

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Babu
Debi Pershad Singh and another v. Joy Nath
Singh and others, from the High Court of
Judicature at Fort William in Bengal ;
delivered 7th April 1897.*

Present :

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Appellants are the proprietors of Mehal Ramgurh, including three mouzahs, through which there runs a hill stream or nullah, there known as the Kudra, its course being from south to north. Before entering Ramgurh, from the south, the Kudra intersects the adjoining mouzah of Chikhuria, belonging to the Maharajah of Dumraon ; and, on the north, it passes from Ramgurh into mouzahs Hata, Khaja and Narainpore, which are the property of the Respondents in this appeal.

The Appellants at one time used, for purposes of irrigation, water diverted from the Kudra, which was stored in a tal or reservoir in Ramgurh, before being distributed over the surface of the land. The diversion was made within mouzah Chikhuria, by the erection of a bandh or dam upon the bed of the stream belonging to the Maharajah of Dumraon, from which the water was conducted by a channel or cut, passing at first through the lands of Chikhuria, to the Appellants' tal. The bed of that channel or cut was on a higher level than

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that of the surface of the water of the stream in its ordinary flow. Before the end of the year 1884, the Appellants made some alterations upon the structure of the dam, in consequence of which two separate actions were brought against them, concluding for its removal, one by the present Respondents, and the other by the Maharajah of Dumraon.

These actions depended before the Moonsiff of Sasseram, who heard the cases together, and made the following order applicable to both :—

“ That a modified decree be passed in both these
 “ suits for the removal of the bandh in dispute, it
 “ being decided that the bandh is recent, and that
 “ the Plaintiffs are entitled to have it removed ;
 “ that both the Plaintiffs and Defendants in both
 “ suits are entitled to irrigate their lands in their
 “ mouzahs from the water of the *baha* ; that the
 “ channel to Ramgurh *tal* is also old and the
 “ Plaintiffs are not entitled to have this filled
 “ up ; that the Defendants and the Plaintiffs in
 “ suit No. 339 (*i.e.* the Maharajah’s suit) are
 “ entitled to erect temporary bandhs at the place
 “ in (torn), but not so as to (torn) the flow of
 “ water downwards to the detriment of the
 “ Plaintiffs and other proprietors lower down.”

Appeals were taken against that decree to the Subordinate Judge of Shahabad, and thence to the High Court ; with the result that, as between the parties to this appeal it was affirmed, and, as between the present Appellants and the Maharajah of Dumraon, was materially altered, it being finally adjudged that, in a question with him, the Appellants have no right to construct a dam within the Mouzah Chikhuria for the purpose of diverting the water of the Kudra into the old channel leading to their tal.

These litigations were not finally disposed of until November 1887. Sometime thereafter, the Appellants placed a dam across the Kudra

within their own property, and made a new channel leading through it, from the stream to their reservoir. The dam was destroyed by the Respondents; and the Appellants, in consequence, made an application against them to the Criminal Court, which was rejected on the 5th December 1888, upon the ground that they ought to establish their rights in the Civil Court. The present suit was, in consequence, brought before the Court of the Moonsiff at Sasseram, on the 9th January 1889.

It is necessary to examine the terms of the plaint, because the rights therein asserted, and the remedies craved, form the main grounds of the judgment of the High Court, of which the Appellants complain in this appeal.

The plaint, in substance, concludes for a declaration of the Appellants' right, in terms which necessarily involve the illegality of the Respondents' action in interfering with their dam; and that declaration is followed by a prayer for an injunction against the Respondents committing these or similar acts in the future, and also for pecuniary damages in respect of the injury which the Appellants have sustained. It contains six conclusions in all. The first, which is the basis of all the rest, is to have it declared "that the Plaintiffs are entitled to carry the water of the river to their *tal* at Ramgurh by placing bandhs at any part of the river within the estate of the Plaintiffs, and that the Defendants have no right to obstruct and oppose the Plaintiffs in the construction of any bandh on the bed of the river, at any place above their estate, and the acts of the Defendants complained of above are illegal." The second conclusion is for an injunction against any repetition of the Respondents' illegal acts. The next two conclusions are for damages, the third being in respect of the injury already

occasioned by the destruction of the bandh, and the fourth for loss to be sustained until the Appellants shall be enabled, under the sanction of the Court, to convey water from the river to the Ramgurh tal. The fifth is for such other relief "as appears to the Court fit and proper for free flow of water from the river to the tal, for irrigation"; and the sixth and last relates to the costs of suit.

