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April 10.

PATNEEDI RUDRAYYA

v.

VELUGUBANTLA VENKAYYA AND OTHERS

(K. SUBBA RAO, RAGHUBAR DAYAL and J. R. MUDHOLKAR, JJ.)

Easements — Natural right of drainage—Rights of riparian owner — If could impede natural flow of water — Phenomenon happening from time immemorial—Meaning of—Indian Easement Act, 1882 (5 of 1882), ss. 7, 11.

The respondents 1 and 2 constructed a bund on their own land and dug trenches with a view to protect their lands from being inundated by the flood waters of the Vakada drain; as a result of that, the flood water flowing from appellant's field in the Northerly direction could not find an outlet and stagnated on his land thus doing damage to his crops. The appellant based the right of drainage in the Northerly direction of all water falling on or invading his land including flood water on immemorial user, and not on the natural right of the owner of higher land to drain-off water falling on his land on to lower lands. The Courts below found inter alia that the inundation of the appellant's land was not unusual, abnormal or occasional but was an event which occurred every year in the usual course of nature, and was a happening from time immemorial. The High Court came to the conclusion that the flooding of the fields was not an event recurring periodically from time immemorial but something unusual and that water being a common enemy of all, the defendants Nos. 1 and 2 were within their rights in constructing the bunds and digging the trenches. The point was whether a person had right to create an impediment in the flow of water along its natural direction.

Held, that a 'phenomenon' can be said to have been happening from time immemorial if the date when it first occurred was not within the memory of a man or was shrouded in the mist of antiquity. Where the court upon the evidence available was unable to fix the precise year of commencement of the phenomenon, the proper inference would be that the phenomenon had been known to occur from time immemorial.

Held, further, that the only right the riparian owner may have, is to protect himself against extraordinary floods, but even then he would not be entitled to impede the flow of the stream along its natural course. When the owner of the lower ground by creating an embankment impedes the natural flow of water he would be obstructing the natural outlet for that water. It would make little difference that the water happened to be not merely rain water, but flood water provided the flood water was of a kind to which higher land was subjected perodically.

In the present case the bund erected and the trenches dug up by the respondents 1 and 2 causing stagnation of flood water constituted a wrongful act.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2 of 1958.

Appeal by special leave from the jugment and decree dated December 18, 1953, of the Madras High Court in Second Appeal No. 24 of 1949.

K. Bhimasankaram and *T. V. R. Tatachari*, for the appellant.

K. R. Choudhri, for respondents Nos. 1 and 2.

1961. April 10. The Judgment of the Court was delivered by

Mudholkar J.

MUDHOLKAR, J.—This is an appeal by special leave from the judgment of the Madras High Court in a second appeal reversing the decrees of the two courts below.

The plaintiff who is the appellant before us is the owner of survey no. 159 of the village Vemulavada while defendants 1 and 2 are owners of survey no. 158 lying to the north of survey no. 159 and adjoining. The defendant no. 3 is the owner of a field lying to the north of survey no. 158. To the south of survey no. 159 is survey no. 160 belonging to the brother of the plaintiff. Immediately beyond this field and to the south are a "parallel drain", into which flow the waters of the Vakada drain, and Tulyabhaga drain both running west to east. It would appear that the parallel drain is an artificial drain while the Tulyabhaga is a natural drain. The parallel drain ends abruptly at the eastern end of survey no. 150 at a distance of about two furlongs or so to the east of survey no. 160.

According to the plaintiff rain water falling on survey nos. 160 and 159 flows in the northern direction over survey no. 158 and then enters into a drain shown in the map and indicated by the letters EE. In normal times the water in this drain flows towards the south and empties itself in the Tulyabhaga drain.

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Sometime before the institution of the suit the defendants 1 and 2 constructed a bund running approximately east-west on their own land. Its height, according to the Commissioner, varies between 3′ and 8′ and its width is about 16′. Its length is reported by the Commissioner to be 1580′. Apparently the bund is not a continuous one and there are a few gaps in it. About 5′ to the south of the bund the defendants had dug several trenches 15′ in width and between 2′ and 4′ in depth. These trenches run along a foot-path which separates the fields of the parties. The plaintiff's grievance is that as a result of what the defendants 1 and 2 have done flood water flowing from his field in the northerly direction cannot find an outlet and stagnates on his land thus doing damage to his crops. Further, according to him as a result of the digging of the pits the level of his land adjoining the footpath is gradually decreasing with the result that the top soil of his field is being washed away. He, therefore, sought a mandatory injunction directing the defendants to fill up the trenches and demolish the bunds raised by them. The plaintiff claims the right of drainage of all water falling on or invading his land including flood water on the basis of immemorial user.

