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The Lankapara Tea Company, Ltd. Vs The Gopalpur Tea Co., Ltd. and Others

Appeal from Original Decree No. 4 of 1933

Court: Calcutta High Court

Date of Decision: Feb. 6, 1936

Final Decision: Allowed

Judgement

1. To understand the facts of the case, it is necessary to refer to a map, drawn not exactly but only approximately to scale, which forms a part of

the plaint. The Plaintiff Company is the owner of the Gopalpur Tea Estate. The Defendants Nos. 1, 2 and 3 are the Anjuman Tea Company,

Limited, the Lankapara Tea Company, Ltd. and the Needam Tea Company, Ltd., their Tea Estates being known respectively as Makrapara,

Lankapara and Dalmore. The relative positions of these tea estates are that Lankapara and Makrapara lie to the east and west, side by side;

Dalmore is on the south of Makrapara and Gopalpur lies on the south of Dalmore. Their common landlord is the Defendant No. 4, the Secretary

of State for India in Council. A hill-stream of considerable volume and velocity, which goes by the name of river Pugli, takes its rise in the Bhutan

Hills and emerging in the slopy plains on the south, enters the British territory at some points to the north of the Makrapara and the Lankapara Tea

Estates and flows in a south-westerly direction. It shoots off in its course branches of which the two nearest to the area with which this case is

concerned are first, the river Sukantiti and next, the river Gorgonda, both running southwards. In this south-westerly course, the river Pugli for

some distance forms the common boundary between Lankapara on the east and Makrapara on the west, and then the stream bifurcates. one

branch flowing in a south-westerly direction through Makrapara and into the river Surti which also comes out of the Bhutan Hills and runs by the

west of Makrapara; and another branch running more or less southwards, at first continuing as a common boundary between Makrapara on the

west and Lankapara on the east, as is now admitted, and then flowing through Dalmore and thereafter through Gopalpur. In this case, for the sake

of brevity, the former branch is referred to as the Western branch and the latter as the Southern branch. The river Gorgonda, of which mention has

already been made, emerges out of the Pugli river at a point on the north-west of Lankapara, passes through Lankapara, then through Dalmore

and lastly through Gopalpur. Thus in Makrapara, the western branch of the Pugli runs through the estate and the southern branch (as is now

admitted) forms its eastern boundary; in Lankapara the southern branch of the Pugli forms the western boundary of the estate, and Gorgonda runs

a little to the east and in a course north and south; and in Dalmore and Gopalpur, Pugli and Gorgonda flow north to south, the former lying to the

west and the latter to the east. These facts are, at this stage, undisputed. The Plaintiff''s case in the present suit. stated shortly, was as follows: It

was stated that more than 30 years ago the mouth of the Gorgonda silted up owing to natural causes and the junction point of Gorgonda and Pugli

became firm land with the result that water of the Pugli ceased to flow through it; that the Defendants Nos. 1 and 2, neither under the terms of their

lease nor under the law, have any right to erect any such embankments or bunds, etc. in the bed of any of the rivers aforesaid, but they with a view

to obstruct the free and natural flow of water through and from the Pugli river and to divert it from its natural course had erected and were still

erecting embankments, bunds, etc., in its bed in the Bhutan and the British territories with two results. One of these results is described in

paragraph 9 of the plaint, the substance of which is that during the rains the said river frequently overflowed its banks and sent down large volumes

of water in violent currents through the Gorgonda, which is more than what it can carry, and so overflows the banks of the Gorgonda and causes

damage to the Plaintiff''s property. The second result is described in paragraphs 10 and 11 of the plaint. It is stated in paragraph 10 that so far as

the Plaintiff had been able to ascertain, bunds and embankments marked AA'', BB'', CC'', DD'', and EE'', shown on the plaint map, had been

erected by the first Defendant and those marked 6 to 21 therein had been erected by the second Defendant and then it was stated that:--

each of the said Defendants is still going on erecting further and more similar embankments etc., and had also been often adding to and altering

those already made and erected with a view to completely obstruct and divert the natural course and flow of the Pugli river.

