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**(1940) 05 PAT CK 0004**

**In the Patna High Court**

Harihar Prasad Singh and Others

APPELLANT

Vs

Mt. Janak Dulari Kuer and Others

RESPONDENT

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**Date of Decision :** 07-05-1940

**Acts Referred:**

Bengal Tenancy Act, 1885 — Section 101, 102

**Citation :** AIR 1941 Patna 118

**Hon'ble Judges :** Meredith, J;Agarwala, J

**Bench :** Full Bench

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## Judgement

Meredith, J.—This is an appeal from a decision of the Additional Subordinate Judge at Arrah, dated 16th May 1938, affirming a decision of the Munsif of Arrah, dated 12th October 1936. The Munsif dismissed the appellants' suit with costs, and the subordinate Judge similarly dismissed the appeal. The appellants are the maliks and raiyats of village Dihra, and they sued the respondents as maliks and raiyats of a lower village Chasi for a declaration of their right to take water from a certain water-course known as nadi Harkhaine to their village Dihra for irrigation purposes, along a pyne plot No. 167 of that village, and also by means of sair and don; for a permanent injunction restraining the defendants from interfering with this right; and for damages.

2. The plaintiffs' case was that there was a natural stream coming from the Sasaram Hills a long way to the south and flowing northwards through villages Baghi, Muradpur, Chaprapur, Dihra, Ohasi, Kurmichak, Dargaon, Poswa, Ahile, Bara, Bartiar and various other villages, and ultimately joining the Gangi river at Gyanpur, which Gangi river in turn falls into the Ganges. The maliks and tenants of village Dihra as riparian owners are entitled to take water from this nadi for irrigation purposes. There is a pyne in village Dihra, plot No. 167, which meets the nadi at a point A shown in the plaint map through which water is always taken for irrigating Dihra lands. Sair and don are also used. Besides the appellants' rights as riparian owners, they have also acquired a right by prescription, easement and lost grant to take water from this nadi, as they have

been taking it for over twenty years.

3. This natural stream is called by various names at different places, namely Harkhaine, Kumhari, Nagini, Nagri and Souraha. Besides this nadi there was formerly another nadi named Kumhari, which also came from the south and flowed northwards on the eastern side of the Harkhaine through villages Amarpur, Gurdiha and Bargaon. This nadi used to join the Harkhaine to the north of village Chasi, and for some distance north of that the joint nadi was called Kumhari.

4. This Kumhari nadi, however, was dammed at Gurdiha and other places, and became silted up long ago. From this Kumhari nadi long ago a pyne was constructed taking the water from the Gurdiha bandh to village Chasi bandh, and the pyne having been constructed when there was a common malik of Chasi and Gurdiha. That pyne, however, also silted up long ago.

5. In 1334 Fasli, when the Dihra men cut open the pyne plot No. 167 at the point A as usual for taking water from the Harkhaine nadi, the tenants of Chasi obstructed them and assaulted them, as a result of which a criminal case was brought by the Dihra tenants and a counter criminal case by the Chasi tenants. These cases went up to the High Court, and there they were compromised, so that the parties might decide their dispute regarding their respective rights to take water from the Harkhaine nadi in the civil Courts.

6. The defence case was that the water channel known as Harkhaine was only loosely called a nadi, but was actually an artificial channel dug by Babu Kuar Singh, who was formerly a powerful proprietor of Chasi and Gurdiha, who was also the con-structer of the Gurdiha bandh across the Kumhari and who constructed the channel for the purpose of taking the Kumhari water collected in this bandh to irrigate village Chasi. Hence the proprietors or tenants of Dihra have no right to take water as riparian owners, and never took any water from it either through the pyne plot No. 167, or with the help of sair and don (plot No. 167 is only a portion of an old ahar in village Dihra), nor have the people of Dihra acquired any right to take water from this artificial channel by prescription, easement or lost grant. Except Chasi, no other village was ever or is irrigated with the water of this channel. Kumhari and Harkhaine are simply alternative names for the same channel, and there was never any separate Kumhari nadi flowing on the east side of the Harkhaine northwards through Gurdiha and Bargaon from which Chasi used to take water by means of a pyne. The story of this separate Kumhari nadi was invented by the plaintiffs in order to show that a number of previous disputes and resulting litigations did not relate to the Harkhaine but to this imaginary Kumhari nadi.

7. The concurrent findings of both Courts are that the water channel, which is the subject of the suit, is an artificial channel constructed long ago by a proprietor of Chasi and Gurdiha, probably Kuar Singh, for irrigating the lands of the former village. The people of Dihra therefore have no riparian rights, nor

have they succeeded in establishing that they have any rights by way of prescription. The channel in question takes its origin in village Baghi, and is fed first by surplus irrigation water from Baghi and then by water taken by a pyne running from the Gurdiha bandh and joining the Harkhaine at the trijunction stone of the three villages Gurdiha, Amarpur and Muradpur.

