

(1964) 02 MAD CK 0024
In the Madras High Court
Case No : Second Appeal No. 1265 of 1961

B. Balakrishnan Naidu

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 04-02-1964

Acts Referred:

Madras Rivers Conservancy Act, 1884 — Section 17, 2

Citation : (1966) ILR (Mad) 304

Hon'ble Judges : Veeraswami, J

Bench : Single Bench

Advocate : V. Vedantachari and K.C. Rajappa, for the Appellant; A. Alagiriswami, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Veeraswami, J.—The question in the second appeal relates to the obligation of the State to riparian owners alongside of natural rivers and its

liability to them, when due to floods and consequent inundation, their lands have been washed away or otherwise damaged. Though I have found

little difficulty in agreeing with the reversing judgment of the lower appellate Court in answering the question in the negative, having regard to the

importance of the question and strenuous argument for the Appellant, I shall deal with it at some length. The Appellant owns lands covered by two

survey numbers abutting Kaduvayar and another piece of land covered by a different survey number alongside Kuthiraisevaganar. Both are

admittedly natural rivers. During rainy season they are in spate and, according to the Appellant, are prone to erode his lands, and as a matter of

fact, Kaduvayar on account of breaches in its banks flooded into his lands and washed them away to a total extent, as found by the Courts below,

of seventy-four cents since 1954. He complained to the concerned authorities more than once of his apprehension of further danger to his lands

from floods in the Kaduvayar and asked them to do the necessary works to check eroding, but nothing was done except that in 1955 a modasal

was provided at some distance lower down the river and certain regulators at certain curves. The Appellant further maintained that Kaduvayar was

slightly changing its course which spelt further danger to his lands. On the ground that the State Government had an obligation, in the

circumstances, to train the rivers at deep cuts and maintain their banks in sound and safe conditions to avoid erosion into adjoining riparian lands by

putting up modasals and revetments at required places and that it failed to conform to its obligations and thereby was negligent, with the result that

his lands were flooded and washed away, and on the further ground that the State Government was liable to him for a tortious act, namely, that the

construction of a modasal down the river resulted in damage to him, he sued for a mandatory injunction directing the Defendant-State to take

suitable measures for preventing erosion of his lands and for compensation for damage already caused to them. The State Government resisted the

claim denying that it had any such obligation or that it committed any tortious act by causing damage to the Appellant's lands.

2. On the view that if a river took a zig zag course and if it was likely to cause damage to lands on either side of the river and it is one maintainable

by the Government, it was clearly the duty of the State to see that the river kept its course and continued to do so or that it did not overflow its

banks and wash away riparian lands, and that as the State failed to abide by its obligations to safeguard against erosion by the river, of the riparian

lands, it was guilty of negligence and was liable to the Appellant in damages, the trial Court granted a mandatory injunction as prayed for and also

compensation, fixed at a certain amount. The Court was of the further view that the liability of the State to the Appellant could also be founded on

a tort, namely, the modasal constructed by it down below the Appellant's lands made the junction point in the neighborhood of the Appellant's

lands more vulnerable and would cause damage to them. The lower appellate Court considered that the evidence on record did not justify the

finding of the trial Court based on tortious liability of the State Government. The only material on which the trial Court had proceeded was that of

a defence witness to the effect that it was the duty of the State to train rivers at deep cuts and that for that purpose modasals were put up. I think

the lower appellate Court was right in declining to place reliance on the evidence of the agent of the Appellant, and holding that the evidence on

record was hardly sufficient to find that the modasal constructed by the Government at a lower point in about 1955 endangered the lands of the

Appellant. Nothing more need be said, therefore, on the Appellant's claim founded on tortious liability. The lower appellate Court also differed

from the trial Court and was of the opinion that Kaduvayar being a natural river there was no obligation on the part of the State Government to

keep its banks trim and safe from floods inundating the lands adjoining it. It, therefore, allowed the appeal of the State Government and dismissed

the suit.

3. On behalf of the Appellant, his Counsel Sri V. Vedantachari has submitted (i) that the State being the owner of the natural rivers, it has a duty

under the common law to keep their banks in sound and safe conditions so that floods do not burst out or overflow inundating and causing damage

to adjoining riparian lands ; (ii) that as the State has, in its sovereign right, a privilege and power to regulate all water courses of the land and

distribute water, there is a corresponding obligation to maintain them in such a manner that they are not a source of danger or do not cause damage

to private owners of lands adjoining the water courses and (iii) that the State having been conferred certain statutory powers for conservancy of

rivers, these powers are coupled with a duty and that failure to perform such duty will amount to actionable negligence, if it has resulted in any

damage to private owners.