2. In paragraph 11 it was stated that the main natural current of the Pugli river used to flow by the western of the two channels already described

and that by reason of the erect ion of the bunds AA,'' BB,'' CC'' and DD,'' water has been diverted from the main natural channel to the other

channel, that is to say, the southern channel, which passes through Gopalpur, causing serious loss to the Plaintiff. And it is also stated that the other

bunds and embankments which the two Defendants had erected in the Bhutan and the British territories, and especially the bunds EE'' and 1 to 21,

had caused obstruction and diversion of the free and natural flow of the Pugli river, directly causing frequent floods in the Pugli and with resultant

floods in the Gorgonda. Thereafter, it was stated that on account of the bunds and embankments which the first two Defendants had each erected

in the bed of the river Pugli, there had been disputes between them; and a suit, being No. 102 of 1915, had been in situated by the first Defendant

against the second Defendant but it resulted in a compromise between them; that by the compromise they illegally and without any authority

reserved to themselves the right to erect embankments and bunds in the bed of the river Pugli according to their respective choice and convenience

and they stipulated between themselves that the silted-up bed of the Gorgonda at its mouth should be opened up so as to allow Pugli water to

divert and flow through the Gorgonda,--water which in normal conditions and natural course would have flown through the Pugli itself; and that

Defendant No. 1 had applied for executing this collusive decree by excavating the bed of the Gorgonda at its mouth with a view to cause such

diversion.

3. The foundation of the liabilities of the Defendants Nos. 1 and 2 on which the prayers in the plaint were based was set out in paragraph 15 of the

plaint which ran thus:--

15. The Defendants have no right to erect or cause to be erected or maintain embankments, spurs, dams and bunds &o. anywhere in or about the

bed of the Pugli or across it or to obstruct the free and natural flow of its water through its natural course and bed or to obstruct or divert the Pugli

river from its original and natural channel through which it flowed into the Surti river, neither have they any right to open out by excavations and

removal of silt or sand or other deposits or otherwise the silted up mouth of the Gorgonda and its bed and divert the water of the Pugli through it to

Plaintiff''s estate, The Plaintiff is entitled to restrain the Defendants from making any excavations in the bed of the Pugli or Gorgonda either at their

mouth or at any other place and from diverting the water of the Pugli through the bed of the Gorgonda or in any other manner and also to get the

embankments, spurs, dams and bunds &o., referred to above or any other embankments spurs, dams and bunds, &c, which they may hereafter

make or cause to be made or which may be found in or about the bed of the Pugli removed and also to restrain the Defendants from erecting any

embankments, spurs, dams and bunds &o., in or about the bed of the river Pugli or to impede, obstruct or divert the said river in any way or

manner.

4. The prayers broadly speaking were: (1) Certain declarations based on the rights of the Plaintiff as the lower riparian owner and the disabilities of

the Defendants Nos. 1 and 2 as the upper riparian owners in respect of the river Pugli; (2) a mandatory injunction on the Defendants Nos. 1 and 2

to remove the Bunds and embankments AA", BB", CC", DD", EE", and 1 to 21; (3) a perpetual injunction restraining the Defendants Nos. 1 and

2 from erecting Bunds and embankments in the bed of the said river and from doing any act which may be calculated to impede or obstruct the

free and natural flow of the water of the said river or divert it from its natural course; and (4) a perpetual injunction restraining the Defendant No. 1

from opening out the mouth of the Gorgonda by removing the sand, silt, etc., deposited there, in execution of the collusive decree in Suit No. 102

of 1915 or otherwise.

5. The suit was instituted on the 14th September, 1927, but before the trial actually began, there was a compromise between the Plaintiff and the

Defendant No. 1 by which, subject to certain modifications and explanations, the terms of the compromise-decree in Suit No. 102 of 1915 which

had been passed as between the Defendants Nos. 1 and 2 were agreed upon as good and binding as between the Plaintiff and the Defendant No.

1; and several other stipulations were also agreed upon as between the said parties themselves, declaring in favour of each other and also reserving

to them their respective rights as regards the opening of the Gorgonda mouth and keeping intact or putting up in future of Bunds and embankments

on the Pugli river. The suit then proceeded against the Defendant No. 2 as the only contesting Defendant, and in the end the Subordinate Judge

made a decree in Plaintiff"s favour in these terms:--

It is ordered and decreed that the suit be decreed in terms of the compromise against the Defendant No 1; as it was ordered previously the terms

should be recorded in the decree. The suit be decreed in a modified form on contest against the Defendant No. 2 without costs. Plaintiff"s right to

have the free and natural flow of the Pugli river through its original and natural course be declared and it be declared that the Defendants Nos. 1

and 2 have no right to interfere with such right, subject to the terms of the compromise with Defendant No. 1; and subject to the compromise

between Plaintiff and Defendant No. 1 it be declared that the Defendants Nos. 1 and 2 have no right to erect bunds etc., in the bed of the Pugli to

narrow down the bed or divert the waters of the Pugli from its original and natural course or to obstruct the free and natural flow of the Pugli

through its original, natural course.

