

APPELLATE CIVIL.

*Before Mr. Justice Baguley.*AH LI *v.* U SAN BAW.*

1938

Jan. 27.

Riparian owners—Use of natural stream water—Erection of dam by one owner—No material diminution of water for other owners—Artificial channel—Prescriptive or contractual user—Dam with an overflow bypass—Plaintiff's water supply not materially diminished—Cause of action.

A riparian owner may appropriate as much water as he pleases for the purpose of irrigation of his land by means of a bund put across the river provided that he leaves sufficient water to flow down for the use of the lower riparian owner or owners. There must not be a substantial diminution of water so as to materially lessen the supply of water required by the other riparian owners.

Debi Pershad Singh v. Joynath Singh, I.L.R. 24 Cal. 865 (P.C.), referred to. Dictum in *Kaw La v. Maung Ke*, 8 L.B.R. 556, disapproved.

The supply of water through an artificial channel can only be claimed under a contract or else by prescription.

The defendant who was a riparian owner placed a dam across the bed of a river about half way down his holding, but provided a bypass by which when the water banked up by the bund rose to a certain level the surplus water flowed down the bypass and rejoined the bed of the main stream just below the highest point of the plaintiff's holding. There was no material diminution of the water supply needed by the plaintiff for the irrigation of his land.

Held that the plaintiff had no cause of action against the defendant.

R. M. Sen for the appellant.

Tun Aung for the respondent.

BAGULEY, J.—This appeal arises out of a suit in which the plaintiff asks that the defendant be directed to remove a bund which he has placed across the bed of a stream. This is the main cause of contention. The plaint also refers to some other bund which the defendant is said to have made. There is, however, no mention of this second bund in the prayer and really I do not quite understand the position with regard to it.

* Special Civil 2nd Appeal No. 208 of 1938 from the judgment of the Assistant District Court of Sandoway in Civil Appeal No. 1 of 1938.

1939
 AH LI
 v.
 U SAN BAW.
 BAGULEY, J.

In view, however, of the fact that there is no mention of this second bund in the prayer it is difficult to see what order could be passed with regard to it.

Fortunately a proper survey of the plaintiff's land has been made by a *patta* surveyor in which the various points of interest are noted, and it is, I think, not difficult to see exactly what has happened.

The stream runs roughly from north-east to south-west and the plaintiff's and defendant's holdings are on the south-east side of the stream. The stream passes the defendant's holding before it reaches the plaintiff's holding. At a point about half way down the defendant's holding the bund complained of has been erected. The stream I gather is a permanent stream coming down from the hills but there is little or no appreciable water in it during the dry weather.

The surveyor was called as a witness by the plaintiff. His evidence shows that the bund has been put across the river so as to block the water-course entirely. Just above the bund, however, he has cut what I would describe as a bypass; so, when the water banked up by the bund rises to a certain level, the surplus water flows down that bypass and rejoins the bed of the main stream just below the highest point of the plaintiff's holding.

The second obstruction complained of by the plaintiff is somewhere about the middle of the boundary between the holdings of the two parties; but the map shows no regular stream there and the suggestion seems to be that spare water from the defendant's holding was at some time allowed to flow from there into the plaintiff's holding, but it is clearly not by any natural stream. For the water to get from point F,—the point where the obstruction is said to have been,—to the plaintiff's paddy land, it would have to be conducted across a portion of the plaintiff's holding

which is called a garden land. (It is the customary practice to classify all land that is too high or too uneven to be used for paddy cultivation as garden land.)

It seems to me therefore that if there is a channel then it must be an artificial one and for the plaintiff to prove that he is entitled to the surplus water flowing from the defendant's land to his own land he would have to prove that he was entitled to this water by some right of prescription and this he has not attempted to do. It looks to me as though perhaps at some time the defendant used to allow his surplus water to discharge into the plaintiff's land and that now he prefers to let it go in a different direction into the holding of Ma The The. This he would be entitled to do unless the plaintiff had become entitled to the use of this water by prescription.

I return now to consideration of the bund which the plaintiff asks may be removed. The lower Appellate Court has quoted a dictum in *Kaw La v. Maung Ke* (1) in which it is said :

"In order to support an action by one riparian owner to restrain another from diverting the water beyond his riparian tenement it is not necessary that the plaintiff should prove that he has suffered any damage."

