

(1917) 06 CAL CK 0016
In the Calcutta High Court

The Eralijool Tea Company, Limited and Another	APPELLANT
Vs	
Nagendro Nath Chowdhury	RESPONDENT

Date of Decision : 15-06-1917

Acts Referred:

Limitation Act, 1963 — Section 27

Citation : 41 Ind. Cas. 47

Hon'ble Judges : Walmsley, J;Richardson, J

Bench : Division Bench

Judgement

1. The plaintiff and the principal defendant the Eralijool Tea Company, Limited, are the owners of adjacent tea gardens in the district of Sylhet. The other defendant is the Company's manager. In this judgment I shall speak of the defendant company as the defendant.

2. The plaintiff's garden is on the east and the defendant's garden on the west of a low range of hills (known as the Borail Hills) running north and south. Near the middle of this range there is a gap and the land here forms a basin towards which the drainage of the defendant's garden from the north as well as the south naturally gravitates, though there was never any natural defined channel. The slope of the ground on the plaintiff's side of the hills is similar. On this side a stream known as the Bogajan Cherra flows from north to south to a point opposite the gap where it turns due east and eventually runs into the Son Bhil some miles away. A tributary stream from the south known as the Balia Cherra meets the Bogajan not very far from the point at which the latter turns east.

3. The gap and the basin and some of the land to the east, which is described in the second schedule of the plaint, belong to the defendant, but the defendant's land does not extend to the Bogajan from which it is separated by land belonging to the plaintiff, being the land described in the first schedule of the plaint.

4. The suit was brought for a declaration, in the words of the third and principal prayer of the plaint, that there is no nala or water passage for the drainage of

water of the watershed and its slope towards the defendant's garden across the land of the first schedule belonging to the plaintiff". The plaintiff also asked in the fourth prayer for a permanent injunction restraining the defendants from diverting the course of the water of the "watershed" and its "slope" towards their garden across the plaintiff's land along the bundh on dug No. 1 of the second schedule or by cutting nala across dag No. 2 of the said schedule or by any other means."

5. For a proper understanding of these prayers they must be read with paragraphs 4, 7, 8, 9 and 14 of the plaint. The plaintiff's case as made in the plaint is that the Borail Hills, including the gap, forms a natural watershed between the plaintiff's garden on the east and the defendant's garden on the west, so that if not interfered with the surface of water of the whole of the defendant's garden, including the land in the gap, would naturally find its way into the Kakra river on the west and" would none of it flow to the east over the plaintiff's land into the Bogajan. The position thus taken by the plaintiff was controverted in paragraphs 4, 7, 8 and 11 of the defendant's written statement. It may be stated at once that the finding of the learned Subordinate Judge on this part of the case is against the plaintiff and in favour of the defendant. The precise finding will be mentioned later when the issues are dealt with.

6. In paragraphs 9, 15 and 17 of the plaint, the plaintiff refers to the artificial wonks construed by the defendant. The complaint made is substantially that the defendant had by means of an artificial drain protected by an embankment diverted the surface water of his garden or a considerable part of such water and caused it to flow to the east over the plaintiff's land. The answer to these paragraphs will be found in paragraphs 9, 12 and 14 of the written statement. The most important is paragraph 9, in which the defendant claimed a prescriptive right to an easement arid asserted, in the last sentence of the paragraph, that the operations undertaken on the defendant's garden had in the result materially reduced the volume of water entering the Bogajan Cherra." On this part of the case the findings of the learned Subordinate Judge are largely in favour of the defendant but partly also in favour of the plaintiff.

7. Paragraphs 15, 18 and 22 - 24 of the plaint set out the damage which plaintiff alleged that he had suffered. He attributed the inundation of his land in the years 1910 and 1911 and the consequent destruction of his tea bushes and his tenants' paddy to the state of things brought about by the defendant and the anticipated similar or greater damage in the future if that state of things were allowed to continue.

8. The plaint also contains charges of trespass and so forth which need not now be noticed.

9. Upon the pleadings a number of issues were framed. Nothing need be said about the formal issues Nos. (1) to (3), nor about issues Nos. (4) and (5) which relate to adverse possession and estoppel. As the learned Subordinate Judge has

found, no question of adverse possession or estoppel really arises and no such question has been argued before us.