8. The plaintiffs did not succeed in showing that there was any natural water-course either south of Baghi, or north of Chasi, and the survey maps and survey khatians definitely proved that the Harkhaine nadi together with its connecting pyne ends on the south in the ahar plot No. 115 in village Baghi. The old Kumhari nadi shown in the thakbast map of 1844 is simply the disputed Harkhaine, and the records of the old civil and criminal cases filed very definitely show that these cases relate to the Kumhari nadi which is the present Harkhaine, and they never related to the old Kumhari nadi which dried up long ago. The cases of 1811 and 1821 referred to in the judgment (Ex. 1) could not possibly have related to the old Kumhari nadi which lay far away from Chasi towards the east, but related to the disputed Harkhaine. Similarly, the Kumhari nadi in dispute in the criminal case of 1861 could not possibly be the old Kumhari nadi shown in the revenue survey maps of 1845, but was the Kumhari nadi which is ahar plot No. 18 in village Gurdiha and the pyne running west from this bandh and then north to Chasi which is the present Harkhaine in dispute.

9. The civil suit of 1862 also related to the disputed channel now known as Harkhaine, and so also two criminal cases decided in 1894. The so-called Harkhaine nadi in Chasi and below it consists only of isolated ahars and nalas separated by one another by bandhs at various places. It is only during the rainy season that all these ahars and bandhs and the disputed water-course named Harkhaine become connected with each other and form a continuous channel.

10. In view of these findings, the evidence of the plaintiffs' witnesses that they had all along taken water from the Harkhaine could not be accepted. The lower appellate Court went so far as to observe that it did not consider it necessary to scrutinize the evidence of the witnesses examined by the plaintiffs on the point of user of the water, because having regard to the finding that the watercourse in question was constructed by a powerful malik like Kuar Singh it was impossible to believe that in his time anybody could take a drop of water from this channel.

11. The findings that the disputed watercourse is an artificial channel and that the previous disputes and litigations related to this channel, are indubitably wrong, and the only question is whether they can be interfered with in second appeal. In arriving at these findings, the Courts below can hardly have studied the course of this channel as shown on the survey maps. One would have thought that one glance at the outline of the channel as shown in the various survey maps would have convinced anyone that this was no artificial channel. It winds sinuously like a serpent. In places it has close loops which are here and there not far from being re-entrant. At some places islands are shown in the midst of the channel. No man in his senses would construct an artificial channel

like this in flat country. No man would construct islands in an artificial pyne.

12. On the other hand, the course of this stream as shown on the survey maps of 1911 is typical of the meanderings of a natural stream in flat alluvial country such as Bihar. Not only that, but the stream is clearly shown as a natural winding stream on the district map (Ex. 23) where it appears rising in village Baghi and flowing for miles and miles far to the north until it flows into a larger stream, the Gangi, which eventually falls into the Ganges. It is to be noticed too--and this is a fact which the lower Courts also seem to have failed completely to appreciate--that the channel shown in the settlement map continues for some distance to the south above the trijunction point where the pyne from the Gurdiha bandh enters it.

13. In village Muradpur the channel which is called nadi Harkhaine is shown in plot No. 560, and in the fard-i-abpashi of village Muradpur (EX. 7) against this plot No. 560 it is noted that this plot is Harkhaine nadi and water comes to it from village Baghi. About 18 acres of land of Muradpur are irrigated with its water, and the remaining water flows to Chaprapur. It is clear therefore that whether or not water is taken into the Harkhaine nadi from the Gurdiha bandh through a pyne constructed by Kuar Singh as alleged by the defence, at least water does flow in the Harkhaine nadi from village Baghi, and indeed there is a concurrent finding of both the Courts below to that effect. The channel shown in the map, running to the south of the trijunction, where according to the defence the pyne runs into the Harkhaine, is clearly the channel through which the water from Baghi comes. It is nobody's case that this portion of the Harkhaine channel is artificial.

14. It is therefore a natural channel continuing the Harkhaine nadi southwards, above the trijunction where the pyne is said to enter up towards Baghi. This is a natural channel and it cannot but have had an independent existence irrespective of any works constructed by Kuar Singh.

15. It follows therefore that the Harkhaine nadi must have existed independently of Kuar Singh's channel, and this being so, then if Kuar Singh did at all dig a pyne taking the water from the Gurdiha bandh to Chasi, at most all he could have done was to have taken the Gurdiha water by means of a pyne and diverted it into the pre-existing natural Harkhaine nadi, and at most also all he could have done was to improve the pre-existing channel, at least from the trijunction point onwards up to Chasi. Even if the Gurdiha water does flow as alleged by the defence, it manifestly flows through a channel already existing independently of the Gurdiha diversion, and that conclusion is inescapable having regard to the course of the channel on the map and the fact that the Gurdiha pyne is shown joining a channel continuing on both sides of its entrance. If I may make plain the point by an illustration, the junction forms a T, and not an L, and even according to the findings of the Courts below the water below the junction consists not only of Gurdiha water but also of Baghi water coming along a natural channel. This no doubt affords a quite simple explanation of why plot No. 560 is

called a nadi and not a pyne ; and the same thing appears further down between Chaprapur and Dihra where the plot, which is numbered 1758, is named nadi Harkhaine. Further up again, when we come to village Chasi itself, and where possibly the local inhabitants would think mostly of the fact that this was the channel through which water was taken to them from Gurdiha by Kuar Singh's pyne, we do find the channel called a pyne. It is shown as plot No. 1255 of Chasi, and the fard-i-abpashi of Chasi refers to it as qudrati pyne ("yeh pyne qudrati hai"), a most significant entry showing clearly that if in one sense a pyne the channel was in its origin a natural stream. The Courts below disposed of this significant entry merely by saying it does not appear to be correct. On the contrary, for the reasons which I have given, it is just the entry to be expected, and appears to be entirely correct.