The defence of the first two defendants was that the land actually slopes from north to south, that rain water and flood water naturally flow from the north to the south and that the plaintiff's grievance is wholly imaginary. They deny the existence of immemorial user upon which the plaintiff rested his case. They admitted that flood waters do stagnate on the plaintiff's land. This, according to them, was a result of the closing of some vents in the Vakada drain by the ryots of that village as a result of which the water collected in that drain during heavy rains cannot find its natural outlet and floods the lands of a number of people including the plaintiff's. The bund erected by the defendants was, according to them to protect their lands from being inundated by the flood waters of the Vakada drain and that it was open to the plaintiff to do likewise by constructing dams at appropriate places

in his field and thus keep back the flood waters of the Vakada drain.

Both the courts below arrived at the following findings of fact:

(1) The land dips in the northerly direction.

(2) That a number of fields including fields nos. 158, 159 and 160 lie in a sort of a basin with elevations along the eastern and western boundaries into which drainage and rain water from all sides tends to accumulate.

(3) Ordinarily the surplus water from lands adjacent to the basin as well as rain water falling on the land in the basin is drained off from north and then finds its way in the drainage channel EE which runs north-south and drains it into the Tulyabhaga drain.

(4) Whenever due to heavy rain Tulyabhaga drain is in spate the flood water which collects in the basin cannot flow through the channel EE and flows in the northerly direction towards another channel called Kongodu channel and that this is what has been happening from time immemorial.

(5) Whenever there is heavy rain the Vakada drain swells up and water therefrom floods survey Nos. 153 to 160.

(6) That this has been happening since time immemorial and that the defendant's contention that this is because of something done in recent times is not correct.

(7) That the inundation of the appellant's land in the further flow of water northwards is not unusual, abnormal or occasional due to extraordinary floods but is an event which occurs every year in the usual course of nature.

The High Court, however, came to the conclusion that the flooding of fields Nos. 153 to 160 because of the swelling of the Vakada drain is not something which has been happening from time immemorial but only subsequent to the year 1924, that the flooding of these lands was not a usual and natural phenomenon but something unusual and that water being a common enemy of all, the defendants 1 and 2 were within

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their rights in constructing the bunds and digging trenches. According to the High Court the plaintiff had no right to prevent the defendants from taking the steps that they are taking and that a custom to allow flood water to flow over the neighbour's land has not been so far established.

We may mention here that the High Court had actually called for certain additional findings from the appellate court and one of the questions raised was whether there was an immemorial user as contended by the plaintiff to let out Vakada drainage water beyond certain points. In coming to the conclusion that the plaintiff has not been able to establish immemorial user in respect of the right claimed by him of draining of flood waters from his field on to the defendants the High Court has ignored the clear finding of the lower appellate court on this point. We find that there is no justification for the course adopted by the High Court.

In para 17 of its judgment it has observed as follows:

> "It is well established on the evidence that from time immemorial flood water, as well as the surplus water, and the water from Vakada and Vemulavada, all collect and flow northwards through the cradle or basin in which the suit lands are situate, when the level of the water in Tulyabhaga is such as not to admit the flow of such water into it. It has been customary from time immemorial for the said water, under such circumstances, to go northwards from the plaintiff's fields onwards over the defendants' fields, and the further fields beyond".

After remand the lower appellate court reiterated its conclusion and observed as follows in para 14 of its findings:

> "On the evidence on record and for the reasons I have given above I am of opinion that the oral evidence either way is inadequate, but on such little evidence as available and on the probabilities of the case and relying upon the evidence of P. W. 4 and the clear indication of the existence of local drain Exhibit P-4, I would find that the Vakada drain

water should have been getting into parallel drain and through EE and F into Tulyabhaga drain for a considerably long period of time, at least from somewhere about the year 1920".

Earlier in its order the lower appellate court has observed:

"In my opinion the parallel drain should have existed at least from the year 1924, if not many years before that".

It would thus be clear that even in the revised finding the appellate court has not been able to fix the precise year of commencement of the phenomenon. It would, therefore, follow that upon the evidence available in this case the proper inference to be drawn would be that this phenomenon has been known from time immemorial. A phenomenon is said to be happening from time immemorial when the date of its commencement is not within the memory of man or the date of its commencement is shrouded in the mists of antiquity. No doubt the lower appellate court has referred to the years 1920 and 1924 in its finding but it has not said that the phenomenon was observed for the first time in 1924 or even in 1920. It has made it quite clear that the phenomenon was known to be happening in these years and that it must have been happening for many years prior to that.

The basis of the plaintiff's claim is not the natural right of the owner of higher land to drain off water falling on his land on to lower lands but the basis is that this right was being exercised with respect to the land of the defendants 1 and 2 from time immemorial. The finding of fact of the lower appellate court being in his favour on this point his suit must succeed.

