

(1940) 10 AHC CK 0007
In the Allahabad High Court

Municipal Board

APPELLANT

Vs

Rai Kamlapat Rai and Others

RESPONDENT

Date of Decision : 24-10-1940

Acts Referred:

Citation : AIR 1941 All 78 : (1940) 10 AWR 620

Hon'ble Judges : Thom, C.J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Thom, C.J.—This is a defendant's appeal arising out of a suit for an injunction. The plaintiff is one of the owners of a jheel near Gorakhpur known as the Ramgarh tal. Defendant 1 is the Municipal Board of Gorakhpur and defendants 2 and 3 are co-owners of the said jheel. The plaintiff seeks an order injunction in the following terms:

That a permanent injunction be issued against the Municipal Board, Gorakhpur, for bidding it from constructing the drain and from accumulating or allowing to accumulate, and from flowing or discharging any rain, surplus, artificial or dirty and foul water or other material by any artificial means or operations or through the newly dug drain into or near or about the said Ramgarh tal or on the plaintiff's land.

2. The material facts of the case are not in dispute. Ramgarh jheel lies on a level lower than that of Gorakhpur. The jheel in the rains is about five miles long by three miles broad, in the dry season two miles long by one-and-a-half mile broad. The plaintiff avers that he derives along with the other co-owners a considerable income from the plants which grow in the jheel, from the fish in the jheel and from crops grown upon the land which is covered by the jheel during the rainy season but which during the dry season can be cultivated. The Municipal Board of Gorakhpur for purposes of draining part of the city of Gorakhpur have constructed a drain from the city to a point close to the Ramgarh

tal. This drain was practically completed in 1935 and the Municipal Board intended to drain the storm water and the sullage and other dirty water from Gorakhpur into the jheel. The plaintiff objected. He averred that the drainage of the dirty water into the jheel would pollute the jheel and destroy the fish and plants, and further as a result of the construction of the drain a larger volume of rain water would flow into the jheel than did find its way into the jheel by natural water courses and sewage before the drain was constructed. The trial Court dismissed the suit. The learned civil Judge in the lower appellate Court reversed the judgment of the learned Munsif and has decreed the suit. The findings of fact by the learned civil Judge are against the Municipal Board. Upon a consideration of the evidence he found as follows:

(1) Prior to the construction of the disputed drain only rain water and not sullage water of the city flowed into the plaintiff's lake. (2) The entire rain water of the city did not flow into the plaintiff's tal but only of half of the city. (3) Most of the water so flowing was absorbed in the intervening kachcha land and ponds and a very little quantity of even that half flowed into the plaintiff's tank. (4) It is not proved that the aforesaid water entered the plaintiff's tank at the point where the disputed drain empties its water now. (5) The above water formerly flowed through natural channels and not artificial ones and it is not proved that the disputed drain stands in place of them. (6) The new drain discharges into the plaintiff's tank the entire rain and sullage water of the city.

3. The learned Judge visited the jheel and in the course of his judgment referring to his inspection he observes:

At the time of my inspection I found the place where the disputed water entered the plaintiff's tank so full of offensive smell, that it was undoubtedly impossible for any life to survive there. The entire rain water of such a big city as Gorakhpur is next likely to overflow the banks of the lake and the crops like Boro, Jarhan etc., which can only grow in shallow water, are likely to suffer. I therefore find that the disputed drain will cause injury to the plaintiff's crops, fish etc., in their lake.

4. These findings are findings of fact which cannot be disturbed in second appeal. It was contended for the Municipality however that the learned Munsif in the trial Court had wrongfully refused to permit the Municipality to produce expert evidence to prove that the water flowing through the drain into the jheel was not filthy water and would not pollute the jheel. Learned Counsel contended that an application had been made after the evidence had been closed in which the Municipality prayed that they might be permitted to adduce expert evidence and that this prayer had been refused. It appears however that no such application was presented. After the evidence had been closed an application was preferred in which the Municipal Board requested the Court to direct that the water flowing through the drain should be tested by a certain medical officer of health. This prayer was refused in our judgment rightly.

5. The Municipal Board knew well what case it had to meet. The plaintiff alleged in his plaint that the water flowing into the jheel through the aforementioned drain would pollute the jheel. It was a matter of admission that not only did rain-water flow through the drain but also sullage from at least half of the large city of Gorakhpur. In our judgment in these circumstances it was clearly for the Municipal Board to show that the sullage was so mixed with pure rain water that what flowed into the jheel would not have any deleterious effect upon the plants and fish. It was maintained however that even upon the finding that water which flowed into the jheel through the said drain would pollute the jheel the plaintiff was not entitled to decree in terms of the prayer of his plaint. It was urged that in constructing the said drain and draining the rain water and sullage from the city of Gorakhpur into the plaintiff's jheel the Municipality was acting in virtue of its statutory powers u/s 189, Municipalities Act, and that therefore the plaintiff had no right to challenge its action. Section 189, Municipalities Act, enjoins that:

(1) The board may construct, within or, subject to the provisions of Sub-section (2) of Section 120, outside the municipality, such drains as it thinks necessary for keeping the municipality properly cleansed and drained and may carry such drains through, across or under any street or place, and, after reasonable notice in writing to the owner or occupier into, through or under any buildings or land.

6. Section 120 is in the following terms:

(1) The municipal fund and all property vested in a board shall be applied for the purposes, express or implied for which, by or under this or any other enactment, powers are conferred or duties or obligations are imposed upon the board.

