
(1928) 07 AHC CK 0023
In the Allahabad High Court

Secretary of State

APPELLANT

Vs

Alladin

RESPONDENT

Date of Decision : 10-07-1928

Acts Referred:

Citation : AIR 1928 All 735 : (1929) ILR (All) 291 : 114 Ind. Cas. 727

Hon'ble Judges : Kendall, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Kendall, J.—This and the connected Appeals Nos. 2055, 2065 of 1925 and 2109 of 1925 arise out of six suits brought by plaintiffs, who were non-occupancy tenants in the district of Saharanpur, for damages against the defendant the Secretary of State for India-in-Council, and for injunction. The suits have been decreed by the Courts below for varying amounts of damages, but the relief of injunction has been disallowed. The defendant preferred these second appeals. The plaintiffs have acquiesced in that part of the decree which dismissed their claim to injunction.

2. The circumstances which led to the institution of the aforesaid suits are these: The Gangetic canal was made by Government in 1860 or thereabout. At a certain point near Saharanpur it crossed the bed of a torrent of rain-water, called Rao Pathri, descending from the mountainous regions in the vicinity. To prevent the stream and the canal intersecting each other and the resulting damage to the canal works, a super-bridge was constructed to let the stream pass across the canal and thence to flow on in a certain direction. To achieve this end the stream had to be diverted from its old bed at a point further up, at some distance from its junction with the canal, This was necessary, apparently because the place where the canal intersected the old bed of the stream was deltaic, and the passage of water over the super-bridge at that place would have been difficult to control. Across the canal where the stream left the super-bridge as on the super-bridge itself embankments were constructed on either side to prevent the

overflow of water and to avoid the submergence of neighbouring lands. For this device to be successful the silt, which would in course of time raise the level of the bed of the stream, especially along the super-bridge, reducing the height of embankments from such bed, should be periodically removed. It was alleged by the plaintiffs-respondents that this device was meant to protect the neighbouring lands against possible overflow of water but it was maintained on behalf of the defendant that it was for their own purposes that the embankments had been erected and silt was removed from time to time. But whether the main object was one or the other, it is not disputed that as long as the arrangement referred to lasted the lands in the neighbourhood were not overflowed. It is not material whether the resultant protection was only incidental, or whether it was the primary object of the construction of the embankments and of the periodical removal of the silt. It has been found as a fact that silt used to be removed by the Canal Department whenever it was found necessary to do so up to the year 1917, when the practice was discontinued and in the course of a few years the deposit of silt was so great that the water of the stream overflowed its bank and passed on the plaintiff's lands which were on a lower level, causing injury to their crops in 1922. The suits in question were brought by tenants, who are respondents here, and who were adversely affected by the overflow of water, for damages against the defendant, the Secretary of State, on the allegation that the injury complained of was the direct consequence of the failure of the Canal Department to so control the stream by removal of silt deposit as to allow the stream to flow in its channel instead of cutting through the plaintiff's lands.

3. The defendant's appeals have been pressed on three grounds, namely:

1. That the civil Court has no jurisdiction to award the compensation claimed.

2. That the defendant-appellant was not responsible to remove the silt or to take any other step to prevent the passage of water on to the plaintiff's lands in the ordinary course of nature, and that the loss, if any, suffered by the plaintiffs, is the outcome of vis major.

3. That the plaintiff-tenants having obtained ordinary tenancy leases in respect of the lands damaged after 1917, with their eyes open, cannot claim damages for what they could have easily anticipated.

4. As regards the question of jurisdiction certain provisions of the Canal and Drainage Act (8 of 1873) are relied on as ousting the jurisdiction of the civil Court. Section 67 runs as follows:

Except where herein otherwise provided all claims against Government in respect of anything done under this Act may be tried by the civil Courts, but no such Court shall in any case pass an order as to the supply of canal water to any crop shown or growing at the time of such order.

5. Unless some other provision of this or any other enactment can be found to negative the jurisdiction of the civil Court, the general rule laid down in Section

67 must prevail. The only provision which is said to bar the jurisdiction of the civil Court is Section 8 of the same Act, the relevant part of which is as follows:

8. No compensation shall be awarded for any damage caused by

(a) stoppage or diminution of percolation or floods, (b) (c)
(d) But compensation may be awarded in respect of the following matters (e) (f) (g) (h)

(i) Any other substantial damage not falling under any of the above Clauses (a) (b)(c) or (d) and caused by the exercise of the powers conferred by this Act, which is incapable of being ascertained and estimated at the time of awarding such compensation.

