# APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Russell.*

VENKATACHALAM CHETTIAR (PLAINTIFF'S REPRESENTATIVE), APPELLANT,

*v.*

ZAMINDAR OF SIVAGANGA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1903. December 16. 1904. January 5.

*Injunction—Riparian owners—Lands belonging to different owners situated near tank common to both—Ordinary overflow through channel between boundaries—Portion of overflow customarily inundating both lands—Attempt by one owner to erect bank for protection—Effect to increase inundation of opposite land—Injunction refused to restrain opposite owner from preventing erection.*

Plaintiff and defendants owned adjacent lands, near which was situated a tank which was common to both and the surplus from which had flowed from time immemorial down a channel which lay between the plaintiff's land and that of the defendants. The channel was insufficient to carry off all the water, and some of it flowed over plaintiff's lands and some over those of the defendants. The flow was not the result of extraordinary flood but was the normal state of things. Plaintiff desired to erect a bank to protect his land from the water but defendants had prevented him. It was found that if plaintiff did erect such a bank, it would throw back on the land of defendants more water than had customarily flowed over it and would increase the damage to which it had hitherto been subject. On a suit being brought by plaintiff for an injunction restraining defendants from interfering with the erection of the proposed bank:

*Held*, that plaintiff was not entitled to an injunction.

*Menzies* v. *Breadalbane*, (3 Bligh N.S., 414), followed. *Gopal Reddi* v. *Chenna Reddi*, (I.L.R., 18 Mad., 158), distinguished.

SUIT for an injunction. Plaintiff was in possession of the Kuruthamput Inam Devasthanam village, while the Pilar village belonged to first defendant. The remaining defendants were either lessees or mirasidars of the last-mentioned village. Both villages were irrigated by a single tank which was common to both. In order to protect his property from inundation when the surplus water flowed from the tank as it had done from time immemorial, plaintiff desired to erect a bank, but defendants had prevented him from doing so, as the effect of it would be to throw more water on

* Second Appeal No. 348 of 1902, presented against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 461 of 1901, presented against the decree of P. S. Sesha Ayyar, District Munsif of Sivaganga, in Original Suit No. 149 of 1900.

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the defendants' land. Plaintiff prayed for a permanent injunction restraining defendants from objecting to his putting up a bank to protect his lands. The water against which plaintiff wished to protect his land was the surplus water of the tank, which, from time immemorial, had been discharged through a weir, and passed along a channel which was insufficient to carry it all off. The result was that some of the water passed over plaintiff's lands and some over that of the defendants. This flooding of the banks of the channel was the normal condition of things, and was not due to extraordinary flood. It was found that, if plaintiff put up the proposed bank, it would, as defendants contended, throw upon defendants' land more water than had customarily flowed on to it and would increase the damage to which defendants' land had hitherto been subject. Both the lower Courts held that plaintiff was not entitled to an injunction.

Plaintiff preferred this appeal.

*K. Srinivasa Ayyangar* for appellant.

*K. N. Ayya* for fourth, fifth, seventh, ninth and twelfth respondents.

Sir S. SUBRAHMANIA AYYAR, OFFG. C.J.—The plaintiff's inam village and the first defendant's zamindari village are irrigated by a common tank. As found by both the lower Courts, the surplus water of the tank has, from time immemorial, been discharged through a weir and the water thus discharged passes over some of the lands of both the parties and eventually escapes through a channel separating the two villages. It is further found that, if the plaintiff puts up the bund which he proposes to construct in order to save from inundation the portion of his property hitherto affected by the flow of the surplus water, such bund would throw back upon the defendant's land more water than has customarily flowed on to his property and increase the damage to which he has been hitherto subject.

In these circumstances there can be no doubt that the lower Courts were right in refusing to grant the injunction prayed for by the plaintiff, to restrain the defendants from interfering with the erection of the proposed bund.

Assuming the plaintiff was entitled to protect his land from inundation by erecting a bund, it would by no means follow that the Court would grant an injunction in his favour when there has been nothing more than mere assertions on the one hand and

denials on the other as to the right of the plaintiff to raise it. It is, however, unnecessary to say more on this point as the plaintiff has clearly no right to raise any bund in the way proposed by him. Now, having regard to the fact that the surplus waters of the common tank have from time immemorial been discharged so as to overflow certain lands of both the parties, an agreement must be implied as between the owners to the effect that neither can interfere with the accustomed flow of the surplus water so as to increase the burden of the other.

