

(1957) 09 AP CK 0006

In the Andhra Pradesh High Court

Case No : Second Appeals No"s. 1933 and 1934 of 1953

P. Seetharamayya and others

APPELLANT

Vs

Mahalakshamma and others

RESPONDENT

Date of Decision : 27-09-1957

Acts Referred:

Citation : AIR 1958 AP 103

Hon'ble Judges : Mohammed Ahmed Ansari, J

Bench : Single Bench

Advocate : B. Lakshminarayana and S. Subbiah, for the Appellant; G. Venkatarama Sastry in No. 1933 of 1953 and for No. 5 in No. 1934 of 1953 and N. Satyanarayana, K. Raghava Rao, A. Raghaviah and N. Satyanarayana Rao for Nos. 1 to 4 in No. 1934 of 1953, for the Respondent

Judgement

Mohammed Ahmed Ansari, J.—These two appeals by the plaintiffs are against a decree of the Lower Appellate Court, allowing two appeals of the defendants in the case, and dismissing a suit for injunction and damages.

2. The parties, to the appeals are owners of adjacent lands. The appellants own S. Nos. 86 and 87/2, which have been shown in Ex. A-4, the plan prepared by the Commissioner in the case, as A and A-1. Between the plot marked A and the vagu described as a stream in the aforesaid plan are lands belonging to the defendants. These have been shown in Exs. A-4 as B and B-I. The former belongs to the fifth defendant in the case, who is the sole respondent in S. A. No. 1933 of 1953; and the plot marked B-I is owned by defendants Nos. 1 to 4. The vagu forms the western boundary of the three plots, B, B-I and A-I.

It may be taken as established that the fifth defendant had constructed a bund on her land to preserve part of it from damage by flow of water through a breach in the embankment of the vagu. Ex. A-4 shows the breach to be in plot B, and marks the bund as T. It is equally clear that defendants Nos. 1 to 4 have dug a trench to ward off water entering into their plot B/I; which trench is marked as C in the Commissioner's plan. These defendants have further constructed another

bund to the north of their land as additional safeguard.

Ex. A-4 also shows in plot B yet another bund as XZ, which has been built to prevent water stopped by the trench and the bund, from entering other parts of the fifth defendant's land. Finally, there is bund in the appellants' plot A, which runs parallel to the boundary between plots A and B, and has several breaches in it.

3. The appellants' case is that the fifth defendant on account of bitter, enmity between her and the other defendants put up bunds in her plot, and defendants Nos. 1 to 4 dug the trench as well as put up a bund to the north and west of their plots; that thereby rain water falling on the plots flowed into plot A, completely washing the variga and groundnut crops raised therein; and that the appellants twice put up bunds along a length of 150 feet to the west of their plot A to prevent the flow of rain water, but each time the bunds were washed away.

The appellants have, therefore, asked for mandatory injunction to demolish the bunds and to fill in the trench on the defendants' lands, for permanent injunction against these defendants against putting up bunds or digging a trench, and for Rs. 300 as damages for the loss caused by the flow of water. The written statement of defendants Nos. 1 to 4 is that the water in the vagu on the western side of plots B, B-I, and A-I flows from north to south; that riparian owners put up on their lands bunds facing the vagu to prevent damage from the flow of water; that the fifth defendant had failed to keep in good repair the bund on the western side of her plot B, which resulted in breach of 33 links; that instead of closing the breach she put up a bund across her land in order to protect the land from the water; that the vagu water thus coming on her land flowed into the defendants' land; that they dug in their own land a trench as protection; that the bund between plots B and B-I was from time immemorial; that all the parties had to protect their respective lands from the vagu water on account of the negligence of the fifth defendant, and no damage was caused to the plaintiffs.

The defence of the fifth defendant is that the breach was in existence when she got possession of her plot through a Court decree; that the rain water from the vagu used to flow through the breach towards the east; that the defendants Nos. 1 to 4 prevented such flow by digging the trench, that as much damage was being caused to the land, her tenant put up the bund on the northern side of the trench; and that on account of the rush of water the bund was washed, but no damage was caused to the plaintiffs.