6. The Defendant No. 2 has appealed from this decree. In this appeal, it is not disputed that the decree is not a proper decree in so far as it

purports to adjust the rights of the Plaintiff and of the Defendant No. 1 on the basis of the compromise arrived at between them; though a much

simpler form a decree would have been enough for that purpose viz.,

that it is ordered and decreed that the suit as between the Plaintiff and the Defendant No 1 be decreed in terms of the compromise arrived at

between themselves, the said terms being recorded in and forming a part of the decree;

and it was wholly unnecessary to make the declarations against the Defendant No. 1 while making the decree as against Defendant No. 2. These

declarations against the Defendant No. 1 are in the terms of the compromise itself and the only purpose that they serve by being repeated while the

decree as against the Defendant No. 2 is being made is to complicate matters. If they are omitted, as they should in any case be, the decree as It is

against the Defendant No. 2 would with some formal alterations run thus:

The suit be decreed in a modified form on contest] against the Defendant No. 2 without costs. Plaintiff''s right to have the free and natural flow of

the Pugli river through its original natural course be declared and it be declared that the Defendant No. 2 has no right to interfere with such right,

subject to the terms of the compromise with the Defendant No. 1; and subject to the said compromise it be declared that the Defendant No. 2 has

no right to erect bunds etc., in the bed of the Pugli, to narrow down the bed or divert the waters of the Pugli from its original and natural course, or

to obstruct the free and natural flow of the Pugli through its natural course.

7. Now it is not disputed that in the compromise as between the Plaintiff and the Defendant No. 1 certain reservations had been made in favour of

the Defendant No. 2; and the declaration that the Plaintiff''s rights and the Defendant No. 2''s disabilities should be subject to that compromise is

therefore a declaration in favour of the Defendant No. 2; and so, that reservation in the decree is not challenged in the appeal. But the contention is

that no declaration at all should have been made. To appreciate the contention and deal with it, it is necessary to go a little deeper.

8. In suit No. 102 of 1915 which arose out of disputes between Makrapara (Defendant No. 1) and Lankapara (Defendant No. 2) in consequence

of the bunds and embankments, etc, which they had erected to the prejudice of each other in the Bhutan as well as in British territories, the main

terms of the compromise, so far as they are relevant for the purposes of this case, were as follows:--that the common boundary between the

Makrapara and the Lankapara grants would be ascertained and demarcated; that the bunds and embankments set up by Makrapara so far within

the Bhutan territory would be kept intact, with liberty of repair; that the mouth of the Gorgonda was fixed at a width of 70 ft. and Lankapara would

keep that width free and remove a sunken bund which they had erected within that space, but would be at all times at liberty to take such measures

as they might consider necessary, by erection of piers, abutments or bunds, beyond that width, for protection of their own property; that neither of

the parties would be at liberty to erect any fresh bunds or embankments in the Bhutan territory without the permission of the other; and there was a

further clause which was in these words:----

That the parties agree that after demarcation of the common boundary as provided for in clause 1 hereof, an equal free way for the passage of

water on either side of the common boundary (sic), such demarcation will and shall be maintained by the Plaintiff No. 1 without prejudice to the

rights of the parties to erect such embankments for the protection of their grant lands as they consider necessary provided always that the rights

and obligations created and imposed by the lessees under which the said tea grants are respectively held by the two Tea Company parties, that is

to say the Anjuman Tea Co., Ltd. and the lankapara Tea Co., Ltd. under the Government are not in any manner whatsoever affected or interfered

with.

9. Pursuant to the terms aforesaid, there was a demarcation of the common boundary between the two grants, the mouth of the Gorgonda, which

had been fixed at a width of 70 ft. by the compromise as aforesaid, was reopened, the sunken bund as agreed upon was removed, and on the

report of certain experts appointed for the purpose a space of 110 ft, on either side of the common boundary, that is to say a total width of 220 ft.,

was fixed as the free way for the passage of water of the Pugli. There have been more than one execution case as regards this compromise decree,

and as far as one can gather, a keen contest between the two parties as to whether the rights secured by the compromise decree have been duly

regarded or not. These contests were carried up to the High Court on more occasions than one. One such execution matter, the subject matter of

which was the prayer to have the mouth of Gorgonda cleared up further was pending at the time when the present suit was instituted and is

referred to in the plaint as already stated.

