

what ground he has done so. The defendants Nos. 5 to 10 question the plaintiff's title in respect to Baligram only. We, therefore, modify the decree of the lower Appellate Court and direct that the plaintiff's suit be dismissed in respect of mouzah Baligram. With this exception the decree given by the Munsiff will stand.

Under the circumstances of this case we think that each party should bear his own costs in this Court and in the lower Appellate Court.

H. T. H.

*Appeal allowed and decree modified.*

*Before Mr. Justice Mitter and Mr. Justice Macpherson.*

ABDUL HAKIM AND OTHERS (DEFENDANTS) v. GONESH DUTT AND OTHERS (PLAINTIFFS).<sup>b</sup>

1886  
September 8.

*Easement—Embankment—Drainage—Right to drainage of surplus surface water through natural water-course.*

The right of the owner of high lands to drain off its surplus surface water through the adjacent lower grounds is incident to the ownership of land in this country.

Where the defendants had erected a dam across a natural water-course which was found to interfere with the natural drainage of the surplus rain-water of the adjacent lands of the plaintiff, and where the lower Court had ordered that the dam be altogether removed,

*Held*, that the Court was wrong in taking it for granted that the plaintiffs were entitled to have the whole dam removed, but should have enquired *how far* the erection of the dam interfered with the plaintiffs' right.

IN this case the proprietor of mouzah Kenar sued the proprietors of mouzah Lalpurah for the removal of a dam alleged to have been erected by the latter on the 7th October 1880. The plaintiffs alleged that the water was drained off their lands through a *nigar* or natural water-course into a river named Samdahain which flowed through the defendants' lands, and they further alleged that the defendants had erected a dam across the river below where the water-course fell into it; and that the result had been to stop the drainage from their lands, and cause them damage which they estimated at Rs. 100 for removing the

<sup>b</sup> Appeal from Appellate-Decree Nos. 1080 of 1883, against the decree of H. Beveridge, Esq., Judge of Patna, dated the 29th of March 1883, modifying the decree of Moulvi Mahomed Nural Hosein, Second Subordinate Judge of that District, dated the 13th of April 1882,

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dam, and Rs. 500 for damages caused to their lands. They further claimed damages caused to a ferry, which they held, by reason of the defendants having started another ferry across the river above the dam, which they alleged they were not entitled to do, but that question formed no part of the appeal preferred to the High Court.

The plaintiffs based their claim in the plaint to have the dam removed upon prescriptive right, alleging that their lands had been drained through the channel in question for upwards of 20 years.

The defendants alleged that the dam was not a new one but had long been in existence, and they relied upon a decree passed in the year 1817 which they said had as long ago as that declared their right to erect the dam at the place it now stood. They further denied that the *nigan* or water-course in question was the natural drain for the plaintiffs' surplus water, and that the plaintiffs had acquired any right to drain their lands in the manner alleged.

The Subordinate Judge found that the plaintiffs had a right to drain their lands in the way alleged; that, although the defendants had a right to erect a dam, still the one complained of was a new one, and had caused injury to the plaintiffs' lands; and that the defendants had no right to erect the dam in such a manner as to shut up the water-course of the plaintiffs. He accordingly directed that the defendants should make a sluice 4 feet wide and 1 foot deep in the dam to admit of the surplus water of the plaintiffs' land being discharged through the *nigan*, and that the defendants might close the sluice so long as it did not affect the drainage in question, but he found that no damage was proved, and disallowed the plaintiffs' claim in that respect.

The defendants appealed to the District Judge against that decree, and the plaintiffs preferred a cross appeal. The District Judge found that the dam was a recently erected one, and that whatever rights the defendants might have had in or before the year 1817, they had lost by disuse; that, although the plaintiffs based their case upon an easement, they might have placed it much higher; and that the burden lay on the defendants of proving that they had the right to erect the dam, and interfere

with what he found to be the natural flow of the surplus water off the plaintiffs' land. Upon these findings he considered that, as the defendants had not discharged that burden, the plaintiffs were entitled to have the dam removed, and that as there was no evidence to show that the sluice ordered to be made by the lower Court would be sufficient to allow the water to flow freely off the plaintiffs' land, he directed the dam to be altogether removed within one month. Upon the question of damages that Court considered that Rs. 600 was not too much for the plaintiffs to claim for injury to their land which measured 55 bighas, and it accordingly awarded them that sum.

The defendants now preferred this second appeal to the High Court against that decree.

Mr. *O'Kinealy* and *Munshi Mahomed Yusuf*, for the appellants.

*Baboo Mohesh Chunder Chowdhry*, and *Mr. C. Gregory*, for the respondents.