16. Further north again the channel in many places is bandhed, and where the bandh gives rise to accumulation of water it is very naturally recorded as ahar. That, however, does not in any way detract from the plaintiffs' case that it is essentially a natural channel modified in many places by villagers so as to use its waters with greater facility for irrigation. The lower Courts appear to have misdirected themselves entirely on this point, as I shall presently show, in arriving at their conclusion that the channel is artificial. At different places in its course through various villages towards the north the channel has different names and different descriptions, but that would in no way prevent its being essentially a natural channel, and here again the Courts below have misdirected themselves as to what in law can constitute a natural watercourse.

17. The settlement glossary shows that the word nadi is used to designate a natural river or stream, similarly for nala, and at places to the north it is described as nala which means a natural water-course. Even the word ahar is described as a reservoir of water or a small hollow in a river bed, so that an ahar may well be a reservoir constructed in the course of a natural stream, and indeed those plots which are recorded as ahars in many cases appear in the survey maps more like stretches of a natural channel.

18. Both the Courts below have not only found that the channel is artificial, but that the plaintiffs have not established that they ever took water from it for irrigating village Dihra. Here again one look at the maps would appear to show them wrong. Both in the cadastral survey map of 1911 and in the revenue survey map of 1845 a pyne is closely shown taking off from the Harkhaine nadi and flowing into the midst of village Dihra. This pyne leaves the Harkhaine at a point marked A on the plaint map, which is just the spot where according to the plaintiffs they were assaulted by the Chasi tenants while attempting to take water. The pyne is shown in the cadastral survey as plot No. 167 of Dihra, and is called pyne. This most significant feature of the village maps, which so strongly corroborates the evidence of the plaintiffs' witnesses, cannot be disposed of, as the Munsif has done, simply by saying that this pyne plot No. 167 appears to be connected with other pynes and ahars situated in village Dihra; or by ignoring it

completely as has been done by the lower appellate Court. This is little better than, having once adopted a preconceived notion brushing aside everything which does not square with it. Wherever the survey entries, as in the use of the words *qudrati nadi*, and *nala*, and in showing this *pyne* No. 167, do not favour the theory adopted by the Courts below, they are simply brushed aside as wrong. The lower appellate Court has indeed, as I have noticed already, expressly omitted to scrutinize the evidence of the witnesses examined by the plaintiffs on the point of user of the water, because that evidence is not consistent with its view that the water, course was an artificial one constructed by a powerful *malik*.

19. Actually both the Courts below have been greatly influenced in their view by the fact that no *fard-i-abpashi* of village Dihra was prepared during the last survey operations. This, they think, leads to the clear inference that the Harkhaine is an artificial stream, and that Dihra must have no right to take water from it either through the *pyne* in plot No. 167, or by means of *sair* and *don*. Had they examined the position more closely they would have found that no such inference could be drawn from the absence of an irrigation record for Dihra. It appears that the survey of that village was a special survey made of village Dihra completed in 1908 some years before the cadastral survey. The survey operations must have started at least as early as 1907, as they were finished in January 1908. Indeed, the order for this survey would probably have been passed as early as 1906. That order must have been passed u/s 101, Ben. Ten. Act. Section 102 of that Act prescribes the particulars to be recorded, and states that these particulars shall be specified in the order.

20. Amongst those particulars under the heading (gg) are included rights and obligations in respect of the use of water for agricultural purposes. This provision (gg) was however added to Section 102 only in the year 1907. It follows that if the order for the survey of Dihra was passed early in 1907 or in 1906 it could not have provided for the preparation of any record of irrigation rights, and consequently no *fard-i-abpashi* could have been prepared, since the particulars to be recorded must depend on the terms of the order. This fully explains the omission to record the water rights for village Dihra and the adverse inference made by the Courts below, and on which they have very strongly relied in coming to their conclusions, was unjustified. The Courts below also went wrong in strongly relying on the *thakbast* maps of 1844 (EX. A series). The Munsif observes:

In Ex. A, *thakbast* map of village Chasi, it is noted amongst other things that it is irrigated by the *Kumhari pyne* and that the village belongs to Babu Kuar Singh. In Exs. A-1, A-2 and A-3 which are *thakbast* maps of villages Dihra, Bargaon and Gurdiha it is noted amongst other things that these villages have no right to take water from the *pyne* and the *nadi* and that these villages depend for their water on rains and *ahars* situated in the villages. It will therefore clearly appear that the Dihra village had no right in 1844 to take water from the *Kumhari nadi* and

that Kumhari nadi is shown in these maps as the present Gurdiha bandh. and the present disputed Harkhaine.