4. As to the first point, it may be granted that the State does own the natural rivers. In fact, the Madras Land Encroachment Act, 1905 declares

that rivers streams lakes, tanks and all standing and flowing water, among others, are the property of the Government subject to certain exceptions.

But I know of no common law of this country which, by reason of the ownership of natural rivers being in the State, lays an obligation on it, to

guard against such rivers, due to natural causes or an act of God, causing damage to private lands adjoining their banks. Every owner should of

course so use his lands as not to cause injury to the neighboring lands or their

owners. But even this is not an absolute rule of law and will allow reasonable latitude under relevant circumstances. It should also be observed that the rule will have application only to human acts and has never been extended to acts attributable to nature or vis major. In this view, I think it unnecessary to consider on the facts of this case as to how far the principle of *Rylands v. Fletcher* (1868) L.R. 3 Eng. & Ir. A.C. 330, can be applied to Indian conditions of irrigation channels which are artificial and provided by the Government. Suffice it to say that it clearly does not apply to natural water courses, unattended by human interception or interference. The obligation to safeguard against waters artificially controlled or stored, endangering riparian or neighboring lands or property springs not from the fact of ownership of the bed or the waters but from the fact of such artificial control or storage of waters. I think the law is that if the Government or a private person owns a natural river or a water-course and due to floods coming from torrential rains, a-natural cause, the neighboring or riparian lands are inundated or damaged, the owner is not held responsible ; but if such an owner interferes with the natural river or water course and diverts, restricts or otherwise controls the same, for whatever purpose, and if, by his failure, to take precautions, water escapes or overflows, causing damage to the neighboring or riparian lands or property, the defaulting owner will have to answer for it. To the facts of this case is applicable the first part of the rule. It follows the first point for the Appellant fails.

5. On the second point, I think it is necessary to observe that it proceeds upon what appears to me to be a misconception in the context of the facts here. It is well settled that it is the prerogative of the Government, as it was of the Crown, to control and regulate sources of irrigation and distribute water as it thinks fit or as the requirement or exigency demands, provided the exercise of the discretion does not prejudice the accustomed supply which one is entitled to. All that an owner of a registered wet land can ask for is the accustomed supply of water in quantity and facilities and so long as this is accorded to him, he cannot insist that it should be from this or that channel. The assumption learned Counsel makes from these premises, is that the prerogative of the Government is coupled with a duty to guard against damage to neighboring or riparian

lands or property. No such duty is derivable from or can be related to the mere prerogative or the exercise of it. The obligation of the Government, as in the case of a private person, arises, in circumstances discussed in dealing with the first point of the Appellant. When the Government does something to change or divert the course of a natural river or divert its waters through artificial channels for distribution and irrigational purposes, any damage to other owners of lands directly caused by such interference of the Government, unaccompanied or unattended by reasonable foreseeable and necessary precautionary measures being taken by it, may be actionable. This is but an instance of the general principle that if you do something and in doing it or in connection with it, you are negligent either by an act or omission and as a result, a third party is put to damage, you will be liable in damages for your negligence. The duty to act or not to act to guard against damages to third parties does not and cannot arise, so far as natural rivers are concerned, in the absence of interference with them by the Government in exercise of its prerogative by putting up bunds across, or diverting the waters by means of artificial channels and the like, which, unless precautionary methods are taken, may or are reasonably likely to cause damage.

6. It is, however, argued for the Appellant that although the ownership of natural rivers, in the absence of negligence on the part of the owner in maintaining and regulating the same, may not by itself attract liability to damages, since, the Government's power, privilege or prerogative to control, maintain and regulate natural rivers is for the benefit of the public, failure to exercise its power and make such rivers safe for neighboring riparian owners and take reasonable steps in that regard will amount to negligence. Learned Counsel for the Appellant supports his argument by reference to certain Indian and English authorities. The Madras Railway Co. v. Zamindar of Carvatenagarum(1), decided that the Zamindar was not liable for any damage caused to the neighboring owner by the overflow of water from an irrigation tank which he was obliged, under the common law of the land, to maintain and which owing to unprecedented rains burst out and washed away its bunds. The Privy Council, while pointing out that the principle of Rylands v. Fletcher (1868) L.R. 3 eng. & Ir. A.C. 330, might apply to India too in circumstances like those that

arose in that case and that the principle, based as it was on the maxim of *sic utere tuo ut alienum non laedas* was one recognized by the laws of

civilized countries held that it did not afford a rule applicable to circumstances of the case it was considering. Observed the Privy Council at page

385:

The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognized by Hindu and Mohamedan Law, by

regulations of the East Indian Company, and by experience older than history, as essential to the welfare, and, indeed to the existence of a large

portion of the population of India. The Public duty of maintaining existing tanks and of constructing new ones in many places was originally

undertaken by the Government of India and upon the settlement of the country has, in many instances, devolved on zamindars, of whom the

Defendant is one. The zamindars have no power to do away with these tanks in the maintenance of which large numbers of people are interested,

but are charged under Indian Law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts referred

to in the judgment of the High Court, and vouched by history and common knowledge, it becomes apparent that the Defendant in this case is in a

very different position from the Defendants in *Rylands v. Fletcher* (1868) L.R. 3 Eng. and Ir. A.C. 330.