6. Section 9 provides for limitation as to such claims.

7. Section 10 relates to enquiry to be made by the Collector who is to determine and award compensation.

8. Those provisions do not expressly or by necessary implication exclude the jurisdiction of the civil Court in the present suits. Section 8 (a) obviously refers to cases where a person entitled to the supply of water for irrigation has been wholly or partly deprived of it. Clause (i) is no doubt general, but can only apply to damages claimed for an act done by an officer in the exercise of his powers conferred by the Act. The Secretary of State or his officers have done no act in the exercise of powers "conferred by this Act." which resulted in damage to the plaintiffs and for which compensation can be awarded by the Collector in the manner provided for. Such powers are to be found in part 3 of the Act, Section 14 et seq. The claim to damages in these cases arises out of the omission of the Canal Department to do what it is said they were under a continuing obligation to do in consequence of the action of the Government in diverting the course of Rao Pathri and taking it through the super-bridge and the embankments. To decide the question of jurisdiction it has of course to be assumed that the plaintiff's case is well founded as regards its merits. If the plaintiffs are entitled to damages for the act of the defendant in not removing the silt and for not taking any other appropriate step to prevent the injury to their property by the overflow of water in directions other than the one marked out for it, such damages are referable to the breach of an obligation arising independently of the Act and incurred long before it was passed. The plea as to jurisdiction has no force and was rightly ignored by the Courts below.

9. The next question of importance is whether the defendant is liable to compensate the plaintiffs for loss suffered by the latter in consequence of the water of Rao Pathri flowing on to the plaintiffs' lands which lie to the right of the stream below the super-bridge. The present situation is thus described by the Court of first instance who inspected the locality:

I inspected the locality and the position has now become thus that even the slightest flow causes the water to flow towards the plaintiffs' lands. The water

cannot at all go towards and along its former channel. The loss to the plaintiffs cannot be said to be due to any abnormal flow.

10. It appears that the matter had attracted the attention of the Canal authorities some time in 1884 and the expert advice then given as against the manner in which it was prepared to control the stream, and apprehensions were then entertained that the neighbouring lands were exposed to the risk of being flooded owing to the anticipated deposit of silt. To obtain permanent security an alternative scheme was suggested by more than one engineer, which was, however, not adopted, apparently on the score of economy. The periodical removal of silt prevented untoward results happening in that neighbourhood till 1917, when the Canal authorities seem to have taken a different view of their responsibilities, and the practice of removing silt, which entailed expense and which was unnecessary to their own purposes, was discontinued. A few years later matters were brought to a head, when in 1922 the plaintiffs' crops were damaged by the flow of water from the stream below the canal crossing.

11. It is argued for the appellant that on the facts as stated no action for damages is maintainable against what is said to be an act of State. Reliance is placed on Halsbury's Laws of England, Vol 1, p. 14, para. 16, where the following rule has been deduced from English cases:

There are also a number of cases in which the legislature in authorizing the construction and carrying on all works (especially works of public utility) necessarily interfere with the existing rights of individuals. Where an Act of Parliament authorizes the use or the doing of a particular thing and the thing is used or done for the authorised purpose, any damage resulting therefrom and not due to the negligence or unreasonable conduct is *damnum absque injuria* and no action will lie therefor.

12. In the first place, there is no Act of the legislature specifically relating to the stream, Rao Pathri and ensuring immunity from consequences of the omission complained of in these cases. On the contrary, the Indian Statute book abounds in provisions for compensation for injury to private property resulting from the execution of works of public utility. In the second place it cannot be held that the damage resulting from the inaction of the Canal Department was not due to "unreasonable conduct or negligence." The abandoning of the practice of removing silt from time to time which continued for nearly half a century, with no other precaution being substituted therefor, cannot be described otherwise than as "unreasonable" especially in view of the note of warning that had been sounded by "certain experts alluded to before. The rule has been elaborately stated by Subrahmani, Ayyar, J., in *Sankaravadivelu Pillai v. Secretary of State* [1905] 28 Mad. 72, where he observes:

The law with reference to liability of such persons was considered in *Canadian Pacific Ry. Co. v. Parke* [1899] A.C. 535, where the leading authorities on the point were referred to and explained by Lord Watson who delivered the opinion

of the Judicial Committee. The cardinal rules deducible from them may be formulated thus:

(i) Wherever, according to the sound construction of a statute, the legislature has authorized a person to make a particular use of property and the authority given is in the strict sense of the law permissive merely and not imperative the legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.