4-5. The findings by the trial Court are that the breach in the embankment was already in existence when the fifth defendant obtained possession of her land, that the water in the vagu flowing from the north was entering her land and passing south towards the land of defendants Nos. 1-4; and that the fifth defendant first constructed the bund to protect a major portion of her land in the east from damage by rain water. The Court has further found that the construction of the T bund resulted in the rain water flowing in larger volume to

the plot of defendants Nos. 14 who dug the trench to protect their land, which was counteracted by the fifth defendant's putting up fresh bund XZ to the north and east of the trench.

Finally, the Court has held that the result of these protective acts by the defendants on their lands has been to divert the usual flow of water from its normal course to the plaintiffs' land resulting in damage to them, and consequently the defendants as joint tort-feasors were liable to damages of Rs. 250, and should also be restrained. The suit was accordingly decreed with proportionate costs.

6. Two appeals were filed in the Lower Appellate Court. Defendants Nos. 1 to 4 presented one and the fifth defendant another. The Lower Appellate Court has allowed both the appeals and dismissed the fifth defendant's appeal. It has held that during flood seasons the water came through the breach into the land of the fifth defendant, which flow into the lands of defendants Nos. 1 to 4 was prevented by their digging the trench C. and putting up the bund on the southern side of the trench, and reflow into the fifth defendant's land was prevented by her putting up the bund XZ and that caused the damage to the appellants' land. But the lower appellate Court has held that the defendants as riparian owners can lawfully protect their lands from the over flow of the stream in times of flood by raising its banks or in any other way, which does not amount to an obstruction in the bed of the stream, even though the effect be to cast the flood water upon the lands of other proprietors. The appellants were held not entitled to any reliefs, because the damage they had suffered did not amount to an actionable wrong.

7. These conflicting judgments are not due to any doubt concerning the rights of a land holder in times of floods. The leading case of the point is *Nield v. N.W. Ry.*, (1874) 10 Ex. (A), which has been followed both in England and in this country. There, a flood had occurred in a canal from the bursting of the banks of an adjoining river, and the defendants, the canal company, placed a barricade across the canal above their premises, and thereby flooded the plaintiff's premises. It was held that they were not liable for the damages. Lord Bramwell, B says:

The flood is a common enemy against which every man has a right to defend himself, and it would be mischievous if the law were otherwise, for a man must then stand by and see his property destroyed, out of fear lest some neighbour might say "you have caused me an injury. The law allows I may say, a kind of reasonable selfishness in such matters; it says "Let every one look out for himself, and protect his own interest", and he who puts up a barricade against a flood is entitled to say to his neighbour complains of it "why did not you do the same" I think what is said in *Menzies v. Earl of Breanabane*, (1828) 3 Bligh (NS) 414 (B), is an authority for this and the rule so laid down is quite consistent with what one would understand to be the natural rule....

8. Before giving the other authorities. English and Indian wherein the aforesaid

observations of Bramwell, B., have been followed. I would cite at this stage a passage from Beven on Negligence (4th Edition) at p. 599, which runs as follows:

The distinction then, is between water coming on land in the normal way and water coming on abnormally. The former is an incident property from which a man may not relieve him self at the expense of his neighbour; the latter is a common enemy, against the advent of which (sic) may take precautionary measures without regarding his neighbour; though when the evil has once befallen him, he may not shift it from his own shoulders to those of his neighbours: he may protect his land, but may not relieve his and from actual injury at the expense of his neighbour.

9. The aforesaid quotation neatly summarises the several authorities covering the position of the land owner, who finds his land threatened with rain water or by flood. But to continue with the authorities, the next case I would refer to is *Gerrard v. Crowe*, 1921-1 AC 395: AIR 1920 PC 111 (C). The parties to the case owned lands upon opposite sides of a river, which in flood, rose higher than its bank, and some of the flood water used to flow over the respondents' land, ultimately finding its way back to the river. The respondents erected an embankment from a point on their land about half a mile from the river diagonally to its bank, with the object of protecting their lands behind the embankment and the water-flow over the appellant's land in time of heavy flood was thereby increased.

