APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Krishnan and Mr. Justice Beasley.*

SHEIK HUSSAIN SAHIB (PLAINTIFF), APPELLANT,

1925, November 10.

v.

PACHIPULUSU SUBBAYYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Water, flow of—Adjacent lands of lower and higher levels—Natural right of owner of latter to let off his water to land of lower level—No distinction between rural and urbar areas.

An owner of land on a lower level to which surface water from adjacent land on a higher level naturally flows is not entitled to deal with his lands so as to obstruct the flow of water from the higher land. This rule is applicable to all lands whether situate in the country or in towns; *Gibbons* v. *Lenfestey*, (1915) 113 Law Times (N.S.), 55 (P.C.), followed; *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*, (1906) I.L.R., 29 Mad., 539, and *Sangana Reddiar* v. *Perumal Reddiar*, (1910) M.W.N., 545, overruled.

SECOND APPEAL against the decree of A. NARAYANA PANTULU GARU, Subordinate Judge of Kistna at Ellore, in A.S. No. 380 of 1921 preferred against the decree of C. BHASKARA REDDI GARU, District Munsif of Kovvur, in O.S. No. 911 of 1919.

The plaintiff owned some lands in a village, the rain water falling on which was naturally flowing on the defendants' neighbouring land which was on a lower level. The defendant erected a bund on his land the effect of which was to pen back the plaintiff's water. Plaintiff sued (*a*) for a declaration of his right to allow

* Second Appeal No. 1076 of 1922.

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his water to flow on the defendants' land in its natural course, (*b*) for the removal of the bund and (*c*) for a permanent injunction restraining the defendant from obstructing such flow. The defendant pleaded that the plaintiff purchased his lands knowing that the bund had already been raised before his purchase, that the plaintiff had no natural right in law and that there was no actual damage caused to the plaintiff. The District Munsif held that the plaintiff had the natural right, that he sustained damage to the extent of Rs. 50 owing to the obstruction to the flow of his water and ordered the defendants to open three sluices in the bund so as to allow the flow of the water. On appeal by the defendants, the Subordinate Judge, without finding whether any damage was caused to the plaintiff, dismissed the suit holding that the plaintiff had no natural right. He relied on *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(1) and *Sangana Reddiar* v. *Perumal Reddiar*(2). The plaintiff then preferred this Second Appeal.

This Second Appeal coming on for hearing the Court (PHILLIPS and RAMESAM, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The plaintiff (appellant) is the owner of a piece of land which lies on a higher level than the land of the defendant and he seeks to prevent the defendant from erecting a bund on his land, which has the effect of preventing the flow of surface water over the plaintiff's land on to the defendant's land which is its natural outlet. The lower Appellate Court following the ruling in *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(1) has held that the defendant is entitled to prevent water flowing over his land by erecting a bund. It is now argued for the appellant that this decision in *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(1) is only applicable to cases where the lands

(1) (1906) I.L.R., 29 Mad., 539. (2) (1910) M.W.N., 545.

are situated within a town and he relies on subsequent cases of this Court, *Ramasawmy* v. *Rasi*(1) and *Maharajah of Venkatagiri* v. *Secretary of State for India*(2). In *Ramasawmy* v. *Rasi*(1) the prior decision in *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(3) was distinguished on the ground that it referred to land in a town and was therefore not applicable to agricultural land outside a town. The decision in *Maharajah of Venkatagiri* v. *Secretary of State for India*(2) was with reference to the right to bund a natural stream and SESHAGIRI AYYAR, J., prefers to base his decision on illustration (*h*) of section 7 of the Easements Act (Madras Act V of 1882) rather than illustration (*i*) which deals with surface water, illustration (*h*) dealing with natural streams. He, however, adds that if the learned Judges in *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(3) intended to lay down that the principle regarding the conflict of rights should be extended to agricultural areas in rural parts he dissents from the proposition and WALLIS, Offg. C.J., takes the same view. SUBRAHMANYA AYYAR, J., in *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(3) laid down the proposition that the natural right mentioned in illustration (*i*), namely, "the right of every owner of upper land that water naturally rising in, or falling on, such land and not passing in defined channels, shall be allowed by the owner of adjacent lower land, to run naturally thereto," was not an absolute right but was the right to pass such water without incurring any liability for damages caused thereby and held that when that right came in conflict with the right mentioned in illustration (*a*), namely, "the exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force" the latter must prevail. If this proposition is correct, it would be illogical to hold that the natural right to pass water over a lower land cannot prevail in a town, whereas it must prevail in the country.

