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May, 25.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.
SAMI-ULLAH (DEFENDANT) v. MAKUND LAL AND ANOTHER
(PLAINTIFFS).*

Tort—Cause of action—Damage to the property of another caused by the cutting of a bund in order to save the tort-feasor's land from inundation.

Where there is a natural outlet for a natural stream, no one has power, for the safety of his own property, to divert or to interfere with its flow, and if he does so, he is ordinarily liable to pay damages to any one who is injured by his act. The right of a person to protect his land from extraordinary floods extends to the doing of anything which is reasonably necessary to save his property; but he cannot actively adopt such a course as might have the effect of diverting the mischief from his own land to the land of another person, which would otherwise have been protected.

Defendant, through fear lest, in a season of heavy rainfall, the normal outlets to a certain tank on which his land abutted would be insufficient to carry off the surplus water, and with the object of saving his own land from possible inundation, cut a bund, to the maintenance of which the plaintiff had a prescriptive right, and thereby caused certain lands belonging to the plaintiff to be flooded and the crops thereon destroyed.

Held that the plaintiff had a good cause of action in damages against the defendant. *Whalley v. Lancashire and Yorkshire Railway* (1) and *Ram Lal Singh v. Lill & Dhary Muhton* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Dr. M. L. Agarwala and *Maulvi Iqbal Ahmad*, for the appellant.

Munshi Kamla Kanta Varma for the respondents.

LINDSAY and KANHAIYA LAL, JJ.:—In the village Lahurapur there is a pond called Bir Bundh situated in plot No. 4810. On the north of this pond is some land belonging to the village Lahurapur. On the south of this pond are some plots belonging to the village Kondari. Makund Lal and Mathura Das are the owners of the village Lahurapur. Sami-ullah is the owner of the village Kondari. In the rainy season when the pond is overflooded a portion of the surplus water flows through a drain round the north and west of mauza Lahurapur, and the remaining surplus water flows towards the East through an old drain situated in the village Pipnar. In order to protect their land

* Second Appeal No. 295 of 1919 from a decree of G. C. Badhwar, District Judge of Ghazipur, dated the 11th of December, 1918, confirming a decree of Kameshwar Nath, Subordinate Judge of Ghazipur, dated the 22nd of August, 1917.

(1) (1884) 13 Q. B. D., 181. (2) (1877) I. L. R., 3 Cal., 770.

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from damage the former owners of the village Lahurapur constructed an embankment on the north of this pond, some time prior to the last settlement. The allegation of Sami-ullah was that in the month of February, 1916, the owners of the village Lahurapur raised this embankment in order to prevent the water of the pond overflowing towards their land, that the said act was wrongful and caused serious loss to a considerable area of land appertaining to the villages of Kondari and Nasirpur, which consequently became submerged on account of the flow of water being obstructed. He accordingly sued for an injunction requiring the owners of the village Lahurapur to remove within a certain time the raised portion of the embankment and to refrain from thereafter doing anything to stop the flow of the water of Bir Bundh pond towards the north. The owners of the village Lahurapur filed a cross-claim, alleging that during the flood of 1916 Sami-ullah and his tenants had wrongfully cut a portion of the old embankment, situated on the north of the pond, and by so doing directed the current of the water of that pond to flow towards the culturable land lying on the north and east of mauza Lahurapur, thereby destroying the paddy crops that stood there. They consequently asked for an order directing the owner of the village Kondari to repair the embankment at his own cost and to restore it to its original condition. They further prayed for an injunction restraining him from thereafter cutting the embankment or from making any interference with it. They also claimed Rs. 1,200 as damages.

The court of first instance found that Sami-ullah and his tenants had wrongfully cut the embankment in order to divert the water towards the lands situated on the north of the embankment, but it was not satisfied that any damage had been caused to the crops growing on the lands situated on that side. It further found that the owners of the village Lahurapur had not raised the embankment or done anything to disturb the flow of the water in any manner. It accordingly dismissed the claim of Sami-ullah and decreed the claim of the owners of the village Lahurapur for an injunction requiring the owner and tenants of the village Kondari to repair the breach made by

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them and restraining them from thereafter cutting the embankment or interfering with it in any manner. On appeal the learned District Judge upheld the findings of the trial court except in regard to the claim for damages, which, he found, was established to the extent of Rs. 1,050; but he gave a decree to the owners of the village Lahurapur for damages to the extent of Rs. 400 only.