Apart from this and even were the parties not the owners in common of the tank, the plaintiff would not, according to the authorities, be at liberty to put up the proposed bund. It is quite true that every land owner exposed to the inroads of the sea has the right to protect himself by erecting such works as are necessary for that purpose and that if he acts *bonâ fide* he is not liable for any damage occasioned to his neighbours who must protect themselves (*Rex* v. *Pagham Commissioners*(1)). But I take it that the law does not, except in the case of extraordinary floods, give such large powers for protection to riparian owners, it having been distinctly laid down that such owners have a right to protect their lands with reference to ordinary floods, only if they do so without injury to others (*Rex* v. *Trafford*(2)); compare also *Ridge* v. *Midland Railway Company*(3), cited in Coulson and Forbes' 'Law of Waters,' 2nd Edition, page 155.

Here, however, the bund proposed would, as found by the lower Courts, affect the defendant's land injuriously. The case is therefore analogous to *Menzies* v. *Breadalbane*(4) where the House of Lords, speaking through Lord Lyndhurst, pointed out the similarity between the English, Scotch and Roman Laws bearing on the matter, and held that a proprietor of land on the bank of a river ought to be restrained from erecting a mound, which, if completed, would in times of ordinary flood throw the waters of the river on to the grounds of a proprietor on the opposite bank, so as to overflow and injure them.

This decision of the House of Lords is referred to in *Whalley* v. *Lancashire and Yorkshire Railway Company*(5) as illustrative of the

(1) 8 B. & C., 355; 32 R.R., 406.
(2) 8 Bing, 204; 34 R.R., 680.
(3) 53 J.P., 55.
(4) 3 Bligh N.S., 414; 32 R.R., 103.
(5) L.R., 13 Q.B.D., 131 at p. 136.

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second of the four heads of the classification there adopted by the Master of the Rolls. He observed: "Then we come to the case of having property which is subject to this defect, that unless you can prevent the injury which the ordinary course of nature will bring upon it, by transferring that injury to your neighbour's property, your property must suffer as the natural consequence of its position. That is the case of *Menzies* v. *Breadalbane*(1) where property was so situated with regard to a river that if the river was left alone with its ordinary flow of water, it must, in the course of nature, eat away the property or occasionally overflow it. If the owner of such property, in order to cure that defect were to do something to his land which by turning the stream out of its ordinary course would throw that defect on his neighbour's land, he would, I think, according to the ordinary principles of law, become liable to pay the damages this would occasion, and further be prevented from continuing to do it by an injunction."

That is practically the case here. The land of the plaintiff, by its situation, has from time immemorial been exposed to the periodical overflow of the water discharged by the weir and therefore the owner of such land even if he had no interest in the tank would not be at liberty to construct an embankment such as that proposed, to the injury of the proprietor of lands on the other side.

The case of *Nield* v. *London and North Western Railway Company*(2) is not in point for the reason that, apart from the water sought to be turned away in that case being extraordinary flood water, neither party to the contest was responsible for the coming in of the water; while here the water which is sought to be kept off by the plaintiff, is the surplus of what comes into the tank in the interests of both the parties and has to be discharged for the safety of the common property—the tank. This circumstance would distinguish the present from the case of *Gopal Reddi* v. *Chenna Reddi*(3) also.

I feel some difficulty in understanding what the precise *ratio decidendi* of *Gopal Reddi* v. *Chenna Reddi*(3) is. In one part of his judgment, Shephard, J., observes: "It is found or admitted that it has long been the practice to have some sort of bunds." If this be the real reason for the final decision in the case, it would

(1) 3 Bligh N.S., 414; 32 R.R., 102.
(2) L.R., 10 Ex., 4.
(3) I.L.R., 18 Mad., 158.

not be in conflict with *Menzies* v. *Breadalbane*(1) where the Lord Chancellor distinguished the case of *Farquharson* v. *Farquharson*(2), on the ground, among others, that the mound in question there was erected on old foundations and that it had been shown that there was a custom or practice of riparian owners in that part of the country to embank against each other. In another part of his judgment, however, Shephard, J., says that the stream, when in flood, spread itself over the defendant's lands and did not come in its full volume to the plaintiff's lands. If such spreading was the usual state of things in times of ordinary flood, so as to make the ground on which the spreading took place a part of the regular course of the river in certain seasons of the year, the construction of an embankment which would confine such ordinary flood waters within narrower bounds so as to damage the lands of others, would have been actionable according to *Menzies* v. *Breadalbane*(1), and the conclusion in *Gopal Reddi* v. *Chenna Reddi*(3) would be in conflict therewith; for a stream may have one course ordinarily and a wider course in particular seasons, and any work which interferes even with the latter wider course calculated to injure the property of others would be within the rule laid down by the House of Lords, as pointed out by the Lord Chancellor thus: "The ordinary course of the river is that which it takes at ordinary times; there is also a flood channel; I am not talking of that which it takes in extraordinary or accidental floods, but the ordinary course of the river in the different seasons of the year, must, I apprehend, be subject to the same principle" (*Menzies* v. *Breadalbane*(1)). The distinction thus drawn by the Lord Chancellor between usual or ordinary floods and accidental or extraordinary floods would seem to be denied by Shephard, J., when he observes: "I fail to understand why the periodical rising of a stream, consequent on the fall of rain, should any the less be considered an extraordinary danger." Though thus some portions of his judgment are calculated to create a doubt on the point, yet, I take it that Shephard, J., did not intend to lay down anything inconsistent with *Menzies* v. *Breadalbane*(1) since the learned Judge in terms says that the act complained of did not divert the stream from its natural course. Be this as it may, the