In section 7 we have the definition of what an "easement" is, namely, "restriction of one or other of the following rights" which are mentioned. Because illustration (*a*) mentions the right of an owner of land "in a town" to build on such land, it does not necessarily exclude the right of an owner of land in the country to build on such land. In fact section 7 itself deals with the exclusive right of every owner of immovable property,

(1) (1915) I.L.R., 38 Mad., 149. (2) (1915) 28 M.L.J., 98.
(3) (1906) I.L.R., 29 Mad., 539.

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subject to any law for the time being in force, to enjoy and dispose of the same, and also the right of every owner of immovable property, subject to any law for the time being in force, to enjoy without disturbance by another the natural advantages arising from its situation. *Prima facie*, the owner of immovable property is entitled to do what he pleases with his land and can only be restrained by law or by the superior right of some other person. There can be no distinction between such a right in a town and the same right in the country, unless it is subject to any law for the time being in force. We find it difficult to realize the distinction drawn between such rights in *Ramasawmy* v. *Rasi*(1) and *Maharajah of Venkatagiri* v. *Secretary of State for India*(2) unless there is some law or custom having the force of law which restricts the right in rural areas, but not in urban areas. The difficulties of cultivating land are referred to and it is suggested that owing to these difficulties the natural right of an owner of land to do on it what he pleases is subject to restrictions but this can only be if the restrictions are imposed by law or custom having the force of law. If the right of an owner to pass his surface water on to the lower land is an absolute right which the owner of the lower tenement cannot resist, it is undoubtedly an easement right enjoyed by him over the lower tenement, but we find in the Act that the right is given as an illustration of a right against which an easement may be acquired and is not described as being in itself an easement right. It is doubtful whether the legislature would have given a right which is in itself an easement right as an illustration of a natural right in restriction of which an easement right can be acquired. We may mention that the observations, in *Maharajah of Venkatagiri* v. *Secretary of State for India*(2) with reference to illustration (*i*) of section 7 are *obiter* inasmuch as it was found in that case that the water which was interfered with was the water of a naturul stream. The decision, however, in *Ramasawmy* v. *Rasi*(1) distinctly limits the proposition put forward in *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(3) to urban areas although in the earlier judgment there is no language to lead one to suppose that the learned Judges meant to confine the decision to urban areas. They no doubt refer to illustration (*a*) which deals with land in a town, but the right mentioned is only an illustration of the rights referred to in section 7 and does not exclude other rights

(1) (1915) I.L.R., 38 Mad., 149. (2) (1915) 28 M.L.J., 98.
(3) (1906) I.L.R., 29 Mad., 539.

ex jure nature appertaining to an owner of land. An owner of agricultural land is undoubtedly entitled to raise the level of his land if he so wishes, provided there exists no legal restriction of such act. It might thus happen that a lower land when raised would become higher in level than the adjacent land which had formerly been on a higher level. The right to pass water would thereby be reversed and the owner of the originally lower land would be entitled to pass water on to what was originally the higher land. If the owner of the lower land has such a right to raise his land over the whole of it, it is strange that he cannot raise the level over only a part, such raising having the effect of stopping the flow of water through the adjacent land but whether he has such right must depend on the extent of the right of the owner of the land which was originally higher. Three other authorities have been cited before us from other parts of India, the first being *Ambica Saran Singh* v. *Debi Saran Singh*(1) in which it was decided that the owner of a higher land had the right to pass his surface water over the lower land so long as it continued to be on a lower level, apparently dissenting from the decision in *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(2) although in terms it does not purport to do so. In the other two cases, of Calcutta and Patna respectively, the Easement Act does not apply, *Ramadhin Singh* v. *Jadunandan Singh*(3) and *Sarban* v. *Prudo Sahu*(4). The former case is of no assistance here, for it merely deals with the right of a party to abstain from passing water falling on his land to the lower land and to collect it on his own land. The Patna case does not refer to any authorities and the Court came to a conclusion differing from that taken in *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(2).