10. It would have been of some assistance to us, and certainly interesting to know what exactly were the bunds and embankments that were there

or had been erected by the first two Defendants prior to 1915 and with regard to which the suit was instituted or were covered by the compromise

decree. But we are told that of this there is no evidence in the present case. It may be noted that in the plaint in the present suit it was stated that

the 26 bunds and embankments shown on the plaint map were erected by the first two Defendants "" during the last 10 or 12 years,""--suggesting

that they came into existence since the suit of 1915. But whatever that may be, in the present suit the first two Defendants, in arriving at a

compromise between themselves, did not purport to go back upon the compromise-decree in the previous suit and, on the other hand, purported

to regard it as still governing their relations and they only provided for some variations and modifications in the light of such circumstances as had

arisen since that date. The several terms of the compromise that are relevant for our present purposes, as having a bearing on the contention which

has been urged before us on behalf of the Appellant, are the following:--

3. The Defendant No. 1 Anjuman Tea Company Limited is hereby restrained by a permanent injunction from executing the said decree in suit No.

103 of 1915T be far as excavating and removing the sand and silt from the mouth of the river Gorgonda.

7. That subject to all the terms of this compromise petition the compromise-decree in Suit No. 103 of 1915T, Sub-Judge"s Court, Jalpaiguri,

between the Defendant No. 1 Anjuman The Company Limited and Defendant No 2 Lankapara Tea Company Limited and others as modified

hereby will stand good and be binding between the parties of this suit.

8. That the parties agree that the channel mentioned in para, 5 of the plaint in this suit as passing through the Makrapara land to the Surti river,

was never or is not the main or any channel of the Pugli and the Defendant No. 1 shall have the right to use it in any way that is considered

necessary.

9. That parties agree that in pursuance of clause 6 of the petition of compromise in said Suit No. 102 of 1915T the common boundary line

between the Makrapara Tea Estate and the Lankapara. Tea Estate was duly fixed and a free way of 220 feet for the passage of Pugli water on

both sides of the common boundary so demarcated (that is to say 110 feet on each side of the said common boundary line) was agreed to be

maintained in accordance with the joint report of Mr. Desbruislies and Mr. G. G. Biswas, Engineers. It is further agreed that the said waterway of

220 feet should in no way be interfered with by any of the parties on any grounds whatsoever.

10(a). The Plaintiff"s right to have the natural flow of water of the Pugli river through its natural course is hereby declared and it is further declared

that the Defendants have no right to interfere with such right save and except that the Defendants Nos. 1 and 2 shall have liberty to erect such

embankments beyond the said 220 feet of waterways for the protection of their grant lands as they consider necessary as laid down in clause 6 of

the petition of compromise in said Suit No. 102 of 1915T.

(b) It is further declared that the Defendants have no right to erect or cause to be erected any embankments, spurs, Dame or Bunds &o. in the

bed of the river Pugli within the said 220 feet of free waterway or to do or cause to be done anything in order to narrow down the said bed or

divert the water of the Pugli river.

11. Very high ground was taken by the Defendant No. 2 in the written statement that he filed in the suit. Some of the averments in this written

statement may conveniently be reproduced. In para. 3 it was pleaded that he has absolute and indefeasible right under the law as well as under the

terms of the Lankapara lease to erect as protective measures, any bunds, embankments, etc., in any river or stream causing or threatening to cause

damages to his estate. In para 5 it was stated that the embankments, bunds, etc., referred to in the plaint as erected by him had one and all been

erected as protective works for the safety of the Lankapara estate, from invasion of the Pugli river and in order to keep it in its natural course from

which it had been diverted by the obstructions which had been erected by the Defendant No. 1. And in para 8 it was repeated that:--

This Defendant No, 2 firmly repudiates the allegation made in para. 15 of the plaint that Defendant No. 2 has no right to make and erect or cause

to be made and erected or maintain the embankments, spurs, Dams and Bunda etc., in or about the bed of the Pugli river and that the Plaintiff is

entitled to get the embankments etc.,..... in the bed of the Pugli river or any other embankments etc., which the Defendant No. 2 may hereafter

make and erect etc.....in the bed of the Pugli removed and also [to restrain the Defendant No. 2 from erecting any embankments etc.,.....in or

about the bed of the river Pugli; and say that the Defendant No. 2 has every and absolute right to make and erect etc..... in or about the bed of the

Pugli river such embankments etc.....as are or may be necessary and required as protective works etc, etc.