The question for consideration in these appeals is whether on the facts found the owner and tenants of the village Kondari had any right to cut the embankment in order to protect their own lands from the extraordinary flood which took place in the year 1916. It is admitted that the pond in question is an old one and that the embankment has been in existence from the time of the last settlement, that is to say, for more than 40 years. It was found by the court below that the owners of Lahurapur had done nothing to raise the height of the embankment and that if the owner of the village Kondari had not made a breach in the embankment, the damage to the paddy crops standing on the north of the embankment might possibly have been avoided. It is well established that where there is a natural outlet for a natural stream, no one has power, for the safety of his own property, to divert or to interfere with its flow, and if he does so, he is ordinarily liable to pay to any one who is injured by his act, no matter how the water before the mischief came into the watercourse.

The owner of the village Kondari here diverted the water, which might otherwise have flowed either into the lands on the south or through the drains which run towards the north-west and the south-east into other lands. By cutting a breach in the embankment, the owner of the village Kondari caused injury to the crops which stood on the north of the embankment, and the very object with which the embankment must originally have been constructed was thereby frustrated.

In *Whalley v. Lancashire and Yorkshire Railway Co.* (1) the circumstances were somewhat similar. There by reason of an unprecedented rainfall a quantity of water was accumulated against one of the sides of the defendants' railway embankment,

(1) (1884) 13 Q. B. D., 181.

to such an extent as to endanger the embankment, when, in order to protect their embankment, the defendants cut trenches in it by which the water flowed through, and went ultimately on to the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done, had the trenches not been cut. In an action for damages for such injury, the jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property and that it was not done negligently. It was, however, held by the court of appeal that though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable.

The right of a person to protect his land from extraordinary flood extends to the doing of anything which is reasonably necessary to save his property; but he cannot actively adopt such a course as might have the effect of diverting the mischief from his own land to the land of another person which would otherwise have been protected. The owner of Kondari in the present instance, acting through his tenants, cut the embankment probably with the object of protecting his own land, but its effect was to transfer the mischief by diverting the flow of water towards the land situated on the north of the pond, and as he is found to have been acting in concert with his tenants in making the breach, he has been rightly held to be responsible for the damages caused thereby to the owners of Lahurapur.

In *Ram Lal Singh v. Lall Dhary Mukton* (1) it has been laid down that where a person shows a prescriptive right to maintain a *bund* which had certain outlets for excess water, and uses all reasonable and proper precautions for its safety, he cannot be made liable for damage caused by the escape or overflow of water on to the lands of others and the consequent injury of the crops thereon, if the escape or overflow was caused by the act of God or *vis major*; and a cutting of the *bund* in those circumstances cannot be permitted.

(1) (1877) I. L. R., 3 Cal., 773.

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The *bund* in the present instance was maintained by the owners of Lahurapur and, as it had been in existence for the prescriptive period, the owner of the village Kondari had no right to interfere with it.

The amount of damages awarded by the learned District Judge seems, however, to have been arbitrarily fixed. According to his own finding, about 100 bighas of paddy crops were destroyed by the act of the owner of the village Kondari and his tenants. The produce of that area, according to the estimate of the learned District Judge, was to the extent of the half share to which the landlords were entitled, *i. e.*, Rs. 1,050. The lower appellate court has given no reasons for awarding a smaller sum.

We dismiss S. A. Nos. 295, 296 and 297, with costs, accordingly and allow the cross-objection filed by Makund Lal and Mathura Das in S. A. No. 296 of 1919 in so far that we decree the claim for Rs. 1,050 damages, with proportionate costs here and in the courts below, in addition to the other reliefs which the court below has granted.

Decree modified.

Before Mr. Justice Pudball and Mr. Justice Sulaiman.

MUHAMMAD ZAMAN AND OTHERS (DEFENDANTS) v. MANZUR HASAN
AND OTHERS (PLAINTIFFS)*

*Public highway—Rights of user of general public—Religious procession—
Obstruction caused by procession halting at frequent intervals—Suit for
declaration of right to obstruct highway.*

Although the members of religious procession may have a right to use a public highway for purposes of passage, just as any other members of the public, they have no right to extend such user by halting every few yards for several minutes at a time and blocking up the thoroughfare, and no suit will lie to uphold a claim to such a right. *Vijiaraghava Chariar v. Emperor* (1) referred to.

The facts of this case are fully stated in the judgment of the Court.

Mr. B. E. O'Connor, Mr. Nihal Chand and Maulvi Iqbal Ahmad, for the appellants.

*First Appeal No. 451 of 1918, from a decree of Lal Gopal Mukerji, Second Additional Subordinate Judge of Aligarh, dated the 10th of September, 1918.

(1) (1903) I. L. R., 20 Mad., 554

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