The right of a riparian proprietor to divert and use water for the purpose of irrigation is certainly not understated in the plaint. The right, claimed by the Appellants in the first conclusion, is not less broadly asserted in the body of the plaint, and is neither more nor less than a right on the part of an upper proprietor to dam back a river running through his land, and to impound as much of its water as he may find convenient for the purposes of irrigation, leaving only the surplus, if any, for the use of proprietors below. In the absence of a right acquired by contract with the lower heritors, or by prescriptive use, the law concedes no such right. The common-law right of a proprietor, in the position of the Appellants, is to take and use for the purpose of irrigation, so much only of the water of the stream as can be abstracted without materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below, and without impairing its quality. What quantity of water can be abstracted and consumed, without infringing that essential condition, must in all cases be a question of circumstances, depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume.

The plaint contains no statement in regard to the character of the dam which is alleged to have been illegally destroyed by the Respondents,

or in regard to the quantity of water which it had the effect of diverting from the channel of the Kudra into the Ramgurh tal; and there was no issue adjusted to try the question whether the bandh destroyed was one which the Appellants were legally entitled to construct. Yet it is obvious that, until that question had been raised and determined in the Appellants' favour, no injunction could issue, and no decree for damages could be made against the Respondents. The plaint is likewise silent in regard to the size and character of the bandh or dam which the Appellants claim the privilege of erecting within their own lands of Ramgurh, under the sanction of the Court; and as to the quantity of water which by means thereof they would be enabled to divert from the Kudra, without making any provision for its return to the stream. They appear to have ignored the fact that their right to take the water, and the quantity they were entitled to take, were matters inseparably connected with each other, and were mainly dependent upon the very considerations which they have omitted to state; and they relied upon a claim of right which, on the face of it, is extravagant. The unfortunate result has been, that none of the issues adjusted for the trial of the cause (with the exception possibly of those relating to the law of limitation, for which there does not appear to have been any foundation in fact) can, in the opinion of their Lordships, admit of a satisfactory, if any, answer, without an investigation into facts, which have neither been averred, nor made the subject of proof.

It is a somewhat singular circumstance that each of the parties should have relied, with equal confidence, upon the decrees obtained in the previous suits with reference to the Chikhuria dam, as *res judicata* in their favour. The decree

obtained by the Maharajah of Dumraon is *res inter alios*, and cannot affect the present case. In the suit at the instance of the present Respondents, it was, no doubt, expressly found, that both parties to this appeal were entitled to take water from the Kudra for the purposes of irrigation. In neither of these suits does there appear to have been any issue taken, or proof led in regard to the actual quantity of water diverted into the Appellant's tal, by means of the Chikhuria bandh. The Appellants can take no benefit from the finding, as supporting the claim put forward by them in this suit, because it was qualified by the condition that they were not entitled to interfere unduly with the flow of the stream, in prejudice of the Respondents and other lower proprietors. As for the finding that the Respondents were entitled to take water for the irrigation of their lands, it was plainly outside of and irrelevant to the case which the learned Judge was deciding. The existence of their right to take water for such a purpose, and, if existing, its extent, could not be determined, except in a question with proprietors of riparian lands below their mouzahs.