(2) Provided that the board shall not incur any expenditure for acquiring or renting land beyond the limits of the municipality or for constructing any work beyond such limits except:

(a) with the sanction of the Local Government, and (b) on such terms and conditions as the Local Government imposes.

7. With these two sections may be read Section 8(1)(j):

A board may make provision, within the limits of the municipality and with the sanction of the Commissioner outside such limits for,

(j) establishing and maintaining a farm or factory for the disposal of sewage.

8. It is clear that the intention of the Legislature was that so far as property outside the municipal limits was concerned the Municipal Board could acquire land for the purposes of a drain or for the purposes of disposal of sewage only with the consent of the Local Government and upon such terms as the Local Government approved. The aforementioned provisions do not, as was contended by learned Counsel for the Municipality, confer upon the Municipality the power to take land outside the Municipality for the purposes of a drain or a sewage works without notice to the owner or the occupier of that land and without his

consent and without compensation. During the course of the argument there was an extensive citation of authorities upon the question of the powers which a municipality could exercise in the discharge of its statutory functions. It is unnecessary to refer in detail to these decisions. The law upon the point is not in doubt. It was clearly expounded in *East Fremantle Corporation v. Annois* (1902) A.C. 213. The facts of that case were that a municipality in Western Australia at the request of the ratepayers, in order to improve a street reduced the gradient opposite the respondent's house so that it was left on the edge of a cutting with a drop of about six or eight feet to the road. It was held by the Privy Council that the respondent was without remedy since none had been given by statute and the appellants had not exceeded the powers conferred upon them by the Western Australia Municipal Institutions Act. In the course of his judgment Lord Macnaghten observes:

The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by Lord Keynon and Buller J., and their view was approved by Abbott C.J. and the Court of King's Bench. At the same time Abbott C.J. observed that if in doing the act authorised the trustees acted arbitrarily, carelessly, or oppressively, the law in his opinion had provided a remedy. Those words, "arbitrarily, carelessly or oppressively," were taken from the judgment of Gibbs C.J. in *Sutton v. Clarke* (1815) 6 Taunt 29 decided in 1815. As applied to the circumstances of a particular case, they probably create no difficulty. When they are used generally and at large it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language, Turner, L.J. observed in a somewhat similar case that "such powers are at all times to be exercised bona fide and with judgment and discretion." And in a recent case, where persons acting in the execution of a public trust were sued in respect of an injury likely to result from their act, the present master of the rolls, then Collins L.J. observed that the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs.

9. In the present case, even if under the statute the Municipal Board of Gorakhpur had the power to drain the sewage and the storm water of the city on to the plaintiff's property the Board has in our judgment acted arbitrarily and negligently. According to the plaintiff's allegations the plaintiff derives an income from the jheel and according to the finding by the learned civil Judge in the lower appellate Court water drained by the Board into the jheel will pollute the jheel and prove deleterious to the plants and fish. Even if the Board were within its rights in using the plaintiff's jheel for the disposal of the sewage of the city, it was acting arbitrarily and negligently in that it did not consult the plaintiff or offer him compensation and, secondly, it did not take ordinary and reasonable

steps to purify the sewage before running it on to the plaintiff's property.

10. Be that as it may, in our judgment the provisions of the Municipalities Act do not entitle the Municipality to drain the sewage from the city on to private property out of the boundaries of the city without the owner's consent. If the Legislature had intended to endow Municipalities with such wide and far reaching powers inconsonant with the rights of private property, it would have so declared in clear and specific terms. The provisions of the Act already referred to appear to us rather to contemplate that a municipality if it desires for any purpose to use land outside its boundaries it should acquire the land for example under the Land Acquisition Act or by a private agreement with the sanction of the Local Government. It is to be observed further that Section 189 does not refer to the out-fall of any drain which may be constructed by a municipality. Provision is made for carrying a drain underneath, or through or into property but there is certainly nothing in the section to justify the contention that a municipality can take its sewage outside the municipal boundaries and dispose of it where it likes upon private property regardless of the rights of the property owner. In our opinion, the Municipal Board of Gorakhpur have acted in this matter in a high handed and arbitrary manner. It is difficult to understand how a public body could conceive that it had any right to drain the dirty water from the city on to private property outside the limits of the municipality without the owner's permission. In contesting the plaintiff's claim instead of taking the more reasonable course of acquiring the jheel under the Land Acquisition Act or making some reasonable provision for the construction of a sewage farm or factory the Board, in our opinion, have not shown that circumspection and sense of responsibility which is to be expected from a public corporation.

11. By the time the suit was disposed of in the trial Court apparently the drain had been completed and water was being drained through it into the plaintiff's jheel. The learned civil Judge in the lower appellate Court had this fact and the immediate difficulties which faced the Municipal Board in view when he made his final order. He granted decree restraining the defendants from discharging the rain and sullage water of the city of Gorakhpur into the plaintiff's jheel but he deemed it proper to direct that the decree should come into force after the case had been finally decided in this Court. In the public interest whilst dismissing this appeal we consider it expedient that the Municipal Board should have some time within which to take such steps as it may be advised for the disposal of the water and sullage which at the present moment is flowing into the plaintiff's jheel through the aforementioned drain. In the result the appeal is dismissed with costs. The operation of the decree, however, will be suspended until 15th January 1941. It will be open to parties at any time to apply for further orders. The suspension of the decree will not affect any claim for damages which the plaintiff may have.