APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

AIYASAMI AIYAR (THIRD PLAINTIFF), APPELLANT,

v.

THE DISTRICT BOARD, TANJORE, AND OTHERS (DEFENDANT AND FIRST AND SECOND PLAINTIFFS), RESPONDENTS.*

1907. March 12. December 4, 5, 6. 1908. January 8.

Local Boards Act (Madras)—Act V of 1884, s. 95—Act throws on Local Boards the duty of making necessary improvements in roads by necessary implication—Board not liable for damage caused by such works, when not negligently carried out.

The duty imposed on District Boards by section 95 of Madras Act V of 1884 to construct and maintain roads casts on them by necessary implication the duty of constructing and maintaining the necessary culverts and tunnels under them. This implied power to construct and maintain such culverts and tunnels is not merely permissive, to be exercised only when no injury will be caused to others thereby, but an imperative duty cast on the Board by the Act.

No suit for injunction or damages will lie against the District Board for any injury caused by the construction or improvement of such works, when such works or improvements are necessary in the interests of the public for the maintenance of the road, and there is no negligence in the carrying out of the work. *Sankara Vadivelu Pillai* v. *Secretary of State for India in Council*, (I.L.R., 28 Mad., 72), distinguished.

THE facts are fully set out in the judgment of the lower Appellate Court which was as follows:—

"The appellant, that is, the District Board, Tanjore, enlarged the ventways of two tunnels bearing Nos. 140 and 141 in road which is situated west of Pattamangalam village. Respondents No. 35, who are the inhabitants of this village brought the suit for a permanent injunction to restrain the District Board from altering the original dimensions of the ventways, and for a mandatory injunction to cause the restoration of the ventways to their original dimensions.

A channel flowing west of the road crosses the road by four tunnels and irrigates the plaintiff's village. Plaintiffs complain that on account of the enlargement of two of the tunnels, a larger

* Second Appeal No. 584 of 1904, presented against the decree of M.R. Ry. T. T. Ranga Chariar, Subordinate Judge of Kumbakonam in Appeal Suit No. 764 of 1903, presented against the decree of M. R. Ry. S. Ramaswami Ayyar, District Munsif of Mayavaram, in Original Suit No. 185 of 1902.

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quantity of water than necessary is thrown upon their lands; that the drainage channel passing east of the road has not the capacity to drain away the said water; that their lands are therefore rendered unfit for cultivation, and that they suffer great loss. They also state that the injury they have thus to suffer every year cannot be adequately compensated for in money.

Defendant contends that plaintiffs have no right to insist on the ventways being maintained at particular dimensions; that the Board is under a statutory obligation to maintain the road and the tunnels underneath it in good order; that, owing to the incapacity of the old tunnels to drain away the water of the channel, the road was often damaged and the persons who had to use it were put to inconvenience; that the enlargement complained of was therefore legitimate; and that plaintiffs cannot maintain this suit.

The District Munsif found that the enlargement of the tunnels was calculated to cause injury to plaintiffs' lands; that the defendant was not justified in having carried out the enlargement without adequately protecting plaintiffs' lands from inundations, and that plaintiffs are entitled to the injunctions asked for."

The Subordinate Judge held that the Board being enjoined to maintain the roads in proper order was not responsible unless it was shown that it had exceeded or abused its powers, or exercised them negligently so as to cause injury to others. He reversed the judgment of the lower Court and dismissed the suit.

The third plaintiff appealed to the High Court.

T. V. Seshagiri Ayyar and *B. Govindan Nambiar* for appellant.

The Hon. Mr. *V. Krishnaswami Ayyar* for first respondent.

JUDGMENT.—The plaintiffs on behalf of themselves and other landholders seek for a permanent injunction restraining the District Board of Tanjore from increasing the size of two tunnels or culverts passing under a public road. The road runs from north to south, and for a part of its length, on the west side of it, and running parallel with it, there is an irrigation channel called the Pallavan channel; it is in this part of the road that the two tunnels in question are situated, and water from the Pallavan channel passes through them under the road, and is used for the irrigation of the seed beds of the plaintiffs and other landholders, lying on the east side of the road. These two tunnels having fallen into disrepair the District Board, the authority responsible for the maintenance of the road

decided, in repairing them, to increase their size, the object being to allow a greater volume of water to pass through them and thus to prevent the waters on the west side of the road from rising in the rainy season to such a height as to damage the road surface. The complaint of the plaintiffs is that the increased volume of water discharged by the tunnels is, or is likely to be, too great to be carried off by the channels on the east side of the road, and that consequently their fields will be submerged and their crops injured.

Both the lower Courts find that they will be injured in the way they allege, and the question is therefore whether they are in these circumstances entitled to the injunction for which they pray.

We endeavoured, by calling for a finding of fact, to ascertain whether the tunnels were constructed at or after the time of the construction of the road for the purposes of the road, or whether they existed before the construction of the road as irrigation conduits or pipes. The Subordinate Judge has however been unable to find any evidence sufficient to establish either position, and is able only to find that for fifty years or so the tunnels and the road have existed together without alteration in the dimensions of the former.

We must take it, then that the road was vested in the Local Fund Board by section 8 of Madras Act IV of 1871 and transferred to the District Board by section 4 (iii) of Act V of 1884 and that when it first vested in the Local Fund Board the two tunnels now in question were in existence.

It seems to be accepted by both sides that the injury to which the plaintiff's lands are liable will be caused if caused at all, by the waters of the Pallavan channel, but there is no finding whether it will be caused when the water in the channel is at its normal level in the irrigation season, or when it is at its ordinary seasonal flood level, or only at a time of extraordinary flood.

