CRIMINAL REVISION.

Before Panckridge J.

HATU NAIK

v.

EMPEROR.*

1932

May 23.

Embankment—"Existing embankment", meaning of—Bengal Embankment Act (Beng. II of 1882), ss. 6, 76.

"Existing embankment" in clause (*b*) of section 76 of the Bengal Embankment Act means an embankment existing at the time the addition is made and not the embankment existing at the time of the notification under section 6.

Ramnath Pandit v. *Emperor* (1) and *Lakshmi Kanta Hazra* v. *Emperor* (2) followed.

Executive Engineer, Cossye Division v. *Kailash Shaikh* (3) explained.

The material facts appear from the judgment of the Court.

Narendrakumar Basu (with him *Sarojekumar Maiti*) for the petitioner. The conviction under section 76 (*b*) of the Bengal Embankment Act cannot stand for two reasons. Firstly, because there is no evidence on the record to show that there has been any addition to the dimensions of the *bândh* in existence at the date when the notification under section 6 was issued with regard to this area in 1901. Secondly, there is even no evidence to show that any addition has been made to the *bândh* as it existed before the damages were done by the flood of 1926. Both these questions turn on the interpretation of the phrase "existing embankment" in section 76 (*b*).

*Criminal Revision, No. 268 of 1932, against the order of T. Roxburgh, Sessions Judge of Midnapore, dated March 18, 1932, confirming the order of K. C. Haldar, Deputy Magistrate of Midnapore, dated Nov. 30, 1931.

(1) (1911) I. L. R. 38 Calc. 413. (2) (1919) I. L. R. 46 Calc. 825.
(3) (1929) Cr. Ref. Nos. 48 and 49 of 1929, decided by Mukerji J. on 15th May.

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With reference to context, this phrase means the embankment which was existing at the time when it was brought under the notification. In any case, it at least means the embankment which existed at the time when damage was done to it by the flood. The section was never intended to penalise repairs on which the very life of the embankment depended. It cannot be expected that when flood damages an embankment and immediate repair is imperative, time should be wasted in getting the sanction of the Collector. It has been held in *Executive Engineer, Cossye Division* v. *Kailash Shaikh* (1) that addition by way of repair was not an offence under the section. [Evidence was then discussed.] The convictions should be set aside.

Debendranarayan Bhattacharya for the Crown. The meaning of the phrase "existing embankment" in section 76 has been considered in several cases. In *Ajodhya Nath Koila* v. *Raj Krishto Bhar* (2), it was in connection with clause (*a*) of the section.

In *Ramnath Pandit* v. *Emperor* (3), it was held that the meaning is the same, both in clauses (*a*) and (*b*). Following these, it has been definitely held in *Lakshmi Kanta Hazra* v. *Emperor* (4) that it means the embankment as it exists at the time of the addition and not at the time of the notification. It negatives expressly the first contention raised by the petitioners. On this interpretation, it also follows that no repairs can be done without previous permission of the Collector. The second contention, therefore, is also untenable. The limits of the addition or repair will be fixed by the Collector. He has been made the authority to consider the propriety of the proposed additions, having regard to all the circumstances then existing. No doubt this wide power requires great caution in its exercise, but the responsibility is entirely that of the Collector.

(1) (1929) Cr. Ref. Nos. 48 and 49 of 1929, decided by Mukerji J. on 15th May.

(2) (1902) I. L. R. 30 Calc. 481.

(3) (1911) I. L. R. 38 Calc. 413.

(4) (1919) I. L. R. 46 Calc. 825.

The unreported decision is clearly distinguishable, inasmuch as there was no evidence that any addition had been made at all. Evidence was then discussed. The Rule should be discharged.

Narendrakumar Basu, in reply.

PANCKRIDGE J. A point of some importance is raised by this Rule. That point is indicated by ground No. 3, which is in the following terms: "For "that in the absence of any evidence as to the original "height of the *bândh* the conviction is bad in law." It appears that petitioner No. 23, Pulinbihari Datta, is one of the owners of an embankment called the Tâladihâ *zemindâri* embankment, which is situated in an area, in respect of which a notification has been made under section 6 of the Bengal Embankment Act of 1882. The date of this notification is the 11th of March, 1901. In 1926, there were floods of exceptional gravity in the district of Midnapore; as a result of these floods, the embankment was breached at several places. The petitioner No. 23 and also some of his tenants applied to the Collector for permission to repair the *bândh* up to the old level. The Collector, on the 5th of April, 1928, gave permission to repair the breaches up to the level of 19 feet. A further application was made, on the 4th January, 1929, to the Collector asking him to give permission to raise the *bândh* to the original level, which was alleged to be more than 19 feet. On the 23rd of April, the Collector gave permission for the *bândh* to be repaired to a level of 19 feet for the 1st mile, 20 feet for the 2nd mile, 21 feet for the 3rd mile and 22 feet for 4th mile. There is evidence to the effect that all the petitioners, with the exception of petitioner No. 23, were seen working on the *bândh*, with the result that it was raised to levels in excess of those prescribed by the Collector's order. There is also evidence that persons working on the *bândh* refused to obey the Irrigation Department officer, who called upon them