(ii) But where the authority given is imperative the person so authorized incurs no responsibility however much injury he may cause to another, so long as he is not convicted of negligence,

(iii) The burden lies on those who seek to establish that the legislature intended to take away the private right of individuals to show that by express words or necessary implication such an intention appears.

The task of arriving at a conclusion as to the permissive or imperative character of an authority in a given case being by no means free from any difficulty even where it depends solely on the words of a statute that must obviously be the more so where the conclusion has to be arrived at with reference to unrecorded custom and practice very rarely brought up by discussion and decision before Courts and with reference to which only the rights and obligations of the State in this country in regard to public irrigation have to be postulated.

13. No authority derived from any legislative enactment can be cited to warrant the course adopted by the Canal Department which is obviously detrimental to the interest of persons owning or occupying land within the area likely to be affected by the action of Rao Pathri below the canal crossing where the stream has been practically let loose to flow in any direction and in any number of smaller streams. The Government have undoubtedly the right to alter the course of a stream, but in so doing it cannot countenance injury to private property to avoid expense or inconvenience to its officers. The case above referred to is practically on all fours with the one that has to be decided in these appeals. There a "calingula" was constructed in 1882 by Government for the purpose of reducing the flow of water into a tank through a channel. The necessary effect of the "calingula" would have been to cause the water diverted from the channel to flood the plaintiffs' land. To obviate this, a small drainage channel was formed by Government to carry off the surplus water. Plaintiffs contended that the drainage channel was not sufficient to carry off the water and that the water which flowed over the "calingula" stagnated on their lands and made them unfit for cultivation. They prayed for a mandatory injunction directing that the "calingula" be blocked up.

14. It was held that they were entitled to the relief claimed. Government have the right to distribute the water of Government channels for the benefit of the public, subject to the rights of a ryotwari landholder, to whom water has been supplied by Government, to continue to receive such supply as is sufficient for

his accustomed requirements. But the rights of Government, in connexion with the distribution of water, do not include a right to flood a man's land because, in the opinion of Government the erection of a work which has this effect is desirable in connexion with the general distribution of water for the public benefit. The fact that the opening of the "calingula" was necessary for the protection of the tank and the fact that there was no negligence in the construction of the "calingula" so far as the "calingula" was concerned, did not deprive the plaintiffs of their right to have their property protected.

15. The learned Government Advocate on behalf of the appellants has referred us to a well-known English case which at first sight appears to favour his argument. In *Cracknell v. Mayor and Corporation of Thetford* 4 C.P. 629, the defendants were empowered by an Act of Parliament to render navigable a certain river, and in the exercise of their power under the Act they erected staunches in the river, and the result of these combined with the natural growth of weeds in the river and the accumulation of silt against the staunches was that the river overflowed its banks and damaged the plaintiff's land. It was held that there was no obligation on the defendants to cut the weeds or remove the silt unless it was necessary to do so for the benefit of navigation. This has been pointed to as a parallel case to the present one. There was, however, one important consideration there which does not appear from the head-note in the printed report and that was that the defendants were not invested by the Act with any power for draining or for maintaining the flow of water except for the purpose of navigation. In fact it was pointed out that if the defendants had done any act on the soil for any other purpose than that of improving the navigation they might have been guilty of trespass, and further that the removal of the accumulation, though it might have been injurious to one landholder, might have been beneficial to another. In short, whereas the defendants had every right, and in fact were bound, to erect the staunches under the provisions of the Act they had no right to remove the weeds or the silt, and they could not therefore be held to have been negligent or to be liable for damages on account of their omission to do so. That decision was dated 1869 and has constantly been referred to in the English decisions of later date. In the case of *Gedds v. Proprietors of the Bann Reservoir* 3 A.C. 430, the facts were not dissimilar to those of the present case. The defendants were invested by statute with certain powers for the purpose of securing a regular and proper supply of water to some mills. They erected a reservoir in accordance with their powers, and collected the waters of various streams and sent them through the channel of the river M to supply another river B, all of which they were entitled to do under the Act. After a time they neglected to cleanse the channel of the river M so that at times it overflowed its banks and damaged the land of the adjoining proprietors. In the course of hearing, the case of *Cracknell v. Mayor and Corporation of Thetford* 4 C.P. 629 was relied on by the defendants. It was argued for the plaintiffs that there was an obligation cast upon the defendants, whether under the express provisions of the Acts or not. In distinguishing the case from *Cracknell v. Mayor*

and Corporation of Thetford 4 C.P. 629, Lord Hatherly remarked that the respondents (defendants).