(1) 3 Bligh N.S., 414; 32 R.R., 103. (2) Cited in 3 Bligh N.S., 414 at p. 421.
(3) I.L.R., 18 Mad., 158.

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facts of the present case are altogether different from those of *Gopal Reddi* v. *Chenna Reddi*(1) as will be clear from what has been already stated.

It now remains only to notice the argument on behalf of the appellant that his case was supported by the view of the law accepted by certain American authorities cited in Angell on 'Water Courses' and Washburn on 'Easements.' But those authorities relate to the improvement of one's land with reference to surface water strictly such—that is, water due to fall of rain or snow, percolation, etc.—and not flowing in a definite watercourse. On the contrary, the rule that the course of water in a stream including its course in times of ordinary flood should not be changed or obstructed for the benefit of one class of persons to the injury of another, seems to be generally admitted in the United States (Angell on 'Water Courses,' 7th Edition, section 334, and note). It seems to be admitted also that there is no liability in respect of extraordinary floods on the manifest ground that they are (to use the elegant language of Agnew, J., in *Pittsburg Railway Company* v. *Gillieland*(2), "unexpected visitations whose comings are not foreshadowed by the usual course of nature and must be laid to the account of Providence whose dealings, though they may afflict, wrong no one." In some of the States, however, the Courts have had, from the necessity of the case, to refrain from extending the recognised rule as to the ordinary flood-channel of a river, to the case of some great rivers which periodically bring down huge floods that, overflowing the banks, sweep down populous and fertile lowlands on either side for miles. In *Kansas City, &c., Railway Company* v. *Smith*(3), cited by a writer who has recently discussed the subject, the matter is put strikingly. There the Supreme Court of Mississippi said :—"If the waters of the Mississippi river which at flood times spread from twenty to forty miles and flow in a continuous and unbroken body down the valley are to be dealt with as the waters of a stream and the whole valley is to be given up as the course way of the stream, the most fertile portion of our state may at once be abandoned . . . . There are farms innumerable and rail roads, villages, towns and cities situate in a watercourse if the usual course of the flood water of the Msisissippi river mark and define the course of that stream.

(1) I.L.R., 18 Mad., 158. (2) 94 Am. Dec., 97 at p. 105.
(3) 37 Am. L.R., 713 at p. 721.

It is manifest that to apply the strict rules of law controlling in cases of streams and the obstruction thereof, to such a stream and to such conditions, is in the very nature of things impracticable and impossible. Calling these overwhelming floods surface or channel water for the purpose of dealing with them under rules applicable to entirely different conditions advances us no step in the solution of the question involved. We must deal with things and not names, and conditions inherently and radically different cannot be assimilated by mere terminology." The gist of this argument is that conveyed by the observation of Dr. Hunter (Roman Law, 2nd Edition, page 313) that "occasional floodings do not change the legal extent of the bank, otherwise all Egypt would be a bank of the Nile."

But the special features of the Mississippi and Nile floods can constitute no good reason for discarding with reference to rivers and streams generally the well-established definition that the bank of a river is the furthest reach of the river so long as it keeps within its natural course (Hunter's 'Roman Law,' page 313); and it is scarcely necessary to say that, as the circumstances of rivers and streams in this Presidency are in no way comparable to those attending the Mississippi, the Nile and the like, they do not warrant a departure form the rule of law laid down by the House of Lords in the case already cited.

Further, River Conservancy Legislation (Madras Act VI of 1884) having provided for State interference where such would seem to be necessary for the definition, control and protection of waterways in the country, there would seem to be so much less reason for our Courts adopting, on the ground of any public policy, a rule different form that established by authorities ordinarily followed here.

I would accordingly dismiss this appeal with costs.