The appellant sued the respondents for damage and an injunction. It was not proved that any flood channel was obstructed or existed or that there was any ancient or rightful course for the flood waters across the respondent's land. In these circumstances, the Privy Council held that the action could not be maintained, and Viscount Cave observed:

The general rule as to the rights of an owner of land on or near a river to protect himself from floods is well settled. In *Farquharson v. Farquharson*, 1741 Mor 12779 (D), the rule was stated as follows: "It was found lawful for one to build a fence upon his own ground by the side of a river to prevent damage to his ground by the overflow of the river, though thereby a damage should happen to his neighbour by throwing the whole overflow in time of flood upon his ground; but it was found not lawful to use any operation in the alveus.

10. Finally, the House of Lords had occasion to deal with similar situation in *Lagan Navigation Co. v. Lambeg Bleaching, Dyeing and Finishing Co.* 1927 AC 226 (E). Here, the appellants had brought an action for an "injunction to restrain the respondents from entering on the appellants' undertaking and from removing the soil at the appellants' Lock No. 8 and for damages. The residents justified their action as being executed abatement of a nuisance caused by the appellants (sic)ing embankment on sides of their canal and they further counter claimed for an injunction to restrain the appellants from raising those banks as to cause certain lands and premises belonging them from being flooded.

The questions at issue between the parties solved themselves into whether the respondents there, under the circumstances, justified in digging and removing certain of the earthen banks built by appellants on both sides of lock No. 8 situate the Lagan Canal, which had been formed by the appellants under the statutory powers conferred (sic) them. Lord Shaw after referring to the observations of Viscount Cave in Gerrard's case (C), ready referred to says at P. 249:

If the above, so often repeated, be the Law the regard to the duty of each riparian proprietor (sic)ing bound to protect himself in a case where to has executed protective work upon his own property, it may well be argued that the present case is a fortiori one in which the same principle ought to be applied, seeing that the works protective of the navigation were here in the nature of a statutory requirement.

11. These authorities have been followed in this country as laying down the correct proposition of law, and the earliest of such cases is Gopal Reddi v. Chenna Reddi ILR 18 Mad. 158 (F). The defendants of the case were owners of land on the banks of a Jungle stream and had raised embankments which prevented their lands from being flooded, but caused the stream to overflow the land of the plaintiff situated lower down the stream. It appears that it was not reasonably practicable for the defendants to protect, their lands from inundation by any other means than those adopted. A Division Bench held that no actionable wrong had been committed and the suit was not, therefore, maintainable Shephard J. says at page 161:

There is a great distinction between protecting one self from an apprehended danger and getting rid of the consequences of an injury which has actually occurred. The distinction was clearly marked in Whalley v. Lancashire and Yorkshire Ry. Co., (1884) 13 QBD 131 (G), where it was held that the defendants were liable because, a misfortune having happened they had transferred it from their own land to that of the plaintiffs." In M. and S. M. Rly. Co., Ltd. v. Maharaja of Pithapuram, ILR 1937 Mad 919: AIR 1937 Mad 703 (H), the appellants were made liable because an opening was made in the northern bank of the stream for the purpose of averting imminent danger to the appellant's property. It was held therein that if flood water comes on to a land the landholder must not take active steps to turn it on to his neighbour's property since such an act would not amount to a protective measure in anticipation of apprehended danger.

Again, in AIR 1938 289 (Nagpur) , had held that where a riparian proprietor for his own purposes, viz., to rid his land of the mischief diverts the watercourse to his neighbour's land and the accumulation of water there was not made as a voluntary act by the neighbour for his own benefit but by that riparian proprietor for ridding his land of the calamity, it is the duty of that neighbour to protect himself from the threatened danger irrespective of the consequences to his another neighbour. Finally, there is an unreported decision by a learned Judge of this Court in S. A. No. 24 of 1949 (J). In this case of Venkayya v. Budrayya (J),

all the English and Indian authorities on the point have been collected and considered. The defendants had erected a bund in their S. No. 158, which was near the boundary between their and plaintiffs' lands. There was also a trench parallel to the bund. The plaintiffs complained that flood water coming from the southern side used to flow into theirs, and then to other lands through the defendant's land, and this was stopped by the construction. The defendants claimed that they were entitled to erect the bund to prevent the flood water from coming on their land.