7. The Privy Council went on to say that in *Rylands v. Fletcher* (1868) L.R. 3 Eng. and Ir. A.C. 330 there was no obligation, public or private, to

make or to maintain the reservoir and no rights in it had been secured by other persons and expressed the view:

The rights and liabilities of the Defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory

powers have been conferred and statutory duties imposed. The duty of the Defendant (Zamindar) to maintain the tanks appears to their Lordships

a duty of very much the same description as that of the railway company to maintain their railway ; and they are of opinion, that, if the banks of his

tank are washed away by an extraordinary flood without negligence on his part, he is no more liable for damage occasioned thereby than they

would be for damage to a passenger on their line, or to the lands of an adjoining proprietor occasioned by the banks of the railway being washed

away under similar circumstances. See *Whether v. North Kent Railway Company* (1858) 27 L.J. Ex. (N.S.) 417.

8. But it appears to have been argued before the Privy Council that the Zamindar in that case was negligent in not taking sufficient precautions to

avoid breach of the tank, negligent in the sense that:

Negligence consists in the omitting to do something that a reasonable man would do, or in doing something that a reasonable man would not do, in

either case unintentionally causing mischief to a third party.

9. The High Court in that case had decided that even in this sense there was no negligence. The Privy Council felt unable to say that the case had

been decided on an erroneous view of the law. This case has laid down the principle that where the law or custom imposes a public duty upon an

individual, like the zamindar in that case, to maintain artificial reservoirs for benefit of the public and the duty extends to their continuance and

maintenance by preserving and repairing them but due to natural causes without negligence on the part of such a person, the reservoirs overflow

flooding and damaging the neighboring lands, no action for damages will lie. Learned Counsel for the Appellant argues that this principle is also

applicable to the Government whose privilege and duty it is to maintain for the benefit of the public, irrigation systems and should be extended to

the case of natural rivers owned by the Government. I am unable to accept this contention. The point is that the principle applicable to artificial

reservoirs is inapplicable to natural rivers which, in no sense, can be regarded as being controlled or regulated by the Government. But where the

Government interferes with their course, to that extent the position may be different. But that is not the case here. Further, even in regard to

artificial works required by law to be maintained for public benefit, any damage caused by them, not by negligence even in the sense argued before

the Privy Council, but by vis major or natural cause is not actionable. *Geddis v. Proprietors of Bann Reservoir* (1878) L.R. 3 A.C. 430 related to

statutory powers to carry out a certain purpose and in carrying it out, on account of negligence, on the part of those entrusted with the powers,

damage was caused to neighbors. Lord Blackburn in his speech in the House of Lords said at page 455:

For I take it, without citing cases, that it is now thoroughly well established that

no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone ; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers.

Now, upon that view of the law, if in this case the learned Judges in the Exchequer Chamber are right in holding that the Defendants have no power to interfere with the channel of the Muddock at all, of course no action will lie against them. But if on the other hand Baron Fitzgerald and Chief Baron Palles are right in the view which they took, that they have power to do so, I think that the conclusion becomes irresistible that they ought to adopt a reasonable exercise of that power by cleansing, scouring, widening and deepening, the natural channel of the Muddock, so as to make it capable of receiving the waters which they pour down it, and that not to do so before they poured down the water, was a neglect to make a reasonable use of the powers given to them by the statute.

10. The House of Lords held that where statutory powers conferred upon a River Board or a person are merely limited to carry out the purposes for which they have been conferred but by a reasonable exercise of the powers given by the statute available under the common law, damage could be prevented it would be negligence if such reasonable exercise of powers is not undertaken. This principle was applied by the Irish case in *Bligh v. Rathangan Drainage Board* (1898) 2 Ir. Rep. 205. But it is noteworthy that this rule was related to artificial works connected with natural rivers and not purely natural rivers which without intervention of any human agency but purely due to vis major or natural cause flooded and washed away the neighboring lands. That to the latter class of cases the rule has no application is seen from *Smith v. Cawdle Fen Comrs* (1936) 4 All. E.R. 64, *Gillett v. Kent Rivers Catchment Bd.* (1938) 4 All. E.R. 810 and *E. Suffolk Catchment Bd. v. Kent* (1940) 4 All. E.R. 527. These cases were decided with reference to statutory powers conferred on public authorities and were concerned, the first two with the artificial works and the third with a tidal river inundating the neighboring lands on account of a