21. That the people of Dihra had no, right to take water from the Kumhari pyne and Kumhari nadi is entirely consistent with the plaintiffs' case since it is the plaintiffs' case, as I have already stated, that there was another river Kumhari which came from the south to village Gurdiha and passing north of the Gurdiha bandh it went through village Bargaon and Kheri in its downward course and finally met the Harkhaine near about villages Bara and Bargaon, and according to the plaintiffs the old documents filed by the defendants really related to this old Kumhari nadi from which nadi Chasi people used to take water by a pyne known as Kumhari pyne leading to their village. That this was so they established by filing the revenue survey maps, which clearly show the course of the old Kumhari nadi which subsequently silted up; and also the Kumhari pyne running westwards from the Gurdiha bandh on the Kumhari and then northwards to village Chasi running half way between the old Kumhari nadi and the Harkhaine nadi. I shall revert to this presently.

22. I mention it now to show that the only thakbast entry conflicting with the plaintiffs' case is that Dihra, Bargaon and Gurdiha depend for their water on rains and ahars situated in villages. The Courts below have relied strongly on this entry, but it was an entry which the thakbast surveyors were not competent to make. It is consequently no evidence, and the Courts below were wrong in relying upon it. As will appear from Hirst's "Notes on the old revenue survey of Bihar" the thakbast was a rough and ready survey made in 1844 as a preliminary to the regular revenue survey made in 1845. Its function was to record, boundaries only, as a demarcation survey, and water rights were completely beyond its scope. The surveyors had no authority to record any irrigation rights, and any such notes made on the map carry no presumption and are not evidence. This has been clearly laid down by the Privy Council in *Jarao Kumari v. Lalomoni* (90) 18 Cal. 224. That was a case where, amongst other evidence, a thakbast map was produced containing a note by the amin that certain lands were debutter, and their Lordships observed that the amin, who made it, had no authority to determine what lands were debutter, but only to lay down and to map boundaries.

23. Consequently, this map could not be treated as raising a presumption of correctness within Section 83, Evidence Act, 1872, on the question as to the amount of debutter land in one of the villages mapped. Statements on the face of the map as to what lands were debutter appeared to have been made according to the pointing out of the agents of the proprietors of the mauza and the principal tenants, and those statements could not be regarded as evidence.

24. In another Privy Council case, *Jagedo Narain Singh v. Baldeo Singh* AIR 1922 P.C. 272, it was held for the same reason that entries in the thakbast khasra had by themselves no evidentiary value. Finally, there is a third Privy Council case, *Krishna Pramada v. Dharendra Nath* AIR 1929 P.C. 50, where the position has

been made quite clear. It was laid down that thakbast state, ments are admissible and of evidentiary value unless -- and this is the important point--the entries relate to matters altogether outside the scope of the thakbast survey.

25. The learned lower appellate Court cites this case as an authority for his view that he is entitled to rely on the irrigation entries in the thakbast maps. He is of opinion that the statements regarding the irrigation rights were not outside the scope of the thakbast survey. It appears to me, however, clear that such entries were altogether outside the scope of the preliminary boundary demarcation survey known as thakbast. Taken purely as a map the thakbast map is in no way inconsistent with the plaintiffs' case, since the Harkhaine nadi is shown and there appears also a little outlet opening from it into village Dihra.

26. As I have said, the revenue survey maps of 1845 (Ex. 9 series) support the plaintiffs' case with regard to the old Kumhari and Kumhari pyne in the strongest possible fashion, and the Court below having for some reason, which I find inexplicable, adopted the view that the old channel and pyne, which formed the subject of much litigation in the past, were really the disputed Harkhaine nadi, have found the revenue survey maps extremely difficult to explain away.

27. On this point both the judgments are extremely unsatisfactory and unconvincing. Having regard to the old maps, it was impossible to avoid holding that at some time in the past there was an old nadi known as the Kumhari nadi some distance to the east of and distinct from the Harkhaine. At the same time, the defendants' case could only be accepted by holding that all the previous litigation really related to the Harkhaine nadi under the names of the Kumhari nadi or Kumhari pyne. They were therefore faced with holding at the same time that the Kumhari nadi and pyne were and were not distinct from the Harkhaine. Thus, we find the following passages separated only by a few lines in the judgment of the learned subordinate Judge:

To me therefore it appears that the story of the silting up of the river and pyne (i. e. Kumhari) has been introduced to explain away the judgments referred to above in all of which villages other than Chasi were deprived of the water of the disputed water channel...

Secondly:

It is contended by the appellants (plaintiffs) that this Kumhari river silted up between 1845 and 1908 when the cadastral survey of Bargaon took place. No doubt taking the revenue survey map and cadastral survey map of Bargaon to be correct, this contention of the appellants must be accepted. But merely because there was one Kumhari nadi which silted up after 1845 it cannot be said that all the litigations which took place from 1863 downwards related to a pyne issuing from that silted up river which on account of the silting up of the river could not carry any water. It is therefore manifest that the litigation, the judgments of which are Exs. I, K, LandL (1) related to the disputed water.