This statement is made on the authority of a Privy Council case, *Debi Pershad Singh v. Joynath Singh* (2). I have referred to this ruling and nowhere in it can I find any passage which supports this statement. Referring to the proprietor of an upper tenement who claimed the right to dam up a stream and to impound so much of its water as he might find convenient for irrigation, leaving only the surplus, if any, for the use of the proprietors below, it is said that his common law right is to take for the purpose of irrigation so much

1939

AH LI

v.

U SAN BAW.

BAGULEY, J.

(1) 8 L.B.R. 556.

(2) (1897) I.L.R. 24 Cal. 865.

1939
 AH LI
 v.
 U SAN BAW.
 BAGULEY, J.

water only as can be abstracted without materially diminishing what should be allowed to descend.

It seems to me that if the amount which is allowed to descend is sufficient to supply the owner of a lower holding with as much water as he needs for his own purpose it cannot be said that the amount that goes down is materially diminished. Diminished it may be, but not materially diminished if the owner of the lower holding has enough for his needs. The dictum that the owner of the lower holding is entitled to restrain the owner of the upper holding without any proof of damage, actual or to be feared for the future, cannot anywhere be found in the Privy Council ruling referred to. A decree may be passed on actual damage incurred or when the remedy sought is by way of an injunction, when damage can reasonably be feared in the future, but manifestly it is impossible for a man to prevent another one from irrigating his land merely in order that he may have the pleasure of seeing a large volume of water passing his holding.

This being the case, it is, I think, necessary to see whether there it is true that the plaintiff has suffered, or is likely to suffer, from the effect of this dam, taking into consideration the fact that in addition to the dam the defendant has dug a water-course to enable all the surplus water to rejoin the main channel of the river at a spot where it is available for the plaintiff. It must be remembered that when a permanent stream is dammed it is impossible to block it up completely. As the water continues to come down it will rise to the top of the bund and then go off in one direction or another. Even in big schemes for water-works, where water is drawn off in pipes for the use of a city, there must be some escape channel in case more water comes down than is necessary for the use of the city. Once the artificial lake or pond is filled water will continue to

pour in at one end and unless it goes over the top of the bund it must escape either into the defendant's holding (in which only a limited quantity of water can be used), or down the escape channel, and what goes down the escape channel is available for the use of the plaintiff and the owners of holdings below his.

Now, taking the *patta* surveyor, who may be regarded as an unbiased witness, and who was called by the plaintiff he says that when he visited the plaintiff's paddy land, there was water in it and the plaintiff had already transplanted his paddy. His visit was some time about August.

Ko Aye the headman, also called by the plaintiff, says that Po Kin who holds the land next below the plaintiff was able to get water from the river. And he could only get the water which came through the escape channel, passed the plaintiff's land and reached his land.

The other witnesses called by the plaintiff speak of there having been no water in the river after the bund was made. But it seems to me that they are speaking of the land immediately below the bund and above the point where the escape channel rejoins the old river bed. In this portion there can be no water unless the water overflows the defendant's bunds because the plaintiff has put a bund in the old river bed also, at the point marked E, immediately above where the escape channel rejoins the river bed, and in the place between these two bunds the plaintiff is now growing tobacco. The necessity for the bund at the lower point can only be the fact that were it not for this bund water coming through the escape channel might flow backwards for a distance up the old bed of the stream and this would interfere with the tobacco plantation.

Po Kin the cultivator of the land below the plaintiff's is called as a witness for the defendant and he says that he gets water on his land not only from the

1939
 AH LI
 v.
 U SAN BAW,
 BAGULEY, J.

1939
AH LI
v.
U SAN BAW.
BAGULEY, J.

river but also the overflow from the upper paddy land and there is evidence that in the middle of October when the case was tried there was water in the plaintiff's fields.

I cannot see that the plaintiff has made out a case that the supply of water to his paddy land is materially diminished. I think therefore that the trial Court was right in dismissing the suit.

I allow the appeal, set aside the order of the lower Appellate Court directing that the bund be opened and restore that of the trial Court dismissing the suit. The respondent will bear the appellant's costs throughout.