12. It was pleaded that there was no collusion between him and the Defendant No. 1 and that on the other hand he was always fighting the latter.

It was also denied that the bunds, etc, erected by him in the Pugli had narrowed down the channel and the natural course of the river or had caused

any diversion or obstruction to the same.

13. Some 20 issues were framed in the suit embracing a multitude of matters; but on the compromise being entered into between the first two

Defendants, all except 6 of them were struck out. These 6 issues were the following:--

1. Has the Plaintiff any cause of action ?

2. Is the suit barred by limitation ?

5. Have the Defendants Nos. 1 and 2 erected embankments, spurs, and Bunda etc., in the bed of the river Pugli and have thereby substantially and

materially interfered with, counteracted, impeded and obstructed or diverted the free and natural flow of water through the origami and natural

course of the Pugli ? If so, are the Defendants Nos. 1 and 2 entitled to do so ?

8. Has the Plaintiff any right to have any of such Bunds etc, made by the Defendant No. 1 or by the Defendant No. 2 removed ? Is the Plaintiff

entitled to have a permanent mandatory injunction f or that purpose ?

15. Is the Plaintiff entitled to any of the declarations sought for ?

16. To what relief, if any, is the Plaintiff entitled?

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14. [Their Lordships proceeded to deal with certain contentions not material for the purposes of this report. The contentions were, (i) that the case

made in the plaint being that the western channel was the main channel of the river and that case being negatived by an admission in the

compromise, the Plaintiff could not now change his case and complain of obstructions on the southern channel; (ii) that it being agreed in the

compromise between the first two Defendants, adopted in the compromise in the present suit, that only a free way of 110 ft. on each side of the

boundary line was to be kept open, the Plaintiff could not complain of any obstructions beyond those limits; and (iii) that the obstruction being not

on the "" original and natural course "" of the river but on a modern deviation, the Plaintiff, as a lower riparian owner, could not complain of

obstructions put up by the upper owner through whose property the new channel passed. Their Lordships repelled all the contentions, holding on

the third contention that apart from its legal aspect, the channel obstructed could not be said to be not the original channel. They then proceeded as

follows:]

15. We pass on now to the question whether the declaration which, the Plaintiff has obtained can be supported. To clear the ground for a

discussion of the question it is necessary to refer to another branch of Mr. Chakravarti''s argument which is that the obstructions complained of

against the Appellant have not in fact interfered with the flow of the stream in Gopalpur.

16. To support this contention Mr. Chakravarti has drawn our attention to certain passages in the "" Report and affidavit"" (Ex. 1) and the

Discharge calculations "" (Ex. 4) of Mr. Bholanath Banerji. These, in our opinion, do not support his argument. On the other hand, on the evidence

of this gentleman it is perfectly clear that these obstructions are for the major part of them right on the bed of the river and are not purely protective

works: they do raise the level of the river, obstruct its current and increase its velocity. The Subordinate Judge was right in holding that the

obstructions have diverted the course of the stream and also caused a substantial alteration in the flow of the river, impeding the natural stream at

places and thereby causing a large volume of water with greater velocity through the Plaintiff''s portion of the river and thus causing damage to his

estate. The mandatory injunction the Plaintiff had precluded himself from getting. But the prohibitory injunction he had asked for has also been

refused to him. There can be no question that upon the right which the Plaintiff claimed to have the encroachments removed and the allegation that

he set out in his plaint, namely that the Defendants had not only put up the bunds and embankments, etc, but were still making similar erections ""in

and across the bed of the main Pugli river during the last 10 or 12 years and are continuously making additions and alterations to them,"" and upon,

the defence of the Appellant denying any such right on the part of the Plaintiff and on the other hand setting up his own "" absolute and independent

right"" to erect such obstructions in the bed of the"" river, and furthermore there having been no statement in his written statement suggesting even

remotely that he did not intend to erect other obstructions or add to or alter the existing obstructions in future, a case for a prohibitory injunction

was completely established. The Subordinate Judge has refused this relief on a ground which he has stated in his judgment thus: --

As the Bengal Embankment Act is in force in the District of Jalpaiguri, it is no longer necessary for the Plaintiff to get a perpetual injunction of the

nature prayed for in clause (g) of para. 19 of the plaint.