28. As for the learned Munsif, he commits himself to the statement that it is clear that the Kumhari nadi shown in the old maps is the present Gurdiah bandh and the present disputed Harkhaine. "The fard-i-abpashi" he says,

of village Gurdiha (Ex. Q1) notes plot No. 80 as pyne Kumhari, and further notes that Gurdiha tenants irrigate 10 acres of land north of the bandh plot No. 81 with the water of Kumhari plot No. 80 by means of sair and don; but the Gurdiha tenants have no right to take water by cutting the bandh; the malik of Chasi is in charge of repairing this bandh plot No. 81, and the water from the Kumhari pyne plot No. 80 goes to Ghasi along Amarpur. The fard-i-abpashi of plot No. 81 (Ex. 15) notes that this plot No. 81 is bandh nadi Kumhari. It is noted in it that this bandh is made in nadi Kumhari; its management is in the hands of the malik of village Chasi; that its water irrigates the lands of Chasi and Bargaon; but the Bargaon people have no concern with the bandh and they can take water over the bandh by means of sair and don.

29. On this basis the learned Munsif observes that

the fard-i-abpashi (Exs. Q2 and 15) therefore definitely prove that the Gurdiha bandh belongs to the malik of Chasi and that water is taken from plot No. 80 which is known as Kumhari nadi to Chasi along Amarpur.

30. This is all perfectly correct, but it is in no way inconsistent with the plaintiffs' case which, it will be recalled, is that water originally passed to Chasi from Kumhari nadi. When this Kumhari began to silt up the maliks of Chasi and Gurdiha preserved the flow to Chasi by erecting the Gurdiha bandh across the Kumhari and constructing a pyne from that point running to Chasi in a straight line between the course of the. Kumhari nadi and nadi Harkhaine. Later, when this pyne also began to silt up, the portion of the pyne running westwards from the Gurdiha bandh was extended still further to the west so as to flow Kumhari water into the Harkhaine itself at the trijunction point. After that, of course, the old Kumhari and Kumhari pyne both disappeared. This story is strongly corroborated by an examination of the thakbast maps, revenue survey maps and cadastral survey maps. It is necessary to keep clearly in mind that altogether there are three channels under consideration, all running from south to north roughly parallel to each other: farthest east the Kumhari nadi to the west of that the Kumhari pyne and west of that again the Harkhaine nadi. All three are clearly shown in the revenue survey maps. Having found correctly that the people of Chasi alone are entitled to the water of the Kumhari pyne, the learned Munsif proceeds directly to add:

The fard-i-abpashi of Gurdiha and of Chasi also prove further that the Harkhaine which runs for a considerable distance in village Chasi and the Gurdiha bandh all belong to Chasi men and were originally made by the malik of Chasi.

31. As far as the Harkhaine is concerned, this is a complete example of non sequitur. Next the learned Munsif proceeds to brush aside the report of the commissioner deputed to examine the water-course, saying merely that the

commissioner was taken out during the rains. The commissioner found a continuous stream flowing from south to north from village Baghi as far as Koshi Dihra, where he started. Here the learned Munsif appears to have been misled by his erroneous view of what could constitute a natural stream. He seems to have thought that though the stream was continuous during the wet season, it could not be called a natural water-course, because it might dry up in places during the dry season. I shall revert to this presently.

32. Next, after drawing the inference from the thakbast map which, in my view, he was not entitled to do, the learned Munsif comes to the rubkari bandobasti papers of the village Chasi (Ex. B series), dated 1860. These rubkari bandobasti papers relate to the settlement made by the Government after confiscation of the estate of Babu Kuar Singh under Regn. 7 of 1822. In all these rubkari bandobasti papers, it appears, says the Munsif, -it is noted amongst other things that the fields of Chasi are irrigated with the water of Kumhari nadi which comes through a pyne to Chasi. Holding as he does that the Kumhari is the Harkhaine, he regards this as inconsistent with the plaintiffs' case. Actually the entries support the plaintiffs' case, since the reference is to a pyne coming to Chasi from the Kumhari nadi, and not to the Harkhaine.

33. Next, the Munsif refers to a judgment of a criminal case of 1861 (Ex. 1), which was brought by the proprietor of Chasi against one Sheobalak Eai, Tahsildar of the proprietors of Gurdiha, for cutting the bandh of the Kumhari nadi and taking water from the opening so made to Bargaon. The Deputy Magistrate who tried the case found from the rubkari bandobasti papers of the settlement officer, dated 16th August 1860, that village Gurdiha could not be irrigated by the Kumhari nadi, and he referred to another decision, dated 18th May 1811 and an appellate decree, dated 1st February 1821, in both of which the dispute was between the people of Dihra and Chasi. He mentions the facts relating to these cases of 1811 and 1821 as follows:

Kumhari nadi runs west to east and a pyne issuing from it towards the north conveys water to the lands of Chasi. The people of Dihra were desirous to throw a bandh across the pyne and water their own lands. By the two cases abovementioned, it was decided that this pyne belonged exclusively to Chasi and the people of Chasi had no right to have a bandh across it.