10. Issues Nos. (7) to (11) relate to matters of fact, Nos. (7) to (10) referring to the land in its natural state and No. (11) to the works carried out by the defendants.

11. The most important issue in the case is No. (12), which relates to the easement claimed by the defendant. It is in these terms:---"Whether there was any easement right over the said drain [the drain mentioned in issue No. (11)] enjoyed by the defendants without interruption and as of right for a period of over twenty years.? If so, was that with the knowledge of the plaintiff or his predecessors?"

12. The next five issues Nos. (13) to (17) concern the plaintiff's title and will be made the subject of a brief reference hereafter.

13. The remaining issues Nos. (18) to (21) relate to the reliefs claimed. Among these No. (19) raises the question of damage as follows:---"Whether the overflow of water alleged in the plaint causes or is likely to cause damage and loss to the plaintiff's property as alleged in the plaint."

14. It has been necessary to refer at some length to the pleadings and issues, because the first ground urged in support of the appeal is that the learned Subordinate Judge has decided the case upon a point which is not raised by the pleadings or issues and to which the evidence was not specifically directed. But before dealing with that argument, it will be well to state more particularly the facts found and proved, about which there is now little or no dispute.

15. Firstly, then, the learned Subordinate Judge has found, and it is not now disputed, that apart from anything done by the defendant the natural outlet of the water collecting in the depression or basin in the gap, which the Subordinate Judge calls the Gossain Bhil, would be towards the east. When the basin fills, there being no artificial obstruction, the spill water would escape to the east and find its way by a channel, which may originally have been ill-defined, first across the defendant's land, then across the plaintiff's land into the Bogajan and so into the Son Bhil. As already mentioned, this state of things is inconsistent with the general ease made in the plaint and it is now conceded that the defendant has at least a right to a free passage to the east for any overflow from the basin, though there may be a controversy whether this right is properly described as a natural right or as an easement.

16. We next come to the group of facts relating to the defendant's interference with natural conditions. The defendant's garden dates from the year 1882 or 1883. The part to the south was first brought under tea. In order to protect the cultivated area from the hill-streams on the east, a water channel was excavated and an embankment was constructed on its west, the effect of which was to give a northerly flow to the water from the hills before it reached the garden. The

channel and the embankment were extended northwards pari passu with the extension of the area under tea. When the water ceased to be confined, it escaped into the low land on the west and thence owing to the slope of the ground into the basin in the gap.

17. The manager of the garden in 1891 and 1892 was Mr. R. L. Cooke, an enterprising gentleman, by whom a new system of drainage was devised and with the permission of the defendant carried out. His object was to drain the basin or part of it and to make the land fit for tea cultivation. With this object he constructed a main drain leading from the basin a north-western direction to the Kakra river. It was part of the plaintiff's case that the drain was a natural channel and it is shown on the map as the Magura Bhil. But whatever its name may be, it is now conclusively established and admitted that it is not a natural but an artificial channel made by the agents and servants of the defendant.

18. Mr. Cooke's next care was to prolong the channel and embankment on the west of the hills as far north as the gap. The channel so prolonged led into the old drain running eastward to the Son Bhil. The extended channel and embankment are shown on the map as nala A and embankment B, while the Subordinate Judge calls the latter the long bundh or L. B. Both this extension and the new drain to the north-west were completed before 1892 or in the early part of that year; that is to say, they were completed more than twenty years before the suit was brought. As regards these works that is not of much importance because so far the plaintiff takes no exception---probably no exception could be taken---to what the defendant did.

19. The controversy is now at any rate confined to the final work constructed by Mr. Cooke in order to complete his system of drainage. He extended embankment B across the old drain leading east so as to shut off that drain and the water of nala A from the basin. It is this embankment (which the Subordinate Judge calls the small bundh to distinguish it from the long bundh or embankment B) which came to be the crux of the case. The extension had not been completed before 1893 and had, therefore, not been in existence for twenty years when the suit was brought.