17. The Subordinate Judge, in our opinion, was in error in thinking that the Bengal Embankment Act afforded a sufficient protection to the Plaintiff.

The Appellant, if he succeeded in getting the permission of the Collector to back him in what he did, would satisfy the requirements of the Act; and

even if he commits an offence and is hit by its penal provisions, the obstructions may or may not be removed at the discretion of the executive

authorities. The conviction of the Appellant under the Act, if any such conviction is had for any obstruction that the Appellant may put up in future,

would be but a poor consolation to the Plaintiff; whereas for the injury that he apprehends the law entitles him to a far surer and more satisfactory

relief in the shape of a perpetual injunction.

18. The propriety of the declaration that has been made in this case has been challenged upon several grounds to which it is necessary now to

advert. The case of Nagendra Chandra Mitter v. Sreematty Kishen Sundari Dasi L.R. IndAp Sup. Vol. 149: 11 B. L.R. 171 (1873) was cited as

laying down a principle which this case offends. It was said in that case:--

It is not a matter of absolute right to obtain a declaratory decree; it is discretionary with the Court to grant it or not, and in any case the Court must

exercise a sound judgment whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for. There is so much

more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be

not converted into a new and mischievous source of litigation.

19. This was said in a case in which no consequential relief was asked for or could be granted; but the principle laid down in the case is one to

which no exception can possibly be taken. And it may also be pointed out that in a later decision of the Privy Council in the case of Natchiar v.

Doradagha Tevar L.R. 2 IndAp 169: 15 B. L.R. 83 (1875), their Lordships explained the principle further and observed that even in a case in

which some consequential relief might, if prayed for, have been granted, it would still be a matter of discretion whether the Court should make a

mere declaration in the particular case. These cases were prior to the enactment of the Specific Relief Act (Act I of 1877), but there is no reason

whatever to doubt the correctness of the proposition referred to above. The proviso to sec. 42 of the Act does not hit the present case, for the

Plaintiff did ask for consequential reliefs--all such reliefs as he was entitled to at the date he instituted the suit. The case of Deokali Koer v. Kedar

Nath ILR 39 Cal. 704: S.C. 16 C.W.N. 838 (1912) was cited but the declaration which has been made in this case is not an eccentric declaration

but a declaration which, in substance, is an affirmation of the right which he claimed and a negation of the pleas that were taken in denial of that

right. The decision of the Judicial Committee in Sheoparsan Singh v. Ramnandan Singh L.R. 43 IndAp 91: S.C. 20 C.W.N. 738 (1916), has been

relied on. That how-ever was a case in which the suit failed at the outset, for the Plaintiffs who had asked for a declaration that they were next

reversioners to the estate of a testator and as such were entitled to apply to the Court for revocation of the Will, when as a matter of fact probate

of the Will had already issued, and so the Plaintiffs were not clothed with the legal character or title which would authorise them to ask for the

declaration. Where a right alleged on behalf of the Plaintiff as owner of a property is denied on behalf of the Defendant, there can hardly be an

argument that a declaration may not be granted, subject, of course, to the discretion which the Court always has in these matters [Joseph Solomon

v. Calcutta Corporation L.R. 43 IndAp 243: S.C. 21 C. W. N 194 (1916)]. It has been argued that where the Plaintiff asks for an injunction as

the substantial relief and that injunction cannot be granted, a declaration of title which was asked for only as incidental to the substantial relief, the

declaration should be refused, and the case of Basaweswaraswami v. The Bellary Municipal Council ILR 38 Mad. 6 (1912), is referred to. This is

not a case in which it has been held that the injunction cannot be granted; the Court has not granted the injunction because in its opinion, an

injunction is unnecessary in view of the provisions of the Bengal Embankment Act,--a view which as already observed, is not correct.

20. But we are not prepared to support this bare declaration for more reasons than one. It is likely to be a source of dispute in future because it is

not sufficiently specific in its character, not having defined the area over which it is to act. It may also be said that it is unnecessary, because it

purports merely to recite the law, such as the learned Judge understood it to be, and is not likely to be of any real utility to the Plaintiff; for in a

future suit which he may have to institute should any fresh obstruction be caused, this declaration he will have without any difficulty, the moment he

shows that he is a lower riparian owner and that there has been no contract which precludes him from his rights as such. Thirdly, we fail to make

out what the learned, Judge was providing against by declining to grant an injunction against the Defendant No. 2 and yet declaring that he had no

right to erect bunds, etc, in the beds of the river etc. We are clearly of opinion that the Plaintiff did make out a case for a perpetual injunction which

is one of the substantial reliefs that he asked for.