34. The Deputy Magistrate found that the Gurdiha bandh had been hitherto constantly closed and under the control of the people or malik of Ghasi, and the defendant Sheobalak's motive in cutting the bandh was to carry the water to village Bargaon. Subsequently, in 1852, the proprietor of village Gurdiha brought a civil Suit No. 102 of 1862 (Exs. G and H, plaint and written statement) for a declaration of title to irrigate the lands of Gurdiha with the water of Kumhari nadi, alleging that the Kumhari nadi and the bandh belonged to the proprietor of Gurdiha.

In the written statement (EX. H) it is alleged that originally Babu Kuar Singh was

the proprietor of Ghasi and Gurdiha and for the purpose of irrigating the fields of Chasi he made the bandh at Gurdiha and took water from the bandh to Chasi by means of a pyne. The learned Munsif observes that the issues raised in that suit were very nearly the same as the issues of the present suit. To me it appears that they are quite different. They related to the old claim of the Gurdiha people to the water of the Kumhari nadi, which is entirely distinct from the present claim of the Dihra people to participate in the water of the Harkhaine.

36. The learned Munsif considers that the decisions of these old criminal and civil cases support the defendants' case. He was not entitled to rely on the decisions in criminal cases, but apart from that if the three distinct channels are kept in mind, these decisions are entirely consistent with the truth of the plaintiffs' case. When faced with the revenue survey maps of 1845 the Munsif avoids the difficulty by observing, in my view wrongly, that these maps are contradicted by the evidence of the plaintiffs' witnesses, because none of the witnesses ever saw the old Kumhari nadi and some never heard of it. Some said they heard of it from their forefathers and some even said that the disputed Harkhaine itself was the Kumhari nadi.

37. That vague statements were made about a river which had silted up so many years before is not surprising; but if it be recalled that the plaintiffs' case was that the Kumhari originally fell into the Harkhaine further to the north, after which the joint river was known as Kumhari, there is nothing necessarily inconsistent with the revenue survey maps in the statements of these witnesses. The Munsif goes on to say that:

The criminal and the civil case papers and judgments (Exs. G to K) very definitely go to show that these cases relate to the Kumhari nadi which is the present Gurdiha bandh and the present disputed Harkhaine and they never related to the old Harkhaine nadi which dried up long long ago.

38. I am unable to follow this reasoning. To me it appears, on the contrary, quite clear that they did relate to the old Kumhari nadi and the pyne taken from it. The Munsif proceeds to observe that:

All doubts concerning the identity of the Kumhari which formed the subject-matter of the suit and the case of 1861-62 are set at rest by the judgments of the two criminal cases (Exs. 1 and L1) decided in 1894. One case was brought by the residents of village Bargaon against certain residents of village Chasi on the allegation that the accused persons had cut the Harkhaine which passes along the boundaries of the two villages on account of which the water from the Harkhaine flowed into Bargaon lands and damaged the paddy crops. The case of the accused persons was that it was the complainant who cut the bandh in order to drain off the water from the Harkhaine which he had no right to do. The second case was a counter case.

39. The Deputy Magistrate, who decided these cases, relied largely on the entries on the thakbast maps to which I have already referred. The Deputy Magistrate

held that the charge that Chasi people cut the bandh to cause inundation in Bargaon could not be maintained. The Bargaon people always wished to establish a right to the water in Harkhaine river and with this object the accused, who were servants of Bargaon malik, went and cut the bandh. "These judgments clearly show," says the Munsif, "that the nadi in dispute in those cases is the present Harkhaine.

40. The learned Munsif was entirely wrong in relying on the decisions in criminal cases in this manner, and that apart from the fact that the decisions were based upon inadmissible entries in the thakbast maps. None of these old cases help the defendants once it is understood that they related to the Kumhari pyne, and not to the Harkhaine nadi. There can be no possible doubt that once there did exist a Kumhari nadi and Kumhari pyne entirely distinct from the Harkhaine. It seems probable that the Kumhari nadi disappeared soon after Kuar Singh erected the Gurdiha bandh, which must have largely stopped the flow of the Kumhari in its natural course.

41. Later on, the intermediate channel constructed by Kuair Singh, that is, the Kumhari pyne, which was the real subject of the old litigation, also disappeared. Both had gone by 1911, as the cadastral survey records show. After that it is probably true that the Kumhari water was taken to Chasi through the course of the Harkhaine, though it may be noted that the survey map of 1911 does not show a continuous pyne leading from the Gurdiha bandh to the Harkhaine. The pyne appears interrupted in the middle, and it may well be that the main source of the Harkhaine water still comes from Baghi. However that may be, there can be no doubt that the Harkhaine had an existence entirely independent of the Kumhari, and it would appear from the revenue survey map that in 1845 it was not fed by the Kumhari water at all, except where the rivers joined far to the north of Chasi. The only water which flowed to Chasi through the Harkhaine was the water coming from Baghi on the southwest. The revenue survey map of Muradpur (Ex. 9-H) clearly shows the Harkhaine nadi at that time fed only by a channel coming from the direction of Baghi. If Kuar Singh or some subsequent malik of Chasi and Gurdiha did lead the Kumhari water into the Harkhaine channel, it is manifest that the most he could have done was to adopt and adapt a pre-existing natural channel.