20. As to the evidence, reference may be made to the depositions of Mr. Bryning and Mohammad Idris and to five letters written by Mr. Cooke to the defendant company in the month of January to April 1892. Of the letters the most important is the last dated 4th April (Exhibit C4). This evidence shows generally what Mr. Cooke's plans were and how they were carried out, but for present purposes its principal significance lies in its bearing upon the small bundh and the object with which that work was undertaken.

21. The learned Subordinate Judge has found that the defendant has a right described as a natural right to the unobstructed flow of water from the basin to the east including the water derived from nala A and that he has acquired a prescriptive right to keep free of weeds and grass a channel 8 cubits in width

from the basin to the Bogajan. He has found, however, that the construction of the small bundh was a material alteration of or interference with the natural right, which substantially increased the burden upon the plaintiff's land. He has, therefore, made a decree which, while it does not give the plaintiff all the reliefs he asked for, is generally in his favour.

22. In appeal it has been contended for the defendant that no case of increase of burden is put forward in the plaint and on the merits that no increase of burden has been established.

23. As to the merits, it is at any rate relevant to inquire why Mr. Cooke made the small bundh and his reason cannot be better stated than in his own words, taken from his letter of 4th April 1892. In one paragraph he describes the state of things which existed before nala A and the drain to the west were finished. The water came into the garden and turned all the north land shown as land now available for extension into a lake and remaining so until it could drain off slowly into the Sone Bhil (sic.) but as the Sone Bhil flood level is two feet higher than the point where the old and new main drains meet each other this north land remained practically a lake during the rains, and the water was generally standing up to the point in the area under tea marked with a cross." The plan to which Mr. Cooke was referring is not forthcoming, but the point where the old and new main drains meet each other" is the junction of nala A and the old drain leading east. That point, therefore, being two feet below the Sone Bhil flood level, formerly there was during the height of the rains no flow of water eastward. The water drained off gradually as the level fell in the Sone Bhil. It may be gathered, I think, that the mere completion of nala A and embankment B would not alter that state of things. The water from nala A during the height of the rains would merely mingle with and swell the water in the basin and as I have said the right of the defendant to conduct water through nala A is conceded as well as his right to an outlet from the basin to the east. In the next paragraph Mr. Cooke refers to the small bundh, which according to his plans was to complete his system of drainage. He says this: The new drain on the east side (i. e., nala A already constructed) now confines the stream (from the hills on the east) and takes them into the Sone Bhil drain, the mouth of which will be closed with a strong bundh when the new drainage system is completed, so that the Kakra main drain will only have to carry off (the garden drainage and as there is a fall of seven feet from the lowest point in Eraliyool to its junction with the Kakra it is evident that it will do this perfectly, and having no hill streams running into it, it will not silt up with sand." The object of the small bundh is clear. It was intended in the first place to prevent the hill streams and the silt they brought down from being carried by nala A into the basin and so overloading the new drain to the north-west. The only escape for the silt-laden water of nala A was to be by the old drain to the east and in order to improve that drain steps were taken at sometime or other after 1993 to deepen it where it crosses the lands of schedule II and schedule I.

24. Now, I am disposed to be of opinion that the original channel by which water escaped from the basin to the Bogajan was sufficiently defined to merit the title of a natural watercourse, though the defendant may have since acquired a further prescriptive right recognised by the Subordinate Judge's decree to keep a certain width of the channel on the plaintiff's land free of water weeds and grasses. But the question whether the channel is a natural watercourse, the defendant's right to its continued existence in its original state being then a natural right, or whether the right to the discharge of water from the basin by the channel is to be regarded as an easement is of little importance. The existence of the right is admitted and the case turns rather on its extent than its nature. As the change caused by the erection of the small bundh occurred within twenty years of the suit, the defendant's right at the date of the suit must be measured, with reference to the state of things in 1892. On the facts set out I find it difficult to resist the conclusion that the small bundh materially affected the benefit which the defendant had previously enjoyed. It is not sufficient to say, as was argued for the defendant, that the new drain to the north-west, diminished the volume of water which previously passed to the east. There was a change in the quality of that water, in so far as the quantity of silt suspended in it became greater. There must have been changes also in the character of the flow of the water. Almost certainly the rapidity of the current increased, at any rate at certain seasons, and probably there was a steadier flow from month to month. The flow would be irrespective of the level of the water in the basin, whereas formerly it had depended on that level. So too the holding up of the water by the erection of the small bundh, a change which interfered with the gravitation of the water, would, to some extent at least, counteract the effect previously attributed to the high flood level of the Sone Bhil.