Inasmuch as the authority of *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(2) which was followed in *Sangana Reddiar* v. *Perumal Reddiar*(5), has been questioned in *Ramasawmy* v. *Rasi*(6) and *Maharajah of Venkatagiri* v. *The Secretary of State for India*(7), we think that it is advisable that the whole question should be considered by a Full Bench of this Court, and accordingly we refer the case to a Full Bench for decision.

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(1) (1914) 24 I.C., 91.
(2) (1906) I.L.R., 29 Mad., 539.
(3) (1915) 27 I.C., 268.
(4) (1922) 69 I.C., 948.
(5) (1910) M.W.N., 545.
(6) (1915) I.L.R., 38 Mad., 140.
(7) (1915) 28 M.L.J., 98.

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ON THIS REFERENCE

V. Suryanarayana for appellant.—I am entitled to this right which is a natural right; *Gibbons* v. *Lenfestey*(1), *John Young & Co.* v. *Bankier Distillery Company*(2) and section 7 (*b*), illustration (i) of Easement Act. *Maung Bya* v. *Maung Kyi Nyo*(3) incidentally deals with this point and approves *Ramasawmy* v. *Rasi*(4) and *Abdul Hakim* v. *Gonesh Dutt*(5) which are in my favour. In law there can be no distinction between natural rights in towns and in country. *Mahamahopadhyaya Ranga Charar* v. *The Municipal Council of Kumbakonam*(6) is wrong.

B. Satyanarayana for respondents.—Plaintiff's right can exist only so long as my land is on a lower level. I have also a natural right to raise the level of my land or to put up a bund; and when I do so the other's natural right will be at an end; *Mahamahopadhayaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(6). Illustration(*a*) of section 7 is not controlled by illustration (*i*); *Maung Bya* v. *Maung Kyi Nyo*(3) does not deal with this point and does not really approve of *Ramasawmy* v. *Rasi*(4) which is wrong. Damage is the test. It has not been found in this case that putting up the bund has caused any damage to the plaintiff.

The OPINION of the Court was delivered by

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—This appeal raises certain questions of fact with which we are not concerned. The question of law to which our attention has been directed is whether the owner of a plot of land on a lower level on to which water flows in the ordinary course of nature from adjacent land on a higher level is entitled in law so to deal with his land as to obstruct the escape of water from the higher land. It is said that any right which the owner of the higher land has is not in the nature of an easement and that terms such as dominant and servient tenements are inapplicable. That may be true in the abstract but it seems to me that the Privy Council and

(1) (1915) 113 L.T. (N.S.), 55 (P.C.). (2) [1893] A.C., 691.
(3) (1925) 49 M.L.J., 222 (P.C.). (4) (1915) I.L.R., 38 Mad., 149.
(5) (1886) I.L.R., 12 Calc., 323. (6) (1906) I.L.R., 29 Mad., 539.

the House of Lords have clearly recognized a very close analogy between the two classes of cases and that if the owner of the land at the lower level raises an obstruction to the natural flow of the water he will be restrained if it causes or tends to cause damage to the owner of that on the higher. *Gibbons* v. *Lenfestey*(1) is a direct authority of the Privy Council binding upon us. In the judgment of the Committee which was delivered by Lord DUNEDIN we have at page 57 :

"The right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude to which this rule can apply. It is a natural right inherent in property ; it is a question of nomenclature whether it is or is not called a servitude."

Later on we have

"where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher ground insensibly without hurting the inferior tenement should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the interior is, without the positive constitution of any servitude, bound to receive that body of water on his property."

In *John Young & Co.* v. *Bankier Distillery Company*(2) Lord WATSON says at page 696 :

"The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly and unreasonably increased by operations which are *in æmulationem vicini*. But he is under no

(1) (1915) 113 L.T. (N.S.), 55 (P.C.). (2) [1893] A.C., 691.

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legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case here, and water artificially conveyed from a distant stream."

And then His Lordship quotes Lord GIFFORD in *Blair* v. *Hunter Finlay and Company*(1):

"Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible."