42. The use of the Harkhaine nadi as a channel for the Kumhari water would not however make the channel an artificial one, or deprive the plaintiffs of their natural rights as riparian owners. Indeed, one might go further, though it is not necessary to do so, for the purposes of the present case: even where the water of a natural channel is diverted into an artificial channel and even where it may spread out over fields, finally emerging into another channel, riparian rights as in the case of a natural stream will remain.

43. This has been laid down by this High Court in *Ramkripal Singh v. Hanuman Das* AIR 1921 Pat. 51 where it was pointed out that a stream, which in its inception is a natural stream, retains its character as such, even when it is

diverted by the operation of man into an artificial channel; and if the water of a stream disperses itself over the fields, but after emerging from the fields, again runs in a definite course, its identity is not destroyed. Riparian rights do not depend upon a grant or upon the ownership of the soil of the stream, but are jure naturae, incident to the ownership of the soil of the land abutting upon the stream, and the doctrine that these riparian rights still exist even when the stream is taken into an artificial channel, is based upon the legal fiction that the artificial channel must have been originally constructed upon the terms that all the proprietors of lands situated on the artificial channel should have the same rights in regard to the use of the water as they would have had if the stream had been a natural one.

44. All this is to be found laid down long ago in *Nuttall v. Bracewell* (1866) 2 Ex. 1, where Channell B, concludes his judgment thus:

I see no reason why the law applicable to ordinary running streams should not be applicable to such a stream as this, for, it is a natural stream or flow of water, though flowing in an artificial channel. It may be that the case of an entirely artificial stream, as one flowing from a mine for instance, would be different, but that an artificial stream may be on the same footing as a natural one, as regards the rights of riparian proprietors, is held in *Sutcliffe v. Booth* (1863) 32 L.J.Q.B. 136.

45. This was quoted with approval in *Holkar v. Poritt* (1873) 8 Ex 107. The truth seems to be that in this case the Munsif went wrong, and the subordinate Judge in a somewhat superficial judgment simply followed the Munsif. The question is whether the High Court can interfere with the decision in second appeal. For the respondents it was argued that the finding of the Court below that the Harkhaine was an artificial channel, built exclusively for taking water to Ghasi, was correct; but the argument on this point was halfhearted, for the facts were really too strong to be contested. The respondents mainly take their stand on the position that there are concurrent findings of fact based on a consideration of all the evidence, and, right or wrong, these cannot be touched in second appeal.

46. Reliance was placed on the Privy Council case in AIR 1934 112 (Privy Council) . That also was an irrigation case, and it was laid down that the High Court has no jurisdiction u/s 100, Civil P.C., 1908, to reverse the findings of fact of the lower appellate Court, unless the findings are vitiated by an error of law, and that rule applies even though the findings may be inferences of fact drawn wholly or in part from documents. The consideration of inadmissible evidence, it is argued, such as the entries in the thakbast maps, and the drawing of wrong inferences from the non-preparation of the irrigation record of Dihra, will not vitiate findings of fact based upon a consideration of all the evidence, documentary and oral, such as the findings are in the present case.

47. For this proposition, reliance is placed on the Pull Bench case, *Soney Lal Jha v. Darabdeo Narain Singh* AIR 1935 Pat. 167, where it was held that the

consideration of inadmissible evidence will not vitiate findings of fact if the High Court can come to the conclusion that there was sufficient admissible evidence on the record to justify findings.

48. In the first place, as I have indicated, all the evidence has not been considered in the present case. The lower appellate Court expressly refrained from considering the plaintiffs oral evidence, because of the preconceived notion which it had formed that it could not be correct. Secondly, the consideration of inadmissible evidence, such as the thakbast maps and the decisions in criminal cases, though it may perhaps not vitiate the findings where there is sufficient other evidence to support those findings, will clearly vitiate the findings where there is not sufficient other evidence, that is to say where the inadmissible evidence is mainly relied on to arrive at the findings in question. That, it seems to me, is just what has happened in the present case.

49. So far as I can see, the Courts below have relied almost entirely on five things in arriving at their findings: (1) that there is no irrigation record showing irrigation rights of village Dihra in regard to the channel, (2) the decisions of the criminal cases, (3) the entries in the thakbast maps, (4) the failure of the plaintiffs to show that the Harkhaine takes its rise miles above Baghi in the Sasaranr Hills and (5) the failure of the plaintiffs to show that the Harkhaine is a continuous channel throughout the year. Excluding these five things, I can find little else on which the findings in favour of the defendants could be based. The remaining" evidence--oral and documentary--almost entirely favours the plaintiffs. Now, the first of these five represents an entirely unjustifiable inference based on a mistake. The second and third were inadmissible as evidence being no more than documentary hearsay. The fourth and the fifth could only lead to an inference adverse to the plaintiffs upon a wholly mistaken view as to what constitutes in law a natural stream.

50. In short, the finding that the Harkhaine is an artificial channel is based mainly on inadmissible evidence and upon an incorrect view of what in law constitutes a natural water channel. All that is laid down in the Pull Bench case is that the decision cannot be interfered with if the findings can still be said to be possible and reasonable findings upon the evidence that is left after excluding the inadmissible evidence. In the present case we are practically left with items 4 and 5 above.