25. As to issue No. 19, the issue relating to "damage", I accept the finding of the learned Subordinate Judge that the evidence offered by the plaintiff falls far short of proving that the damage caused by floods in the particular years mentioned in the plaint is due to the small bundh. But apart from that, in my opinion, the facts are sufficient to bring the case within the principle of the Madras case cited by the Subordinate Judge. *Raja of Venkatagiri v. Raja Muddukrishna* (2). The principle is compendiously stated by James, L. J., in the English case referred to in , the judgment, *West Cumberland Iron of Steel Co. v. Kenyon* (6): "I have always understood that everybody has a right on his own land to do anything with regard to the diversion of water, or the storage of water, or with regard to the usage of water, in any way he chooses, provided that when he ceases dealing with it on his own land, when he has made such use of it, as he is minded to make, he is not to allow or cause that water to go upon his neighbour's land so as to affect that neighbour's land in some other way than the way in which it had been affected before." In the present case the small bundh so altered the nature of the original flow of water from the basin as to constitute a new state of things. The question whether the defendant is or is not entitled to the enjoyment of the flow in its altered condition depends upon user, and at the date of the suit

the right had not been crystallized by user for the prescriptive period. An observation of Lord Robertson's in *White v. White* (1906) A. C. 72 : 75 L. J. P. C. 14 : 49 L. T. 65. may perhaps be applied *mutatis mutandis* to the present case:---"It is equally obvious that the conception of a mill as a growing concern, with expanding requirements, has no place in a discussion with other riparian proprietors about a servitude constituted by use I hold that the respondents (mill-owners) have no right to abstract the water of this river except to the extent to which they have had prescriptive use." That observation seems to apply when an attempt is made, as here, to superimpose a new right upon an old right and it can make no difference in such a case whether the old right is a servitude or a natural right. A plaintiff, whose natural rights are in danger of being infringed or further encroached upon by a new enjoyment on the part of the defendant, capable of being converted by user for the prescriptive period into a new right in the latter, has good cause of action apart from any question as to the amount of damage which he may have suffered or be likely to suffer *McCartney v. Londonderry and Lough Swilley Railway Co.* (1904) A. C. 301 : 73 L. J. P. C. 73 : 91 L. T. 105 : 53 W. R. 385. It is not easy to find a case precisely in point, but I may refer to the observations of Lord Herschell and Lord Watson in *McIntyre v. McGavin* (1693) A. C. 268 : 1 B. 246 : 57 J. P. 548 and to the principle underlying the oases of *Sampson v. Hoddinott* (1857) I C. B. 590 : 26 L. J. C. P. 148 : 3 Jur. (N.S) 243 : 5 W. R. 230 : 140 E. R. 242 : 28 L. T. (o. s.) 304 : 107 R. R. 809; *Baird v. Williamson* (1863) 15 C. B. 376 : 33 L. J. C. P. 101 : 9 L. T. 412 : 10 Jur. (N.S) 152 : 12 W. R. 150 : 143 E. R. 831 : 137 R.R. 561 and *Young v. Bankier Distillery Company* (1893) A. C. 691 : 69 L. T. 838 : 68 J. P. 160.

26. These considerations support the conclusion arrived at by the learned Subordinate Judge on the merits.

27. As to the pleadings, it is true that the plaint is founded on the theory that in its natural state the defendant's garden would drain itself towards the west and not towards the east. The theory assumes that the small bundh coupled with embankment is a sort of artificial watershed interfering with the natural watershed between the defendant's garden on the one side and the plaintiff's garden on the other. No doubt the theory has been shown and found to be largely erroneous. Nevertheless though the theory as a whole may be wrong, it does invite attention to the importance of the small bundh. That bundh was clearly struck at in paragraph 9 of the plaint and in the fourth of the reliefs claimed and in my opinion the defendant's right to retain it is clearly involved in the pleadings and in the important issue No. 12. In paragraph 9 of the written statement embankment B and the small bundh are treated as one embankment, constructed in January 1892, with the object of preventing the passage of water both into and out of the said Bhil" (or basin). It is asserted that prior to the year 1892" the drain to the east was a "natural outlet for the water from the land belonging to the defendant company." The right to the maintenance of the drain as altered by the embankment is claimed in substance as an easement, and it is