The High Court, following certain English decisions, came to the conclusion that water being the common enemy, every owner of land had a right to protect himself against it and in particular to protect himself from the ravages of such unusual phenomenon as floods. Some of the cases upon which the High Court has relied deal with the rights of riparian owners and are thus not strictly appropriate.

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The High Court seems to be of the opinion that the floods, as a result of which the plaintiff and the defendants suffer damage, are an unusual phenomenon. Here again, the High Court has gone wrong because the lower appellate court has found that these floods were a usual occurrence. Where a right is based upon the illustration (i) to s. 7 of the Indian Easements Act, 1882 (5 of 1882), the owner of higher land can pass even flood water received by him on to the lower land, at any rate where the flood is a usual or a periodic occurrence in the locality. The High Court has quoted a passage from Coulson and Forbes on Waters and Land Drainage (1) and a passage from the judgment in *Nield* v. *London & North Western Railway* (2) in support of its conclusions. In the passage in Coulson & Forbes it is stated that the owner of land must not take active steps to turn the flood water on to his neighbour's property. Here, the dam erected by the defendants 1 and 2 stems flood waters going from plaintiff's land down to the defendant's land and so the passage does not support the conclusion of the High Court. The decision in *Nield's case* (2) is further based on the "common enemy" doctrine. In that case also there are certain observations which would militate against the conclusion of the High Court. For instance: "where, indeed, there is a natural outlet for natural water, no one has a right for his own purposes to diminish it, and if he does so he is, with some qualification perhaps, liable to any one who is injured by his act, no matter where the water which does the mischief came into the water course." Of course, the court in that case was dealing with water flowing along a natural water course. But the point is whether a person has a right to create an impediment in the flow of water along its natural direction. Now the water on a higher ground must by operation of the force of gravity flow on to lower ground. Where the owner of the lower ground by creating an embankment impedes the natural flow of water he would be obstructing the natural outlet for that water. It makes little difference that the water

(1) 6th Ed., p. 191. (2) (1874) L.R. 10 Ex. 4.

happens to be not merely rain water but flood water provided the flood is of the kind to which the higher land is subjected periodically.

In England the early extension of the common drains all over the country under the supervision of the Commissioners of Sewers has rendered a discussion on the rights of flow of surface water needless and, therefore, there are no modern decisions upon the question. But old precedents show that the common law rule appears to be the same as that under civil law. In a case arising in Guernsey (1) the Privy Council has applied the rule of civil law to that island. That this is adopted by the common law would appear from the decision in *Nelson* v. *Walker* (2).

The rule of civil law according to Domat is quoted thus at p. 2586 of Waters and Water Rights, Vol. III, by Farnham:

> "If waters have their course regulated from one ground to another, whether it be the nature of the place, or by some regulation, or by a title, or by an ancient possession, the proprietors of the said grounds cannot innovate anything as to the ancient course of the water. Thus, he who has the upper grounds cannot change the course of the waters, either by turning it some other way, or rendering it more rapid, or making any other change in it to the prejudice of the owner of the lower grounds....."

The learned author, after a discussion of old English cases on the point, has stated that the common law regarded the flow of rain water along natural courses as one of its doctrines and that there is no general right thereunder to fight surface water as a common enemy. The author has then observed:

> "All rightful acts with regard to it are confined within very narrow limits which have not yet been fully defined. And to state generally that such water is a common enemy, or that there is a right to fight it at common law, cannot be otherwise than misleading". (p. 2590).

After discussing a number of precedents from the

(1) *Gibbons* v. *Lenfestey*, A.I.R. 1915 P.C. 165.
(2) (1910) 10 C.L.R. 560.

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American State Courts he has pointed out that the common enemy doctrine is of very recent origin he has observed at p. 2591:

> "That surface water is not a common enemy, and that there is no right to fight it according to the pleasure of the landowner, clearly appear from the principles which have already been stated."

We must, therefore, distinguish between cases pertaining to riparian lands and cases like the present. But as pointed out in *Nield's case* (1) the only right which a riparian owner may have is to protect himself against extraordinary floods. But even then he would not be entitled to impede the flow of the stream along its natural course (2). We may repeat that the finding here is that the floods from which the defendants 1 and 2 are seeking to protect themselves are not of an extraordinary type. In the circumstances, therefore, the bund erected by them and the trenches dug up by them must be held to constitute a wrongful act entitling the plaintiff to the reliefs claimed by him. For these reasons we allow the appeal, set aside the judgment of the High Court and restore that of the subordinate judge. The costs throughout will be borne by the defendants-respondents.

Appeal allowed.

(1) (1874) L.R. 10 Ex. 4.
(2) *Menzies* v. *Breadalbane*, (1828) 3 Bligh (N. S.) 414; 4 E.R. 1387.