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to desist. Further, there is the evidence of a Public Works Department surveyor that various sections of the *bândh* have been raised to heights exceeding those for which the Collector granted permission. On these materials, the petitioners were served with notices, alleging that they had raised the embankment above the original level. The notices further informed them that unless they levelled down the embankment by a certain date, they would be prosecuted. Nothing was done by the petitioners, and in due course they were prosecuted and convicted by the learned magistrate of an offence punishable under section 76 (*b*) of the Bengal Embankment Act, namely, of having, without previous permission of the Collector, added to an existing embankment, and the petitioner No. 23 was ordered to pay a fine of Rs. 30 or in default to suffer rigorous imprisonment for one month, and the other petitioners were ordered to pay a fine of Rs. 15 each or in default to suffer rigorous imprisonment for a fortnight. The magistrate further made an order under section 79 directing the petitioners to remove the addition made to the *zamindâri* embankment beyond the levels sanctioned by the Collector within one month from the date of the order. The petitioners then moved the High Court, and it appeared that the proceedings before the magistrate had been vitiated by certain irregularities of procedure. The High Court, accordingly, set aside the convictions and ordered the petitioners to be retried, the retrial to begin from the stage immediately preceding the examination of the accused persons under section 342 of the Code of Criminal Procedure. The petitioners were retried and were again convicted. The learned magistrate sentenced the petitioner No. 23 to pay a fine of Rs. 40 or in default to suffer rigorous imprisonment for one month and the other petitioners to pay fine of Rs. 20 each or in default to undergo rigorous imprisonment for one week. It is against those convictions and sentences that this Rule has been obtained.

Now Mr. Basu maintains that there is no evidence to prove what the original level of the *bândh* was. There certainly is evidence to show what the level of the *bândh* was in 1926, and the trying court has arrived at a finding on the matter, namely, that it was below 19 feet 5 inches for the first mile and below 22 feet for the second, third and fourth miles. These levels have been exceeded in consequence of the work which is said to have been done by the petitioners. Mr. Basu argues that this is not enough and he says that "existing embankment" must be taken to mean an embankment as it existed at the date of the notification, that is to say, in 1901. There is admittedly no evidence on the record as to the state of things in that year. I find myself unable to agree with this construction of the section. Authority is against Mr. Basu. In the case of *Ramnath Pandit* v. *Emperor* (1) Holmwood and Sharfuddin JJ. held that "existing embankment" in clause (*b*) of section 76 bears the same interpretation as "existing embankment" in clause (*a*), that is an embankment existing at the time the addition is made. Following that case, Richardson and Shamsul Hudda JJ., in the case of *Lakshmi Kanta Hazra* v. *Emperor* (2), expressly laid down that "existing embankment" means the embankment existing when the addition is made and not the embankment as it existed at the date of the notification under section 6. As against these authorities, Mr. Basu has relied on the judgment of Mukerji J. in two unreported cases: *Executive Engineer, Cossye Division* v. *Kailash Shaikh* (3). In those cases Mukerji J, sitting singly, accepted the References made by the learned Sessions Judge of Midnapore and set aside the convictions under section 76 (*b*). No reasons, however, are given for the decision, and the letter of reference raises several points, any one of which, if accepted, would justify

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the court in setting aside the conviction. The only relevant paragraph in the letter of Reference is paragraph (*c*), where the learned judge submits that unless there be evidence as to what the height was before the additions and after the additions, there can be no conviction under section 76 (*b*) of Act II. That does not imply that the learned Sessions Judge is putting forward a submission that the state of things to be considered is the state of things at the date of the notification. Nor does the judgment of the court imply that it accepted the view for which Mr. Basu has been arguing. On this point, it is really sufficient if I say I cannot accede to the petitioners' argument, namely, that the petitioners were entitled to raise the *bândh* to the height to which it was in 1901 and, there being no evidence of its height in that year, there is nothing to show that that height has been exceeded. I think I should add that, although the view put forward by Mr. Bhattacharya for the Crown may lead to certain difficulties, it appears to me to be the right one, namely, that by "existing embankment" is meant the embankment as it existed at the date when the additions were made, that is to say, that permission of the Collector is necessary even for repairs if these repairs involve additions to the embankment in the state that it is in when the repairs begin. Whether the department would ever commence proceedings against persons who have merely restored the *bândh* to the state it was in before it was damaged is a question on which I do not feel called to express an opinion. But, having regard to the language of section 76 (*b*) and the authorities, I feel constrained to hold that Mr. Bhattacharya's construction is the correct one.

I do not think that there is any substance in any other of the grounds raised by the petitioners. I think there is ample material on the record from which the court could infer that petitioner No. 23 was a party to the illegal raising of the level of the *bândh*,

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even though none of the witnesses called could swear to having seen him working on the site.

Similarly, I see no reason why the order made under section 79 of the Act should be set aside.

In these circumstances, the Rule must be discharged and the convictions and sentences affirmed.

Rule discharged.

A. C. R. C.