The judgment of the High Court (*MITTER* and *MACPHERSON, JJ.*) was as follows:—

The plaintiffs respondents are the owners of a mouzah called *Keriar*. To the east of that mouzah lies *chuck Jugmual*, and to the east thereof is *Lalpura*, the defendants' mouzah. The Courts below have found that the land slopes from west to east, and the surplus rain-water of the plaintiffs' lands is drained through *chuck Jugmual*, and defendants' mouzah *Lalpura* which are lower in level than the plaintiffs' lands. It has been further found that this surplus rain-water is carried through a *nigar* or a natural out-let which falls into a natural water-course called *Samdahain*. This river *Samdahain* passes through the defendants' mouzah *Lalpura*, and flows towards the east. There is another river called the *Chandimohan*, which also is wholly situated in the defendants' mouzah. The confluence of these two rivers is to the east of that point in the river *Samdahain* where the out-let mentioned above from the plaintiffs' lands joins it. The lower Courts have further found that the proprietors of *Lalpura* have recently constructed a dam across the river which is formed by the confluence of the *Samdahain* and *Chandimohan*, the effect

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of which has been to obstruct the drainage of the surplus rain-water falling upon the plaintiffs' lands.

Upon these facts being found the lower Appellate Court has awarded a decree for the removal of the dam awarding damages claimed by the plaintiffs in the plaint against the defendants appellants.

The defendants have preferred this appeal, and it has been contended on their behalf that the District Judge who decided this case in appeal is in error in holding that, upon the facts found by him, (in the absence of any evidence of prescriptive right) the plaintiffs are entitled to drain off the surplus rain-water of the land through the defendants' lands.

It has been contended by the learned counsel who appeared on behalf of the appellants that the right of the owner of a higher land to drain off its surplus rain-water through the adjacent lower ground is not an incidence of the ownership of land in this country, but can be only acquired by long user.

We are of opinion that this contention is not well founded. That such a right is incident to the ownership of land in this country is well established by decisions of this Court as well as of other High Courts (see *Muthoora Mohan Mytee v. Mohendro Nath Paul* (1); *Hameedunnissa v. Ananda Moyee Dasse* (2); *Khetternauth Ghose v. Prosunno Ghose Gowalah* (3); *Kopil Pooree v. Manik Sahoo* (4); *Subramaniya Ayyar v. Rama Ohandra Rau* (5). The main ground, therefore, taken in this appeal fails.

But the objections taken to the decree of the lower Appellate Court as to the removal of the whole *bund* and the award of the damages claimed by the plaintiffs are, in our opinion, sustained. The first Court refused to make any decree for damages, because the plaintiffs failed to establish "the correct amount." The lower Appellate Court simply finding that the plaintiffs have sustained a good deal of damage, thinks that they ought to be allowed the Rs. 600 (six hundred) which they claim. The award of Rs. 600 as damages does not appear to us to be based on a consideration

(1) S. D. A. 1860, Pt. 2, p. 301.

(3) 7 W. R., 498.

(2) W. R., F. B. 25.

(4) 20 W. R., 287.

(5) I. L. R., 1 Mad., 335.

of the evidence on the record. The lower Appellate Court will, on remand, decide the question of the amount of damages with reference to the evidence on the record.

As to the other relief granted, *viz.* the removal of the whole dam, it is equally based upon imaginary grounds. The District Judge thinks that, because it has been shown that the defendants have obstructed the drainage of the surplus rain-water of the plaintiffs' land, it must be taken for granted, unless the contrary be proved, that the construction of the dam even to the height of an inch is an invasion of the plaintiffs' right. This opinion does not appear to be based upon any materials on the record. We think that this point, namely, how far the erection of the bund is an invasion of the plaintiffs' right, must be enquired into and determined upon proper materials placed before the Court. The case will, therefore, be remanded to the lower Appellate Court to appoint a competent person as Commissioner, to hold a local investigation upon the point, *viz.* whether to secure to the plaintiffs the enjoyment of the right which they have established, it is necessary to move the whole of the *bund* or a portion of it, and, if the latter, what portion. The cost of this investigation will be borne by the plaintiffs in the first instance, but ultimately it will be part of the costs of the suit.

H. T. H.

*Appeal allowed and case remanded.*

*Before Mr. Justice Prinsep and Mr. Justice Pigot.*

GOBIND CHUNDRAS SEN (DEFENDANT) *v.* JOY CHUNDRAS DASS  
(PLAINTIFF.)\*

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*September 11.*

*Sale for arrears of Revenue—Under-tenures—Avoidance of tenure—Act XI of 1859, s. 37, cl. 4.*

Leases of lands which may not have been expressly leased for the purpose of making gardens thereon, but on which gardens have subsequently been made, are, under the provisions of Act XI of 1859, s. 37, cl. 4, protected from avoidance by a revenue auction-purchaser.

THIS was a suit for the recovery of land. The plaintiff stated

\* Appeal from Appellate Decree No. 1023 of 1883, against the decree of Baboo Nobin Chandra Gangooly, First Subordinate Judge of Dacca, dated the 14th of February 1883, modifying the decree of Baboo Mohendra Nath Dass, Second Munsiff of Kaligunje, dated the 17th of July 1882.