The Moonsiff, after taking evidence, gave judgment upon the 31st December 1889. He referred to authorities showing that the law of India, in relation to water rights, does not differ from that of England; and he affirmed, in their Lordships' opinion correctly, that a riparian proprietor who desires to use the water of a stream flowing in a defined channel, must not so use it as to destroy or render useless, or materially diminish or affect, the application of the water by riparian owners below. Accordingly, he declines to affirm the first conclusion of the plaint, and did not deal with the injunction or damages craved; but he found that the

Appellants were "entitled to a fair and reasonable use and share of the water of Kudra nullah, so as not to interfere with or substantially diminish the supply of water to the Defendants holding lands below." That finding, considered by itself, appears to their Lordships to be unexceptionable, although it does not affirm any proposition which is to be found in the Appellants' pleadings. The learned Judge then proceeded to make an order in these terms:—"At the spot where they (*i.e.* the Appellants) propose to cut (the land) or make a channel, they may make a permanent or temporary construction, some masonry or earth-work, either on the bank or across the bed of the stream or on both, but so as not to completely dam it up, whereby they can get a quantity not exceeding a fourth of the whole volume of the water of the nuddi which comes down to that point." To that order, three conditions were attached (1) that the position of the dam and channel might, if necessary, be shifted, within the limits of Ramgurh, (2) that if, after making an estimate, if possible, of the whole volume of water coming down the stream, the obstruction of a fourth would not keep a sufficient quantity available for the proprietors below, it could be reduced to a fifth, and (3) that, when the order came to be executed, instructions might be given to an engineer of the Irrigation Department, selected for that purpose, as to varying and altering the width or depth of the stream, and similar details.

On appeal by the Respondents from that decision, it was confirmed by the Subordinate Judge of Shahabad, with this modification, that instead of allowing the Appellants to take one-fourth or, as it might be, one-fifth of the volume of the Kudra, by means of a permanent bandh, the learned Judge ordained that the Appellants

should have leave to erect and maintain a temporary dam across the bed of the stream, for seven days and no more of each lunar month, carrying the entire water of the stream into the Ramgurh tal during that period, the whole of the free flow being allowed to go to the lower riparian proprietors during the remaining twenty-one days of the month. The learned Judge observed,—“The Moonsiff’s order may be theoretically good; but it will be impossible so to regulate the flow as to bring only one-fourth of the water to Plaintiffs and no more, and at the same time keep the flow downwards unimpeded.”

There is considerable force in the observation of the Subordinate Judge; but it appears to their Lordships that the main objection to the decree of the Moonsiff consists in this, that the proportion of the entire water of the Kudra, which he authorised the Appellants to appropriate for irrigation purposes, was fixed by him without any evidence, and without inquiry. The modification of his order made by the Subordinate Judge is open to the same criticism, and is, from a legal aspect, more objectionable than the order which it qualifies. The legal right of the lower riparian owners is to have the water of the stream transmitted to them continuously and without interruption, and without any substantial diminution in volume, their right being only subject to the qualification that an upper proprietor may, for purposes which the law regards as legitimate, withdraw from the stream as it passes along his lands, so much of its stream as will not materially affect its downward flow, or impair their uses of it.

The Appellants and the Respondents both appealed against the decision of the Subordinate Judge; and, on the 19th May 1893, a Divisional Court, consisting of Mr. Justice W. Macpherson,

and Mr. Justice Gooroo Dass Banerjee, dismissed the Appellants' appeal, allowed the appeal of the Respondents' and dismissed the suit with costs. Their Lordships cannot hesitate to concur in the judgment of the High Court. The Appellants' suit is based upon the assertion of a legal right which is plainly untenable; and unless it were affirmed, they could not obtain the remedies of injunction and damages, which are of the essence of their action. If their right to maintain the bandh had been supported upon the ground that the amount of water which is diverted into their tal did not materially diminish the flow of the stream, and was therefore no more than they were entitled to, the Court might have been enabled to determine what proportion of the water of the Kudra they could legally divert for purposes of irrigation without prejudicing the rights and interests of the Respondents; and also in what manner and by what means that amount was to be withdrawn. In the present shape of the record, it is impossible to arrive at a satisfactory decision upon those points, which were dealt with, without evidence or inquiry, by the learned Judges of the First and Second Courts.

Their Lordships will, accordingly, humbly advise Her Majesty to affirm the judgment appealed from. The Appellants must pay to the Respondents their costs of this appeal.
