(1877) 09 CAL CK 0008

Calcutta High Court

Case No: None

Lill Dhary Muhton		APPELLANT
	Vs	
Ram Lall Singh and Others		RESPONDENT

Date of Decision: Sept. 14, 1877

Citation: (1878) ILR (Cal) 777

Hon'ble Judges: Lawford, J; Ainslie, J

Bench: Division Bench

Judgement

Ainslie, J.

There is no evidence to show that, by agreement or otherwise, the accumulation of water is limited to a certain quantity; and that when the water rises to a given height, the defendants, or the plaintiff, or the plaintiff''s zemindar, is bound or entitled to open a passage for the escape of the surplus.

2. The Munsif found that the plaintiff had entirely failed to prove any right to cut the bund: and we must say that, in our opinion, it would require very strong evidence to establish such a claim as that put forward here, not on the part of the zemindar acting on behalf of the cultivators of his estate, but on behalf of each individual ryot according to his own judgment, to cut down the bund of a neighbouring zemindar, seeing that it is well known that the consequence of so doing would be that, when the water once begins to flow over the bund, the bund must give way, and the accumulation of water, which is absolutely necessary for the cultivation of land, must be lost.

3. The Judge has gone off from the facts of the case, and has based his judgment upon a construction of law derived entirely from English text-books. Now, the law as laid down in English text-books is, no doubt, a very useful guide; but it must not be taken to override the customs of this country--customs arising from the extreme necessity of preserving water and thereby preserving the means of cultivating large tracts of land which would otherwise lie waste.

4. In the present case we have a long-established bund unchanged in its condition with certain outlets for excess water. Prima facie the defendants have a right to maintain the bund in its usual condition, and the right of the plaintiff to cut that bund down is one which we think must be proved most unmistakeably. The Judge does not go upon proof at all, but merely upon his view of the law. Now, that view of the law, as it will presently appear, cannot be supported.

5. The case of the Madras Railway Co. v. The Zemindars of Carvate-nagarum ILR 1 In. Ap. 364 decided by the Privy Council, was a case the converse of the present. It was for damage done by the bursting of an artificial reservoir. The principle, however, is the same. Their Lordships there field that storing of water in this country is an act of necessity; that it was not for the benefit of the proprietor of the land only, but also in order to enable a large body of cultivators to live by the cultivation of that land. They further held, that the damage which was caused by an unusual flood and the consequent bursting of the embankment of the tank by which the railway was washed away was not one for which the owner of the tank could be charged.

6. In addition to this, there is a recent case, Nichols v. Marsland ILR 2 Ex. D. 1. This was a case perhaps much stronger in point, because it was not even a case in which water was preserved for the benefit of a large section of the public, but merely for the pleasure of a particular owner, who had formed an ornamental piece of water by embanking a stream passing through her own lands, and then through the lands of the plaintiff. Eventually on an unusually heavy storm occurring, and a great rush of water coming into this reservoir, the banks proved insufficient to support the pressure, and the lands of the plaintiff, which lay lower down the stream, were injured in consequence. It was held there by the Court of Appeal that the case was distinguished from that of Rylands v. Fletcher ILR 3 H.L. 330--also cited in the Madras case before the Privy Council in 1 Indian Appeals, page 364--in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening vis major of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous) causes the disaster.

7. They also came to the conclusion that, as the jury had found that all reasonable precaution had been taken, the defendant was not responsible for the damage done.

8. This case seems to us to apply distinctly to the present. It appears from the judgment of the Judge, that the damage in the present instance was caused by an unusual inundation, which he describes as bringing down four times the ordinary quantity of water. It must be taken that the damage was caused by the act of God, and not by the act of the defendants, who are not shown to have failed in making provision for properly dealing with such quantities of water as might reasonably be expected to accumulate.

9. The suit must therefore be dismissed. We reverse the judgment of the Judge and restore that of the Munsif with costs.

10. Special Appeals, Nos. 619 to 623, will be governed by this judgment.