There is some evidence and a finding by the Subordinate Judge that injury is done annually to the road in the rainy season, but on the question of the injury done to the plaintiffs' lands the only evidence referred to by the District Munsif showed that even in a time of 'unprecedented' rain, a protective bank on the east side of the road was sufficient to prevent any damage. The findings of fact being in many respects wanting in precision, the case has been argued upon both sides upon the footing that the

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District Board to make a successful defence must rely on the powers conferred upon it by the Local Boards Act V of 1884, and we deal with the matter on this footing.

Mr. Seshagiri Aiyar contends that the power given to the Board to construct culverts under their roads, if it exists at all, is merely permissive, and can be exercised only in such a way that no injury is done to others. But this contention will not bear examination By section 95 of Act V of 1884 (Madras) the District Board is directed to provide so far as its funds allow, for the construction, repair, and maintenance of roads, bridges, and other means of communication. The road in question is, it is not denied, one of the roads to which the provisions of this section are applicable, and, even assuming that, a culvert or tunnel is neither a 'bridge' nor a 'means of communication,' it is vested by section 50 of the Act in the District Board, and it is clearly impossible, or so it seems to us, for the Board to maintain the road passing over a culvert or tunnel unless it at the same time maintains the culvert or tunnel which by the Act, is vested in it. The duty cast upon the Board of maintaining the road necessarily involves then the duty of maintaining the necessary culverts and tunnels under it. It can hardly be denied that an authority to construct a 'road' carries with it the authority to construct the water-ways necessary to enable the road to be carried safely across the drainage of the country, and we did not hear from Mr. Seshagiri Aiyar any argument which should lead to the application of a different rule in the case of a road which was vested, ready made, in the District Board in 1884. If in order to 'maintain' such a road it is necessary to improve the water-ways it seems to us that there is imposed upon the District Board the duty of making the necessary improvements. Mr. Seshagiri Aiyar relied upon the judgments of Sir Subrahmanya Ayyar, J., in *Sankaravadivelu Pilla* v. *Secretary of State for India in Council* (1) and likened the culverts or tunnels in the present case to the 'bye-wash' dealt with in that case. He argued that they are to be treated as 'new works' constructed under an authority which is "in the strict sense of law permissive."

We think the two cases are distinguishable. In the case before us the statute enjoins the maintenance of the road and does

(1) I. L. R., 28 Mad., 72.

not confine the Board to its maintenance as originally designed and executed; and in the absence of any such express restriction, we are of opinion that the injunction to maintain impose the duty to provide such new works as it may be found necessary from time to time to provide in order that the road may be properly maintained.

There is no resemblance between the present case and the case of *Canadian Pacific Railway* v. *Parke*(1) in which Lord Watson makes use of the phrase "in the strict sense of law permissive." In that case the authority was given to the defendant for his own benefit; here it is given solely for the benefit of the public: the District Board makes no profit out of the roads. There having got the water to his land the defendant was entitled to use it or not as he pleased in irrigating that land or any part of it: here it is the duty of the Board to provide so far as its funds admit, for the proper maintenance of the road. The cases are far apart. The case before us is nearer to the case of *London, Brighton and South Coast Ry. Co.* v. *Truman*(2) where for the purposes of the cattle traffic on the railway the Company was authorized to acquire land for, and to construct cattle docks and yards—which when constructed formed as Lord Watson says in *Canadain Pacific Railway* v. *Parke*(1), "just a part of the railway" which it was the business of the Company under its statute to make.

The case of *Cracknell* v. *Mayor, etc., of Thetford*(3) may also be referred to in this connection.

It may no doubt be suggested that in these cases the work done was expressly authorized by the statute, but we do not think that that makes any real difference: in the present case as we have endeavoured to show the power is given by necessary implication. Mr. Seshagiri Aiyar suggested that we cannot imply more than a mere permissive authority in the present case because it was not incumbent on the District Board to put a culvert in the place which was selected for it; but the case *London, Brighton and South Coast Ry. Co.* v. *Truman*(2) is sufficient authority for the contrary view. We may also refer to the opinion expressed by Sir George Jessel in *Hawley* v. *Steele*(4), a case where land acquired

(1) 1899, A.C., 535.
(2) 11 A.C., p. 45.
(3) L.R., 4 C.P., 629.
(4) 6 Ch.D., 521.

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for purposes of the defence of the realm was utilized for rifle shooting in such a way as to be a nuisance to a resident in the vicinity. The Master of the Rolls was of opinion that "the power conferred upon the military authorities was a legal right to the use of the land for that purpose, although such a use would, without the authority of parliament, have been illegal. If that is so, it is impossible to maintain an action for nuisance," and he pointed out that it was not for the Court to decide for what purpose any particular part of the land was to be used.

It is found that action was necessary to prevent the annually recurring injury to the road and it is found that to accomplish this object three courses were open, (1) to raise the road way, (2) to construct a bank along the west side of the road, and (3) to enlarge the water-ways. The first two courses are practically indentical in effect and is not clearly found that either of them by itself will be effective to prevent the mischief: the Subordinate Judge who accepts the District Munsif's finding seems to take it that it was necessary both to raise the road and widen the tunnels, and this is, we think, the effect of the District Munsif's finding and of the evidence to which he points in support of it. It is obvious that in the case of an embanked road the raising of the surface to any great extent, or the raising of one side of the road, may involve the narrowing of the road to an extent which impairs its utility, and that, in the present case, to erect a bank separate from the road along its western side may be impracticable from want of room, or so expensive in that the funds of the District Board will not admit of its being done. There is therefore nothing apparently unreasonable in the finding that the extension of the water-ways was necessary in the interests of the public for the maintenance of the road. There was no negligence in the carrying out of the work, and the plaintiffs have not shown that the Board could have constructed a culvert at any other part of the road which, while effective to protect the road, would have done no injury to the lands on the east side of it.

We dismiss the Second Appeal with costs.