have the power to execute a work of this description and to make channels and cuts, and not only so but they have also the power to widen and deepen cuts and water-courses. Having that power, and having the power to use those water-courses to communicate between the reservoir and rivet Bann, they have chosen to exercise that power in a manner injurious to the plaintiff owing to their not having seen in the first instance the necessity of making provision for the additional quantities of water that would be sent down and at the varying periods in which they would be sent down

and a little further on his Lordship added that persons in the position of the defendants

should use every precaution by the exercise either of their powers created by the Act of Parliament itself or of their common law powers to prevent damage and injury being done to others through whose properties the work or operations are to be carried on, and to avoid subjecting them to consequences which they were not bound to anticipate from the Act of Parliament, seeing that the Act also enabled the parties who had the power to do so to prevent the mischief.

16. If we apply the same principles to the present case we find that although the canal Department may have been empowered to concentrate the water in the delta and to carry them over the canal by the super-bridge, if that was necessary for the protection of the canal, when they failed to repair the embankments which they had constructed to the south of the canal, they undoubtedly failed to do something which they had the power to do, and which would have prevented injury to the plaintiffs. A very similar case of a later date *Bligh v. Rathangan River Drainage District Board* [1898] 2 Ir. Rule 205-is perhaps an even closer parallel to the present case. In this the defendants were held liable, and Sir P.O. Brien, L.C.J. remarked:

If by a reasonable exercise of their powers under the statute they (defendants) could have prevented the damage complained of, and, by reason of their neglect in putting these powers into operation, the damage arose, they are responsible. In that case they cannot justify under the statute.

17. The last case to which we shall refer is that of *Lagan Navigation Co. v. Lambeth Bleaching, Dyeing and Furnishing Co. Ltd.* The Navigation Company were required by a Local Act to keep the navigation and locks etc., of a canalized river in an efficient state for traffic, and in 1912 they raised the coping on both sides of one of their locks and the backs behind it to prevent the locks from being flooded. The result was that the land of the Bleaching Company was flooded and they cut away a portion of the bank to allow the water to escape. It was held that the Navigation Company in constructing works in the exercise of the statutory powers for the protection of their navigation were not liable for the flooding of the respondent's land. In re-stating the principles laid down in the

cases of *Geddis v. Proprietors of the Banna Reservoir* 3 A.C. 430 and *Bligh v. Rathangan River Drainage District Board* [1898] 2 Ir. Rule 205 Lord Atkinson remarked:

These cases establish, I think, the principle that if a man or a public body have statutory powers which he or they may at will exercise in a manner hurtful to third parties or in a manner innocuous to third parties, that man or body will be held to be guilty of negligence if he chooses or they choose the former mode of exercising his or their powers and not the latter, both being available to him or them.

18. His Lordship goes on to point out that in the two cases named the defendants had an option as to which of the two methods they would choose in the exercise of the statutory powers they possessed, and they chose the method which caused damage to a third party. In the case under appeal before their Lordships, however, the Navigation Company either had to erect the banks to protect their own lands from being flooded and to secure that the navigation of the lock should not be interfered with or impeded, or to utterly disregard the obligations imposed on them by the statutes from which they derived their powers. They had therefore no choice and were not liable to damages. It may be added that in the case of *Cracknell v. Mayor and Corporation of Thetford* 4 C.P. 629 the position appears to have been the same as in this last case.

19. These then are the principal authorities of the English law on the questions that arise in the present case. There can be no doubt that the canal authorities had the option either of maintaining the bank and clearing the silt or of neglecting to do so, and they chose the latter; and the English decision afford no support to the contention of the appellants.

20. The third ground was not taken in the written statement, or in the grounds of appeal either in this Court or in the lower appellate Court, but it appears to have been argued before the lower appellate Court. It does not appear to us to have any force. When the tenants took their leases the appellant-the Canal Department-was under an obligation to keep up the embankment and to clear the channel. The tenants therefore had every right to believe that the Canal Department would fulfil their obligation. It has not been suggested that the land was damaged before the tenants took their leases. In the circumstances of the case and in view of the facts already stated the conclusion arrived at by the Courts below was justified. These appeals therefore fail and are dismissed with costs.