51. These two circumstances however cannot be held in law to be possible supports for the finding, because they only lead to an inference that the channel is not artificial upon a wrong legal view of what constitutes a natural channel. It is quite a mistake to suppose, as the Courts below seem to do, that a natural stream must have its origin in a mountain spring, or that it must flow continuously throughout the year, and it must at every single point of its course flow through a clearly defined channel.

52. What is to be considered in law a natural channel is defined by the Privy

Council in *Stollmeyer v. Trinidad Lake Petroleum Co. Ltd.* AIR 1918 P.C. 60. The Vessigny river, which formed the subject of that litigation, was often dry altogether during the dry season, after an intermediate period when there was first a mere trickle and then only a chain of isolated pools. In the course of his judgment Lord Sumner observes:

The respondents have argued that the Vessigny river is not such a river or natural water-course that its lower riparian proprietors can complain of anything they may do in dealing with such water as falls on their own lands... Certain it is that the Vessigny river and its network of ravines constitute a natural system of permanent and defined courses for water. Sometimes there is no water in these water-courses, and sometimes what there is does not course, nor are they ever fed by spring; but these circumstances are not critical. A river may be fed by the rains directly, without any intermediate collection of the water in the bowels of the earth, and still be a river, and a river which naturally runs during a good part of the year does not cease to be a river merely because at times it is accustomed to become dry.

53. Applying this criterion the fact that the Harkhaine cannot be traced in any defined channel above Baghi, and the fact that it may not flow as a continuous stream throughout the year, do not form any basis for an inference that it is not a natural water-course. When such an inference has been drawn from these circumstances" it has been illegally drawn, and the High Court in second appeal can clearly treat these inferences as not binding. Therefore, all the five items which I have enumerated must go. Excluding them, I can find nothing upon which a finding of fact that the Harkhaine is an artificial channel could be based upon any reasonable view of the evidence.

54. In these circumstances the case is one where, in my judgment, it is quite open to the High Court to upset the decision in second appeal. The decision of the Courts below is one which, in my view, involves grave injustice to the appellants and it is fortunate that it is not beyond the power of this Court to remedy that injustice.

55. It is true that the finding that the water from the Gurdiha bandh flows through the Harkhaine channel must stand; but I have already pointed out, and it is not disputed, that where water is diverted into a natural channel that will not derogate from the natural riparian rights of proprietors lower down.

56. This is clear from the principle laid down in *Ramkripal Singh v. Hanuman Das* AIR 1921 Pat. 51 . There is also a Privy Council authority for the proposition in AIR 1925 236 (Privy Council) , where it was held that a watercourse originally artificial may have been made under such circumstances, and have been used in such a way that an owner of land situate on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream. It was a case where a water-course had been made by deepening and widening an ancient natural water-course, and it was held that notwithstanding this natural riparian

rights still subsisted. Hence, even if it were to be held that Kuar Singh had widened and improved the Harkhaine channel, (and the finding does not go as far as that) even then the plaintiffs' natural rights would subsist.

57. This right is a natural right, not an easement, and is not lost by non-user: AIR 1932 46 (Privy Council) . That disposes of the contention that even if this stream be a natural one, the appellants have lost their natural rights. To prove that it would be necessary to find that there has not merely been non-user for the statutory period, but that that non-user was due to the defendants having successfully prevented the use of the water. I have referred to the clear channel which is shown flowing from the Harkhaine into Dihra both in the revenue survey map of 1845 and the cadastral survey map of 1911. Once it is held that the previous litigation did not relate to the use of this channel or to the use of the Harkhaine water, there is nothing in the case upon which a finding like this could be based.

58. One point remains. The High Court in second appeal is not a Court of fact. We cannot properly set aside the findings of fact arrived at by the Court below and substitute our own findings upon an examination of the evidence. At the same time, a remand is to be avoided if possible. I have anxiously considered whether a remand ought to be made in this case for re-examination of the evidence in the light of the legal principles pointed out, after eliminating inadmissible pieces of evidence. I have come to the conclusion that a remand is not necessary, for there are sufficient findings of fact in the decisions of the Courts below to justify decreeing the plaintiffs' suit after making the proper legal inferences. I have stated that the commissioner reported that he found a continuous channel for many miles when he examined the watercourse in the rainy season. That has been accepted by the Courts below. There is, therefore, a finding that in the rains at least the Harkhaine is a continuous stream and made continuous by the natural flow of its water.

59. There is also a finding that this channel is supplied not only from the Gurdiha bandh but also by water flowing naturally from Baghi. From these findings the legal inference must inevitably, in my opinion follow that this stream is a natural one, and no remand is therefore necessary.

60. The appellants of course have only the ordinary natural rights of riparian proprietors. The decision does not mean that they can unduly diminish the water supply of riparian owners further down, such as the defendants.

61. With these observations I would allow the appeal with costs, set aside the decision of the lower appellate Court, and decree the suit with costs. There was a claim for damages. It will be for the Court below now to determine what damage if any should be allowed. Should the damages allowed amount to less than the sum claimed namely Rs. 600, proportionate deduction should be made from the costs allowed to the plaintiff.

Agarwala J.

I agree