added "that so far from the said drain and embankment prejudicially affecting the plaintiff's alleged property, they have in fact materially reduced the volume of water entering the Bogajan Cherra", Clearly issues Nos. 11 and 12 were framed in reference to paragraph 9 of the plaint and paragraph 9 of the written statement. The last part of issue No. 11 raises the question of the date of the construction of the small bundh (which on the evidence may be taken to be the early part of 1893) and issue No. 12 relates to the rights by way of easement claimed by the defendant. It is true that there is no express issue whether the construction of the small bundh increased the burden upon the plaintiff's land but the question here, being not merely one of excess but of a change in the mode of enjoyment, is necessarily involved in the question of the defendant's right to the easement claimed. The easement depends upon user and there is evidence on the record directed not only to the length of the user but also to the nature of the user before and after the small bundh was erected. Upon that evidence a decision has been arrived at and regard being had to the whole record the contention that the learned Subordinate Judge decided the case upon a point not raised by the pleadings or issues and to which the evidence was not directed cannot, as it appears to me, be supported.

28. We have carefully considered whether a further inquiry should be directed generally as to the effect of the small bundh upon the plaintiff's land. We are of opinion in the circumstances that a further inquiry would carry the matter no further and is, therefore, unnecessary.

29. We have also considered whether anything short of a mandatory injunction to remove the small bundh would suffice. But if the defendant is allowed to retain that dam, there would be a difficulty in directing the plaintiff to remove the dam which he constructed across the channel on his own land.

30. The conclusions arrived at are sufficient to dispose of the appeal but it may be as well to add a few words on one or two other points touched upon in the argument before us.

31. In the first place as to the plaintiff's title, it appears that the original owner of the property, whose daughter the plaintiff has since married, died in 1899. He was succeeded by his widow who gave the property to the plaintiff by deed dated 25th Magh 1316 (7th February 1910). The gift is expressed to have been made in pursuance of, a promise by the widow on the occasion of the plaintiff's marriage to her daughter and on his agreeing to reside in her house as gharjawai, the plaintiff, it appears, belonged to a family higher in the social scale than that into which he married. The marriage took place in 1907 and he and his wife had since resided with the widow. It was argued for the plaintiff, on the authority of *Churaman Sahu v. Oopi Sahu* (10) and *Ramasami Ayyar v. Vengidusami Ayyar* 22 M. 113: 8 M. L. J. 170 : 8 I. D 79. that the gift or transfer was binding on the reversioners entitled after the widow. If it was open to the widow as representing the husband's estate to make some such provision for her daughter, or son-in-law on their marriage, it might still be doubtful whether she

acted reasonably and prudently in the exercise of her power. But neither the question of principle nor the question of fact need detain us, because as the learned Subordinate Judge has held in connection with issues Nos. 15 and 16, whether the plaintiff's title is good against the reversioners or not, he has at least a sufficient title as against the defendant to support the suit.

32. On the assumption that the reversioners are bound by the transfer, it was further argued for the plaintiff in connection with the question of limitation that he was entitled to the benefit of Section 27 of the Limitation Act. On the facts found it is unnecessary for the plaintiff to have recourse to that Section and we need not, therefore, decide the point. If an opinion had to be expressed, I should hold that the Section does not apply to a donee or transferee from the widow in virtue of her powers as representing the estate. In such a case the transferee succeeds the widow in her capacity as full owner and not as upon the determination of her interest for life.

33. It may be mentioned that in response to a suggestion from the Court during the hearing of this appeal, the parties made an endeavour to arrive at a settlement. We have no doubt that both parties did their best to find a way out of the difficulty, but in the result it was found impossible to reconcile their conflicting interests.

34. In our opinion the appeal fails and must be dismissed with costs.