RUSSELL, J.—The District Judge has, I think, given good reasons for the opinion which he holds that this is not a case in which the injunction asked for should be granted. It is within the discretion of the Court to grant an injunction or refuse it. The plaintiff has refused to join the fourth defendant at the latter's request in order to deepen the channel F, which would then in all probability carry away all the surplus water of the tank A running in the direction of F in ordinary times and little or no damage would result to the plaintiff if this were done. Till the plaintiff has

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done in this respect all that can reasonably be expected of him I do not think he is entitled to any relief except what the law allows him as a matter of absolute right.

This water which the plaintiff wishes to bund up and throw back on the defendant's land is either running in a defined stream or it is not. If it is running in a defined stream, then the case of *Menzies* v. *Breadalbane*(1) makes it quite clear that the plaintiff has no right to erect the bund referred to by him. The plaintiff does not seek to protect himself from an extraordinary flood. He wants to protect himself from the ordinary overflow of the common tank. This flow runs in a defined channel and owing to the fact, no doubt, that the surplus channel F is silted up, this ordinary surplus water runs on to the plaintiff's land and injures it. It is settled law that " a prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a defined stream, and cannot apply to surface water not flowing in such a stream, though it might ultimately, if not arrested, flow into a tank " (*Robinson* v. *Ayya Kristnama Chariar*(2). The plaintiff could in the present case be allowed to erect the bund proposed by him only if he had a prescriptive right to do so and if the water is running in a defined stream. He has no such right for no such bund has ever been erected before. Even, however, if the water is not running in a defined stream, the plaintiff would not under the circumstances be entitled to put up a bund, the effect of which would be to throw additional water on to the defendant's land and thus cause greater injury to the defendant than is caused at present. It appears that the surplus water escapes from tank A and runs in a defined channel for about 100 yards. It then divides into three branches and the waters in all the branches more or less diffuse themselves over the surface of the lands they pass through. It is with the southern branch this case is concerned. The watercourse is there clearly marked at intervals. Thus the case is as follows: There is a channel which, in its present state, is insufficient to carry away, without overflowing its banks, all the surplus water flowing into it from the tank A. The flooding of its banks is the normal condition of things. There is no extraordinary flood. The case of *Menzies* v. *Breadalbane*(1) just

(1) 3 Bligh N.S., 414; 32 R.R., 103.
(2) 7 Mad. H.C.R., 37, at page 47.

quoted shows that the plaintiff cannot be allowed to erect a bund and throw the water which would ordinarily flow on to his land over on to the defendant's land and thus cause an injury to the latter. This is what the plaintiff seeks to do. The obvious remedy is that proposed by the fourth defendant. The parties should join and deepen the common drainage channel.

The appeal is dismissed with costs.

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## APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Boddam.*

KAVIPURAPU RAMA RAO (PLAINTIFF), APPELLANT,

*v.*

DIRISAVALLI NARASAYYA (DEFENDANT), RESPONDENT.*

1903. December 9, 10.

*Rent Recovery Act—Madras Act VIII of 1865, ss. 9, 10, 11—Suit to compel acceptance of patta—Provision in patta for payment of rent in kind—Power of Court to amend patta by providing for payment in money—"Rent."*

The term "rent," as used in section 11, paragraphs (1) and (2) of the Rent Recovery Act, includes rent of every description, whether payable in kind or in money. *Polu* v. *Ragavammal*, (I.L.R., 14 Mad., 52), explained.

Where rent is payable in money but a patta has been tendered which provides for the payment in kind, the Court has power to amend the patta. *Mahasingavastha Ayya* v. *Gopaliyan*, (5 Mad. H.C.R., 425), approved.

Whether a contract in terms to the effect that rent is payable in money but at a rate to be determined by the Court as reasonable would be a contract within the meaning of section 11 (1);—*Quære.*

Rent had been paid in money from fasli 1288 to fasli 1308, at rates which had varied. On its being contended that the Court could find, from the mere fact of these past payments, that there was an implied contract between the parties that rent was to be payable in money at a rate to be determined by the Court:

*Held*, that such an implied contract could not be found. To warrant such a finding, the circumstances should be such as to suggest an agreement to pay at some definite rate.

SUITS by a landholder to compel his tenants to accept pattas under section 9 of the Rent Recovery Act. The pattas provided

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* Second Appeal No. 458 of 1902 presented against the decree of J. H. Munro, District Judge of Kistna, in Appeal Suit No. 53 of 1901, presented against the decision of K. V. Srinivasa Ayyangar, Head-quarter Deputy Collector of Kistna, in Summary Suit Nos. 293 to 320 of 1900, respectively.