breach of its protecting wall caused by force of nature. In the first case the dykes were kept reasonably clean and the pumping system was also efficient but the damage to the neighboring area was substantially due to the fact that a bank was too low. The action for E damages for negligence as a result of which, it was alleged, the Plaintiffs' land was flooded and water logged and suffered damage, failed on the view, the King's Division Bench took, that the Defendants were not under a statutory duty to execute the repairs which, it was again alleged, they had failed to execute. This was upon the view that if an authority in exercise of its statutory powers acted negligently and the negligence resulted in an injury to another, it would be no defence to say that it occurred in the exercise of statutory powers but if on the other hand, the complaint was that the statutory powers had not been exercised which was in the discretion of the authority concerned, and if the powers had been exercised, the party injured would not have suffered damage, the claim would be on the wrong side of the line as it was really seeking to put upon such authority a duty which the Legislature did not put upon it at all. Much the same view appears to have been taken by another learned Judge of the King's Bench Division in *Gillett v. Kent Rivers Catchment Bd.* (1938) 4 All. E.R. 810. In *E. Suffolk Catchment Bd. v. Kent* (1940) 4 All. E.R. 527 the view of the House of Lords, as gatherable from the various speeches, is that in the absence of a statutory duty, mere omission to exercise enabling powers is no foundation for actionable damage for negligence by nonfeasance or omission, for otherwise it would imply reading into the statute a duty which the Legislature did not choose to impose on the authority.

11. It would be seen from what I have stated above that these authorities which the learned Counsel for the Appellant referred me to are of no assistance to him. They do not support his proposition that either because the State is the owner of the natural rivers or because it has the prerogative and privilege or the power to control, regulate and distribute their waters, there is, therefore, necessarily a duty cast on it to take such measures as may be necessary to guard against the vagaries of such rivers and their damaging riparian lands. There is, to my knowledge, no authority to uphold so wide a proposition and so fraught with serious problems, difficulties and inconvenience of a public character. In my opinion,

there is no duty cast by the common law of the land on the State to keep natural rivers within their bounds and maintain their courses and take protective measures so that on account of floods and natural causes, they do not inundate or endanger the neighboring or riparian lands causing damage to them. But a duty is laid by the law upon the State to protect neighboring lands from danger of floods or inundation only if it interferes with the flow or course of the natural rivers by constructing dams, cross bunds, channels or whatever other artificial work and the like and even in such a case, the State's liability to damages will depend upon whether the injury complained of is the direct result of something done or omitted to be done without reasonable care and caution in connection, with the artificial works. Upon that view the second point of the Appellant cannot be accepted either. But before leaving this point it may be mentioned that a riparian owner of lands adjoining a river is entitled to protect his lands from inundation or against floods by taking protective measures. But the limit of his right is that his act in the protection of his lands does not result in injury to others. See *M. & S.M. My. Co. Ltd. v. Maharaja of Pithapuram* ILR (1937) Mad. 919.

12. There remains the last point of the Appellant that where power is given to an authority for public benefit it is coupled with a duty and failure to perform that duty will amount to actionable negligence. The basis for this argument is Section 17 of the Madras Rivers Conservancy Act, 1884.

Section 17 of this Act confers power upon conservators to do acts necessary to prevent danger to life or property and to do any act which

appears to them to be necessary to prevent erosion, breach of embankments or the flooding over them. The Act itself is, I think, mainly intended

for purposes of conservancy of rivers and it is for that purpose Section 17 has been enacted. I would have thought it necessary to dwell upon

Section 17 and consider its effect in the present context, had it not been for the fact that it is clear from Section 2 that the Act is applicable to only

such rivers, as, by notification, in the Official Gazette, are declared to be governed by the Act. It is not in dispute that no such notification has been

made declaring that the rivers in question would come under the Act. The Act has, therefore, no application to the suit rivers. The foundation of the

argument on which the point of the Appellant is based is not there. It was stated that under the provisions of the Madras Compulsory Labour Act,

1858 the Government had the power to requisition labour for the prevention of mischief by inundation, but I doubt whether this Act has application

to embankments of natural rivers. In any case, I can find no indication in the Act which places a duty upon the State to act under it in particular

circumstances. The power provided thereunder appears to me to be no more than enabling.

13. The second appeal fails and is dismissed with costs. No leave.