21. Mr. Chakravarti has contended that it is not open to this Court to grant the Plaintiff the perpetual injunction which he failed to obtain in the

Court below. He has said firstly, that the law does not permit an Appellate Court to make such a decree in the absence of an appeal by the

Plaintiff; and nextly, he has pointed out that in the memorandum of cross-objection which the Plaintiff has preferred the Plaintiff has not, while he

has taken other points, asked for such a relief. We are of opinion that the wide language of Or. 41, r. 33 of the Code would warrant us in making

such a decree. And in this connection we may refer to two decisions--Tricondas Cooverji Bhoja v. Gopinath Jiu Thakur L.R. 44 IndAp 65 : S.C.

21 C.W.N. 577 (1916) and Trustees for the Development of the City of Rangoon v. G. S. Behara & Sons ILR 10 Rang. 412 (1932). We are

also of opinion that the fact that the Plaintiff has not preferred an appeal does not matter, for he may have felt satisfied with the declaration, if that

were allowed to stand. Nor does the fact that he has not asked for such a relief in his cross-objection, in our opinion, create any difference, so long

as the prayer was there in the plaint and has not been abandoned.

22. In granting the injunction a distinction must be made between the alveus or ordinary natural bed of the river and land on the sides of the river

which may go under water in time of extra-ordinary flood. In the case of Maung Buo v. Maung Kya L.R. 52 IndAp 385: S.C. 30 C.W.N. 218

(1925), their Lordships of the Judicial Committee have considered some of the aspects of the law relating to the rights and liabilities of riparian

owners and have referred to a number of leading decisions bearing on it. Their Lordships have pointed out that successive riparian owners are

each entitled to the unimpeded flow of water in its natural course and to its reasonable enjoyment, as it passes through his land, as a natural incident

of the ownership of his land. In one of these cases, the leading case of Bickett v. Morris L.R. 1 H. L. Sc. App. 47 (1865), Lord Cranworth

speaking of riparian proprietors and adverting to the difficulties of determining in anticipation what damages may result in flood time, observed:--

The Appellant contended that as a consequence of this right every riparian "proprietor is at liberty at his pleasure to erect buildings on his share of

the alveus so long as other proprietors cannot show that damage is thereby occasioned or likely to be occasioned to them. I do not think this is a

true exposition of the law.

Also--

They are entitled to say, we have all a common interest in the unrestricted flow of the water, and we forbid any interference with it. This is a plain

and intelligible rule, easily understood and easily followed, and from which I think your Lordships ought not to allow any departure.

23. Lord Westbury expressed himself thus:--

Now the interest of a riparian proprietor in the stream is not only to the extent of preventing it being diverted or diminished but it would extend also

to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage

at a future date.

24. Lord Chelmsford, L. C., observed:--

In this case mere apprehension of damage will not be sufficient to found a complaint of the acts done by the opposite proprietor, because being on

the party''s own ground they are lawful in themselves and only became unlawful in their consequences upon the principle of sic utere at alienum non

leads. But any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor and,

therefore, the act being prima facie an encroachment the onus seems properly to be cast upon the party doing it to show that it is not an injurious

obstruction.

25. In Menzies iv. Breadalbaine 3 Bli N. S. (H. L.) 414 (1829), Lord Lyndhurst observed:--

A proprietor on the banks of a river has no right to build a mound which.....would, if completed, in times of ordinary (sic)ood throw the water of

the river on the grounds of a proprietor on the opposite bank, so as to overflow or injure them. It is clear beyond the possibility of a doubt that by

the law of England such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for

the proprietors of these lands to obstruct that old course by a sort of new water-way, to the prejudice of the proprietors on the other side. The

ordinary course of the river is that which it takes at ordinary times; there is also a flood channel. I am not talking of that which it takes in

extraordinary or accidental floods; but the ordinary course of the river at the different seasons of the year must, I apprehend, be subject to the

same principle.

26. So far then as regards the alveus or natural bed of the river and the ordinary course of the river through its flood channel, there can be no

difficulty in holding that the upper riparian owner is not entitled to put up any obstruction, at least none, to quote the words of the Judicial

Committee in the case of Kali Kishen Tagore v. Jodoo Lal Mullik L.R. 6 I A 190 : 5 C. L.R. 97 (1879), as would interfere with the flow of the

water as it had been accustomed to flow or would seriously and sensibly divert that flow so as to be an injury to the Plaintiff''s rights.

