The petitioner's application must be dismissed.

13. We have also before us a reference made by the Sessions Judge u/s 438 of the Criminal Procedure Code recommending that in the circumstances the order made u/s 79 be set aside and the fine imposed on the petitioner be reduced. There is nothing to show that in this particular case the addition made to the embankment was injurious to any one and the trying Magistrate gives no reasons in support of his order for its removal. We agree with the learned Sessions Judge and accordingly set aside the order u/s 79 and reduce the fine from Rs. 50 to Re. 1. The balance of the fine, if paid, must be refunded.