The same principle clearly underlies the decision in *Smith* v. *Kenrick*(2) and in that case Mr. Justice CRESSWELL in delivering the judgment of the Court said (page 565):

"There are many cases in which the principle has been recognized, that one landowner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus, he cannot, by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house, nor from building on his own land, although it may obstruct windows, unless indeed by lapse of time the adjoining land has become subject to a right analogous to what in the Roman Law was called a servitude. So also in *Acton* v. *Blundell*(3) where the subject was very much discussed, the Court held that one land-owner having dug a well on his own land could not maintain an action against a party who afterwards sunk a coal-pit in the neighbourhood which had the effect of drawing the water away from his well; the act not being done by the defendant negligently or maliciously, but in a proper manner for the purpose of winning his own coal. We think that the same principle is applicable to the present case. The water is a sort of common enemy,—as was said by Lord TENDERDEN, in *Rex* v. *The Commissioners of Sewers for Pagham Level*(4)—against which each man must defend himself. And this is in accordance with the

(1) 9 Court Sess. Cases, 3rd Series, Macpherson, at page 207.
(2) (1849) 7 C.B., 515; 137 E.R., 205.
(3) (1843) 12 M. & W., 324; 152 E.R., 1223.
(4) (1828) 8 B. & C., 355; 108 E.R., 1075.

Civil Law, by which it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving without claim to compensation, the water naturally flowing down to it."

This last case also touched on the distinction between natural and artificial accumulations of water which was later in 1868 made the basis of the celebrated decision in *Rylands* v. *Fletcher*(1). The reference seems to have been made on account of the conflict of views expressed in *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(2) and *Sangana Reddiar* v. *Perumal Reddiar*(3) on the one hand and *Ramasawmy* v. *Rasi*(4) on the other. The referring Bench in accepting the distinction drawn in *Ramasawmy* v. *Rasi*(4) held that *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(2) only referred to urban areas and we agree that no such distinction arises. It doubtless came from the accident that illustration (*a*) to section 7 of the Easements Act instances a case of land in an urban area because it wishes to safeguard the statutory rights of urban authorities to restrict unapproved methods of dealing with land and buildings. In our opinion *Mahamahopadhyaya Ranga Chariar* v. *The Municipal Council of Kumbakonam*(2) was wrongly decided and the reasoning on which it is based is clearly at variance with the decisions of the Privy Council and the House of Lords to which we have referred; and the same observations apply to *Sangana Reddiar* v. *Perumal Reddiar*(3). It cannot be that the law recognizes two inconsistent rights in adjacent owners, the exercise of one of which would necessarily destroy the other.

It was contended by the respondent that, if the argument of the appellant should be correct, the

(1) (1868) 3 H.L.C., 330.
(2) (1906) I.L.R., 29 Mad., 539.
(3) (1910) M.W.N., 545.
(4) (1915) I.L.R., 38 Mad., 149.

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owners of the adjoining lands at a lower level would be prevented from improving their lands; but this is clearly not so as the adjoining owner can improve his lands to any extent he pleases, even to the extent of raising the level of his lands provided that he makes suitable arrangements for carrying off the water from his neighbour's land. We are confirmed in our view by the fact that the decision in *Ramasawmy* v. *Rasi*(1) was referred to by the Privy Council in *Maung Bya* v. *Maung Kyi Nyo*(2) with approval as being consistent with the authorities.

We refer the case back to the Division Bench for final disposal with this expression of opinion.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Krishnan and Mr. Justice Beasley.*

1925, October 29.

VENKATAKRISHNA REDDI AND TWO OTHERS (DEFENDANTS—RESPONDENTS), APPELLANTS,

v.

KRISHNA REDDI (PETITIONER—PLAINTIFF), RESPONDENT.*

O. XXII. r. 5, Civil Procedure Code (V of 1908)—Order rejecting petition to be brought on record as legal representative—No right of appeal against order even when no rival claimant.

No appeal lies against an order under Order XXII, rule 5, Civil Procedure Code, dismissing, on the objection of the defendant, the application of a person to be brought on record as the legal representative of a deceased plaintiff, even when

(1) (1915) I.L.R., 38 Mad., 149. (2) (1925) 49 M.L.J., 282 (P.C.).

* Appeal against Order No. 346 of 1924.