27. As regards obstruction which a riparian owner may put up in his own lands or at times of extraordinary floods to protect himself and other

riparian proprietors against a common enemy as it were, the law is different. The principles have been explained in Whalley v. The Lancashire and

Yorkshire Railway Company L.R. 13 Q. B. D. 131 (1884) and also in such cases as Menzies v. Breadalbaine 3 Bli. N. S. (H. L.) 414 (1829). In

Ridge v. Midland Railway Co. [1889] 53 J. P. 55, Lord Coleridge, C. J., ex-pressed himself thus:--

There are two riparian proprietors and occupiers of land on the opposite banks of the same river, the land of one being some feet lower than that

of the other. In ordinary times this makes no difference, because the level of the Plaintiff''s land is much above the surface of the stream, but in

times of flood, occurring at uncertain intervals and with uncertain volume and force, if the river overflows its banks at all, it always overflows the

lower bank. That bank was the Defendant''s. The Defendants wanted to build upon the land subject to flood; they had a right to build upon the

land, and, according to all the cases, including those which have been adjudicated upon by such lawyers as Tenterden, Tindal, and Lord Esher, it is

a matter of common law right that every riparian owner is justified in preventing the river overflowing his land. Tindal, C. J., expresses his view

thus: '' At common law the landowners would have the right to raise the banks of the river and brook from time to time, as it becomes necessary

upon their own lands, so as to confine the flood water within the banks, and to prevent it from overflowing their own lands. That is a right

everybody may exercise without the slightest objection. But in improving his property the owner must not injure that of another."

28. The law has been thus summarised:

The result of the cases appears to be that a riparian owner may make defences against floods anywhere on his own land, provided he does not

interfere with the alveus or with a recognised flood channel, but if flood water comes on to his land he must not take active steps to turn it to his

neigh. bour"s property.

(See Coulson & Forbes"- Law of Waters, 4th Edition, p. 162).

29. Dependent as the liability of the upper riparian owner would be upon a variety of circumstances which it is not easy to determine beforehand in

cases of obstruction of this nature, mere apprehension of injury would not be sufficient to found a cause of action and so no injunction in respect of

them can legitimately be granted.

30. There is no reason to suppose that in this case the bed of the river, so far as it passes through the Lankapara and by its side, has not been

sufficiently defined. The maps Ex. 12 series, sheets P1", P2", P3", P4" and P5" prepared by P. W. 4 Anadi Charan Sen Gupta and counter-

signed by P. W. 1 Bholanath Banerji, appear to have been prepared with considerable care and there is nothing to suggest that they do not

represent the branches of" the river correctly. In these sheets the high banks of the river have been shown in red pencil lines. The Plaintiff, in our

judgment, is entitled to an injunction with reference to these maps.

31. We, therefore, order that the declaration which the Plaintiff has obtained as against the Defendant No. 2 be set aside and in lieu of it a

permanent injunction do issue in Plaintiff"s favour restraining the Defendant No. 2, subject to the compromise between Plaintiff and the Defendant

No. 1, from erecting any bund or embankment, in the bed of the river Pugli as depicted on the maps Ex. 12 series, sheets P1", P2", P3", P4", and

P5" so as to interfere with the flow of its water as it has been accustomed to flow or so as to seriously and sensibly divert that flow to be an injury

to the Plaintiff.

32. The Defendant No. 3 has complained that he should not have been kept on as a party to the suit when the Plaintiff chose to give up his contest

with the Defendant No. 1 and elected to enter into the compromise. But we do not think that when after the compromise the Plaintiff proceeded

with the suit against Defendant No. 2, he could very well ask that the Defendant No. 3 should be left out: the Defendant No. 3 being a riparian

owner vitally affected by the acts complained of in the suit was certainly a proper, and perhaps also a necessary, party. His rights of course cannot

be affected by any compromise that the Plaintiff may have chosen to enter into. It should therefore be noted in the decree that the compromise as

between the Plaintiff and the Defendant No. 1 will not affect the Defendant No. 3. The appeal is thus allowed in part, the decree of the Court

below being modified as indicated above; and subject to such modifications the rest of the decree of the Court below will stand. There will be no

order for costs in appeal or the cross-objection, except that the Appellant should pay the cost of the Defendant No. 3 in the appeal, hearing-fee

being assessed at 15 gold mohurs.