

APPELLATE CIVIL.

Before Mr. Justice Mackney.

1940

U KYAN *v.* MUN SHEIN AND ANOTHER.*

Mar. 8.

Creek, when public navigable waterway—Petty stream navigable at times by small boats—Public user—Riparian owner—Use of water flowing past his land—No rights on other parts of channel.

A creek to be designated a public navigable waterway must be both tidal and navigable : and it may be shown that it is used by the public as such. If it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it may not be a public navigable channel.

The King v. Montague, 107 E.R. 1183 ; *Miles v. Rose*, 5 Taunt, 706, referred to.

A riparian owner of land may make a certain use of the water as it passes his property without interference by others, but unless the waterway is a public navigable waterway, or an easement has been created, he has no right of way over that part of the waterway which does not flow through his own land.

Maung Bya v. Maung Kyi Nyo, I.L.R. 3 Ran. 494, distinguished.

Rauf for the appellant.

Hay for the respondents.

MACKNEY, J.—In the Subdivisional Court of Bassein the plaintiff-appellant U Kyan sued the defendants-respondent Mun Shein and Ko Khoon Na for a declaration of the plaintiff's right of way on a certain creek which passes by the lands of both the plaintiff and the defendants, for a mandatory injunction ordering the defendants to remove the obstructions in the shape of two large cargo boats and for a perpetual injunction restraining the defendants from raising any further or additional obstruction interfering with the right of the plaintiff over the creek. There was also a claim for damages, but this claim is no longer pressed.

* Civil 2nd Appeal No. 346 of 1939 from the judgment of the District Court of Bassein in Civil Appeal No. 14 of 1939.

The plaintiff-appellant and the defendant-respondent Ko Khoon Na (Mun Shein is his son) each bought a piece of land from U Shwe Gun. U Shwe Gun's land was bounded on the east by a small tidal creek and on the south by the Dekan-*Chaung*. The portion of the land which is at the corner of the Dekan-*Chaung* and the creek was purchased by Ko Khoon Na. The northern boundary of this land is the village road and U Kyan's site lies immediately to the north of the village road, having the tidal creek as its eastern boundary. The village road runs west and east and is carried over the creek by a small bridge which at high tide is about 6 feet above the surface of the water in the middle and about $4\frac{1}{2}$ feet at the sides. The distance along the creek from the bridge to the Dekan-*Chaung* is only 109 feet. At the bridge the creek is 11 feet wide and at its mouth it is $17\frac{1}{2}$ feet wide. Beyond the bridge the creek stretches as far as the grazing ground but, until it approaches quite close to the bridge, it is a mere trickle of water and even small boats cannot go more than a few feet beyond the bridge. Between the main channel of the creek and U Kyan's site there are *dhani* plants which are said to be covered at high water. Below the bridge on the eastern side of the creek there are more *dhani* plants.

Ko Khoon Na has been living on his present site for at least 18 years and about 15 years ago he widened and deepened the creek in order to admit his large sampans. When these sampans are moored along the bank of his property no other boat can pass by.

The plaintiff-appellant bought his site about 14 years ago, but he did not come to live there until 8 or 9 years ago. His relations with Ko Khoon Na appear to have been amicable until quite recently. Ko Khoon Na then went to China and whilst he was away his son Mun Shein began to keep the sampans in

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the creek in such a manner as to obstruct access to other persons. Up till that time U Kyan had been able to bring his large sampan up the creek to unload it, but to do so he must have unloaded it over the respondents' property, for a large sampan will not go under the bridge and, if it could, it is rather doubtful whether there was enough water to float it on the other side.

In his plaint the appellant claims that the creek is a public natural navigable waterway over which he has a right to pass.

The learned Subdivisional Judge found that though the creek was a natural waterway it had been made navigable for large sampans at the expense and labour of the defendants and that only the parties themselves had ever brought their large sampans into the creek. The learned Judge further found that the creek was not a public waterway. Finally, he was of the opinion that even if the plaintiff were granted an injunction as prayed it would not benefit him because he could only unload the cargo of his sampans on to the defendants' land. Accordingly the suit was dismissed.

This decree was confirmed by the District Court of Bassein on appeal. The learned District Judge was of the opinion that the creek was not a public navigable waterway and that there was no satisfactory evidence of any user of the creek by the general public.

The plaintiff now appeals to this Court on the ground that the lower Courts have erred in the interpretation of the rules laid down in the decisions of the Judicial Committee on which they have relied: furthermore, that they have overlooked the rule laid down by the Judicial Committee in *Maung Bya and one v. Maung Kyi Nyo and others* (1) It is claimed

(1) (1925) I.L.R. 3 Ran. 494 (P.C.).

that the appellant as a riparian owner is entitled to the free use of the creek including the right to navigate it.

I do not find that the case cited is an authority for holding that a riparian owner on a waterway which is not a public navigable waterway, has a right to "navigate" that portion of the water which passes the property of other persons. He has a right to make use of the water as it passes his property, and other persons must not interfere with that right of enjoyment. So far as I understand it, there is only a right of way along a waterway, provided no easement has been created, unless the waterway is a public navigable waterway. If it is not a public navigable waterway presumably riparian owners own the bed of the waterway as far as the middle thereof, but they have no rights over that part of the waterway which does not flow through their own land. There is nothing in the case of *Maung Bya and one v. Maung Kyi Nyo and others* (1) to suggest that they have.

This creek is undoubtedly a tidal creek. The question is: Is it navigable? If it is tidal and navigable, then it must be a public navigable waterway.

On this point I quote from the judgment of the learned District Judge. He says:

"Mr. Basu and U Thein Maung, learned counsel for the parties, however, have stated before me that they have both been to the creek and that, except during the rains, even small boats cannot enter the creek at low tide. In the dry weather, *i.e.*, from about December to May, the whole creek from the mouth upwards is just a mud channel with no water in it at all at low tide. But during the rains small country boats of about 30 to 40 baskets capacity can enter at low tide."

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The learned District Judge has referred to *The King v. Montague and others* (1) wherein Mr. Justice Bayley remarked :

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" Now it does not necessarily follow, because the tide flows and reflows in any particular place, that it is therefore a public navigation, although of sufficient size."

Quoting from *Miles v. Rose* (2), he observed that

" the flowing of the tide, though not absolutely inconsistent with a right of private property in a creek, is strong *prima facie* evidence of its being a public navigable river." " The strength of this *prima facie* evidence," he said, " arising from the flux and reflux of the tide, must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation ; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel."

As the learned District Judge observes, this description seems to suit the creek with which we are at present concerned very closely.

Furthermore there is really no evidence of public user of this creek ; nor, in the circumstances, is it easy to imagine how such a use could ever have arisen. The creek is bounded on either side by the properties of three or four persons, and, although the main village road passes over it, there is no evidence that the villagers use the creek to get into the village, or keep their boats on it.

In these circumstances, it appears to me that the lower Courts were right in holding that this is not a public navigable waterway. In these circumstances, it is clear that the plaintiff's appeal must fail. It is dismissed with costs, advocate's fee five gold mohurs.

(1) 107 E.R. 1183.

(2) 5 Taunt, 706.