The Lower courts had given the plaintiffs mandatory injunction, failing to distinguish between natural drainage, and flood water. The learned Judge of this Court allowing the appeal, held firstly that the plaintiffs had failed to establish having suffered substantial damage and then proceeded to decide whether the defendants were entitled to erect the bund with a view to prevent the flood water from reaching their field. On the latter question he has held as follows:

In a case where the heavy flood was an unforeseen one, it is the right of the owner to protect himself from inundation and the upper owner cannot complain if the lower owner protects himself.

12. By way of contrast to the aforesaid right of protecting one's land against flood, it would be useful to give an authority on what the owner of the adjacent land should not do when, as Beven calls it, water comes on the land in the normal way. The Full Bench of the Madras High Court in *Sheik Hussain Sahib Vs. Pachipulusu Subbayya and Another*, has held that an owner of land on lower level, to which surface water from adjacent land on a higher level naturally flows is not entitled to deal with his lands so as to obstruct the flow of water from the higher land.

Again the right of protection against flood water should not be confused with the customary right of an agriculturist in this country. In *Kasia Pillai Vs. Ganesamuthukumarasamia Pillai*,), an agriculturist has been held entitled to drain off into the neighbouring lower land water brought into his land for agricultural operations. Madhavan Nair J. has observed in the aforesaid case at page 430 (of ILR Mad):

(at p 339 of AIR).

.....It appears to us that in India, the right of an agriculturist to drain off into the lower lands the water brought into his land for ordinary agricultural operations is a customary right. He is entitled to do so by custom; otherwise, it will be impossible to carry on agricultural operations successfully.

13. Having stated the legal position, it is clear that the judgment of the trial Court fails to draw a distinction between normal rain and flood water. Had the damage been caused by normal rain water having been forced towards the appellants' land, one would expect the loss to be annual, but there is no such evidence. Moreover, the sifting of evidence by the trial Court is not satisfactory.

For example, it says there is no regular vagu to the west, but a mere channel so that the water from the north may flow in a defined course towards the tank in the south; yet, the Commissioner's plan describes the same vagu as a stream.

P.W. 1 also states that the ryots had put bunds on all the lands adjoining the vagu except at point of the breach. The precaution would have been unnecessary had not the stream been turbulent. The Lower appellate Court in the middle of paragraph 7 of its judgment states that it is on account of vagu water during flood seasons, that is coming through the breach into the fifth defendant's land first, the flow of which into the lands of defendants Nos. 1-4 was prevented by them, and again the flow of which into the fifth defendant's land is prevented by her that is now flowing into the plaintiffs' land causing damage. These are the proved facts on which the judgment is based, and those facts are not in dispute.

Such are the conclusions of fact in these second appeals. It was urged before me that there was no stream on the west of the defendants' lands and, therefore, they have not the rights of riparian owners in times of flood. But the finding of the Lower Appellate Court about there being a stream, is supported by the description given to the channel in the Commissioner's plan, and the finding must, therefore, stand.

14. The next point in the case is whether the damage was caused by flood water, and the passage from the judgment of the lower appellate Court already referred to clearly shows that. Indeed, the court says that the water during the flood season having caused the damage was not disputed before it. In these circumstances, it cannot be held that the defendants were not entitled to protect their lands from the flood water. I had first considerable doubt as to why the fifth defendant should not be compelled to close the breach through which the water had come on the land.

But it appears to me that once the right to protect the land from flood is ceded to the landholder, the owner should further enjoy the power of reasonably selecting how to protect the land. There is no evidence in the case that the fifth defendant in putting the bunds has negligently chosen the means of protecting her land. Nor is there any data for holding that the water having accumulated on the land, the fifth defendant had diverted the accumulation from plot, B. Again, the deposition of P.W.I shows that there has been no obstruction of the vagu. Therefore, this case is a clear one of *damnum sine injuria*, and the plaintiffs must adopt their own protective measures against the flood water.

15. In these circumstances, both the appeals fail, and are dismissed with costs throughout. This judgment will govern both the appeals. Leave to file Letters Patent appeal is granted.